TELECONFERENCING:
A NORTHERN TERRITORY PERSPECTIVE

by Margo Nelson

Part 2 of Margo Nelson's Report from Balance's November issue:

POTENTIAL LEGAL AND PROCEDURAL PROBLEMS

ii) *The Admissibility of The Evidence*

In Garcin (supra) , Morritt J. regarded the first issue before him as being whether R.S.C. Ord. 38 r.3 gave him jurisdiction to order the evidence of a particular fact or facts to be given by a particular witness in the USA by means of television linkage between that witness and the Court sitting in the UK. Furthermore, should such a jurisdiction exist, should it be exercised?

In determining these issues, Morritt J. had regard to Ord. 38, r1, which required that any fact requiring to be proved at the trial by the evidence of witnesses, be proved by the examination of the witnesses orally and in open court. This Rule was, however, subject to any other provisions of the Supreme Court Rules, the Civil Evidence Acts 1968 and 1972, and any other enactment relating to evidence.

Ord. 38 r.3 provided:

"(1) Without prejudice to rule 2, the court may, at or before the trial of any action, order that the evidence of any particular fact shall be given at the trial, in such a manner as may be specified by the order.

(2) The power conferred by paragraph (1) extends in particular to ordering that evidence of any particular fact may be given at trial:

a) by statement on oath of information or belief; or

b) by the production of documents or entries in books; or

c) by copies of documents or entries in books; or

d) in the case of a fact which is or was a matter of common knowledge wither generally or in a particular district, by the production of a specified newspaper which contains a statement of fact."

Morritt J. considered that the court had power to determine the manner in which evidence is given, but did not have power to enlarge the evidence which could be given beyond that which was legally admissible, except as set out in Ord.38 r.3(2). This led to consideration of the issue whether evidence given by a witness abroad, by means of a television link, was admissible at all. His Honour held that oral evidence given by the witness in the USA would be admissible pursuant to s2(3) of the Civil Evidence Act 1968, if proved by "any person who heard ... it being made".

Furthermore, Morritt J. considered that any video tape of the examination and cross-examination of a witness overseas would be admissible as a 'document' in which the statement was made; see the definition in s10 of that Act. Such evidence would be of greater weight than the ordinary 'statement' under s2 because the witness would have been cross-examined, and the judge would have had the benefit of observing the demeanour of the witness.

The definition of 'document' in s4 of the Evidence Act (NT) is similar to that in s10 of the Civil Evidence Act 1968. Whilst s2 of the Civil Evidence Act 1968 dealing with 'Admissibility of out-of-court statements as evidence of facts stated' has no equivalent in the NT Act. Section 26D of the NT Act, 'Admissibility of Documentary Evidence as to Facts In Issue', read with the definition of 'document' would appear to provide for video-taped evidence to be admissible in evidence. Consequently, the conclusions of Morritt J. are of relevance in this jurisdiction.

The weight to be attributed to such evidence as raised by Morritt J. has broader ramifications in an Appeal Court. As noted in the Introduction, a Court of Appeal will now have the unprecedented opportunity of examining for itself, the demeanour of a witness at trial, (but not necessarily all witnesses) simply by viewing the video-tape Exhibit. Consequently, the presumption that a trial judge's assessment of the acceptability of a witness or the weight to be attached to his evidence should not be readily interfered with by an appellate court may now need to be re-examined in the light of that possibility; must it still be first convinced that the trial judge was wrong before departing from his conclusions on such matters?

It is not only expert witnesses who are examinable by such means. Clearly the witnesses before Young J. and Morritt J. had interests in the commercial litigation. Section 32 Criminal Justice Act, 1988 (UK) specifically provides that a person, other than an accused, may give evidence by way of the video linkage on, inter alia, a trial on indictment or an appeal to the criminal division of the Court of Appeal. Whilst there is no similar provision in the NT, what s32 demonstrates is that the use of the technology for the purpose of taking evidence is not limited to expert witnesses. In a jurisdiction where the credibility of witnesses may well affect the outcome of the trial, the review by the appellate court of such a witness giving his testimony may prove to improve the procedure of an appeal on the merits.

iii) *Swearing In of Witnesses*

Section 5 and s8 of the Oaths Act NT set out how the oath or affirmation of allegiance to be taken or made. Sections 21 and 22 deal with the type of oath to be administered in criminal and civil trials respectively. Section 27 deals with the taking of oaths and the making of affidavits outside the NT. The ambit of s27(1), which is not

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restricted by the sub-sections (2) and (3), seems sufficiently wide enough to allow an oath to be administered in the NT by a person with authority to administer an oath in the place outside the NT to a person in that place for the purposes of legal proceedings in the NT. May the witness be sworn according to the law of the place where he is testifying?

In this connection, I note that in NSW decision Bayer AG v Blewitt (Minister for Health), (1988) 96 FLR 50, (1988) 13 IPR 225, at pages 116 and 296 respectively, Young J. referred to the administration of oaths outside the NSW jurisdiction during the course of video-conferencing:

"Finally, I should note that the evidence of one witness, Professor Antman, was taken by closed circuit television ... with the witness being in the United States of America and the court sitting in Sydney. The witness was sworn according to the law of Massachusetts where he was. I have some doubt as to whether had perjury been committed (which I am sure was not), there could have been a successful prosecution in New South Wales, the place where the perjury was heard but leaving that theoretical problem aside, I thought that the procedure was employed successfully in this case. Not only could one assess the demeanour of the witness quite satisfactorily but the massive disruption that is caused by taking evidence in commission overseas or by bringing the witness to Australia was avoided." (emphasis mine)

Similarly in Laporte (supra) where Young J. ordered that there be a:

"Provision of a person to administer an oath which will not contravene English law."

iv) *Perjury*

As noted above, in Bayer (supra), Young J alluded to the problem of dealing with perjury associated with the use of such technology. This concern may be why in the subsequent case of Laporte (supra), he ordered there to be:

"Provision of facilities for an observer appointed by the defendant to ensure that there is no off-camera coaching or signalling and that no one confers with the witness during any breaks in the cross-examination."

Young J. may have considered such a provision to be important on the ground that the conferencing did not result from consensual agreement between the parties and/or that it was prudent practice and a deterrent to the witness from simply leaving the facility prior to being discharged. What such an order does however demonstrate is the need for the parties at the time of consenting to the use of the facility to include orders to similar effect. The cost of implementing such an order must outweigh the resultant costs of a witness committing perjury, or the difficulties flowing from suggestions that he did so..

THE USE OF VIDEO-CONFERENCING IN OTHER JURISDICTIONS

Canada has utilised video-conferencing facilities since 1985. It was Canada's similar geographical characteristics, with a central national court headquarters and regional cities providing the litigation for the national court, that strongly influenced the Australian High Court to hear leave applications by video-link.

The Federal Court has utilised the facility often for the purpose of taking evidence. There is currently an intention by the executive government to amend Part IIIA of the Federal Court Act dealing with the Trans-Tasman Market Proceedings to enable evidence to be taken and submissions received by video-link or telephone, from within and outside of Australia.

In the UK the practice is increasing, particularly in the taking of children's evidence as prescribed by the Practice Direction (Crime: Child's Video Evidence) of 21 August 1992, set out in [1992] 1 WLR 21.

CONCLUSIONS

The benefits of utilising video-technology in the process of litigation cannot be underestimated. Its scope in litigation is multipurpose, from witness proofing, to taking evidence during a trial, to challenging credibility decisions on appeal, to seeking leave to appeal to the High Court. For an example of its utility consider the following: a practitioner wishing to bring on an urgent application in the Federal Court at 5pm on a Friday afternoon, Summer Time, where the Federal Courts of the Eastern States have adjourned and no Judge is available to hear the application in the Territory, may utilise video-conferencing to bring his application on in WA, where the Court is still in its afternoon session. It is necessary that uniform legislation, or Rules of Court, be designed to regulate the use of video technology, as per the SCAG initiative.

The utilisation of this new technology means that litigation as a whole can become more expeditious while its associated costs can be significantly reduced. At a time when the legal profession must reduce costs in order to maintain its 'market', the utilization of such technology can only be beneficial. However, prudence dictates that the above mentioned practical issues, which could increase costs if not addressed early enough, should be addressed within a reasonable time prior to trial. From a practitioner's point of view the prerequisite is to arrange "by consent" orders in a comprehensive manner well in advance of trial.