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# Taking evidence outside Australia in personal injury cases

By Tom Goudkamp

**This article describes cases in which applications to take evidence outside Australia have been successful, and outlines the basic steps that need to be taken to secure the requisite court orders and the role and duties of examiners.<sup>1</sup>**

## WHEN WILL THE COURT ORDER EVIDENCE TO BE TAKEN OVERSEAS?

Each year, many visitors to Australia are injured in compensable accidents, mainly on the road. The majority are repatriated quickly to their own countries, courtesy of their travel insurers.<sup>2</sup> After instructions have been received and particulars of the injuries and loss have been obtained, either personally or via email or post, the issue of where the evidence of the plaintiff and other witnesses will be taken is considered. It should not be assumed that because the plaintiff resides overseas the evidence will be taken in their country of residence. It is not that simple. The court will direct that a witness be examined outside Australia only if it is in the interest of justice. Generally speaking, taking evidence overseas is not in the interests of justice, since it would detract from the principle that the public should have the opportunity to observe justice being administered and it would be too expensive. However, in certain cases, hearing evidence outside Australia is warranted, such as where it is impractical or inordinately expensive for the plaintiff or other witnesses to return to Australia.

## WHO CAN BE APPOINTED AS AN EXAMINER?

A judicial officer or a person admitted as a legal practitioner may be appointed as an examiner.<sup>3</sup>

## PREPARING TO MAKE AN APPLICATION TO THE COURT

Before applying to the court for an order appointing an examiner to take evidence overseas, the following steps should be taken:

- (i) Become familiar with the procedure that applicants for such an order must follow.
- (ii) Obtain proofs of evidence from all potential witnesses, including the plaintiff and his or her carers, work colleagues and employers.
- (iii) Obtain the plaintiff's hospital records and medical reports for treatment received overseas.
- (iv) Arrange medico-legal assessments overseas, if necessary.
- (v) Provide full particulars to the insurer and serve the medical reports and records.
- (vi) If the plaintiff or any other witness would have difficulty travelling to Australia, obtain verification.
- (vii) Ascertain the respective costs of the various means of hearing evidence. This requires determining the cost of:
  - (a) bringing the plaintiff and other potential witnesses to Australia to give evidence.
  - (b) taking the evidence outside Australia. Such costs will include travel costs, accommodation costs, subsistence costs and the cost of transcription services, interpreters and room hire.
  - (c) taking evidence in Australia by way of video-link.
- (viii) Consider whether it would be practical to take the evidence by video-link. It may be highly inconvenient to take evidence by video-link due to time differences. Also, bear in mind the logistical problems of arranging for a video-link.
- (ix) Obtain the consent of the plaintiff and other potential witnesses, including medico-legal experts, to give evidence outside Australia.

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- (x) Ascertain whether the government of the country in question will agree to the evidence being taken in its country. Enquiries should be made through the Department of Foreign Affairs and Trade.
- (xi) Determine whether the procedural laws in the foreign country require witnesses to give evidence under oath. Rule 24.6 of the UCPR permits witnesses to be examined outside Australia otherwise than on oath, provided that the evidence is taken in accordance with the procedure of the country concerned.
- (xii) Ascertain whether the insurer would consent to an application for orders appointing an examiner. Obviously, applications will have a greater chance of success if they are made by consent.
- (xiii) Be prepared to pay the costs of the examiner, including accommodation and travel expenses, in advance.
- (xiv) Consider if the costs of taking evidence overseas can be minimised by appointing a lawyer who will already be in the country concerned as an examiner. Also determine if costs can be reduced by arranging for evidence to be taken in several matters in the country concerned (that is, see if it is feasible to arrange an 'overseas circuit').

**EXAMPLES OF CASES IN WHICH EVIDENCE WAS TAKEN OVERSEAS**

The following are examples of cases in which evidence was heard outside Australia.

1. A 50-year-old female plaintiff living in the UK suffered a psychiatric injury after her second son was killed in a road accident near Byron Bay, NSW. The plaintiff's mental condition rendered her incapable of travelling to Australia to give evidence. A judge of the District Court of NSW was appointed as an examiner in this case, and a number of other matters that were to be heard in London on the same trip. The witnesses were examined in barristers' chambers.
2. A 40-year-old Italian male fashion editor suffered a catastrophic brain injury in a car accident in Sydney. He was repatriated to Sardinia, where he was cared for by his family. He was unable to speak and was confined to a wheelchair. A Sydney-based barrister was appointed as an examiner, and he took the evidence of the Italian witnesses in a lawyer's office in Rome.
3. A 30-year-old Irishman from New York lost a kidney when he fell from scaffolding on a building site in Newcastle and landed on a spiked fence. After being repatriated to New York, he alleged that a problem with his remaining kidney made it unsafe for him to fly to Australia. A judge of the District Court of NSW heard the evidence in a conference room in a New York hotel.
4. A 30-year-old man from England suffered a neck injury in a road accident, while on a working holiday in Sydney. On his return to England, he was unable to resume his employment as a bricklayer because of ongoing pain and discomfort and psychological problems. A judge of the District Court of NSW was appointed as an examiner, and heard the case in the

Royal Courts of Justice in London in a 'London circuit' with three other cases.

5. A 26-year-old female from Austria suffered a serious leg injury when the motorcycle she was riding in far north Queensland collided with a sedan being driven by a Dutchman. The only witnesses to the accident were from Switzerland and Norway. The plaintiff was repatriated to Austria. Vascular problems developed in her injured leg, which prevented her from flying long distances, thus precluding her from returning to Australia. A justice of the Supreme Court of Queensland was appointed as an examiner, and took the evidence of the plaintiff, the defendant and the witnesses in Vienna.
6. A 30-year-old periodontist, who obtained his qualifications in France but hailed from Lebanon, suffered serious facial injuries in an accident at Moree, NSW. He was repatriated to Lebanon and was unable to return to Australia to give evidence. His claim included a very significant claim for economic loss on the basis that, had he not been injured, he would have been a high-income earning periodontist in NSW. Evidence had to be taken from the plaintiff, some of his university instructors and professors in France, and from various witnesses in Beirut. A Sydney lawyer, who happened to be travelling in Europe at the time, agreed to be the examiner for a daily fee, without any allowance for travelling costs. The evidence was heard in France and Lebanon.

In the abovementioned cases, the applications to take the evidence outside Australia were successful because the preparatory steps described above demonstrated that it was in the interests of justice for the evidence to be taken outside Australia. In some of the cases, the defendants submitted that the evidence should be taken by way of video-link. These submissions were rejected. Reasons that the court gave for rejecting them included the fact that it would be inconvenient to take evidence by video-link due to time differences between Australia and the countries in question, that it would be technically difficult to arrange the video-link from the other end, that it would be unfair to examine witnesses due to the time lag in the video-link and that it would be difficult for the judge to assess the demeanour of the witnesses.

**SOME ORDERS THAT SHOULD BE SOUGHT IN AN APPLICATION**

In an application for an examiner to be appointed to take evidence outside Australia, the following orders ought to be sought:\*

- (i) That a judge or practising lawyer be appointed as an examiner.
- (ii) That specified persons be examined.
- (iii) That the evidence of each person examined be recorded in writing, and the written record be read and signed by them.
- (iv) That the examiner witness the signatures of the persons examined.

- (v) That the examiner send the transcript of the evidence of each person examined and any document or thing tendered to the registrar of the court.
- (vi) That the registrar of the court certify the amount that, in his or her opinion, should be paid into court as a provision for the expenses of the examiner (such expenses will include travel, accommodation, sustenance and incidental costs for the examiner and his or her associate).
- (vii) That the registrar of the court certify the amount that, in his or her opinion, should be paid into court as provision for the cost of conducting the examinations, including the provision of suitable recording of the evidence in writing and the cost of hiring a suitable venue.
- (viii) That the defendant pay into court the sum so certified by the registrar at such time as the registrar directs.

**THE ROLE OF EXAMINERS**

Once appointed, it is the examiner's responsibility to specify a time and place for the examination, to ensure that the examination is conducted in an orderly fashion, that a proper transcript of the evidence is taken, that the exhibits are appropriately marked and that the transcripts are safely delivered to the Australian court. If the examiner is not a judge, he or she cannot rule on any objections. However,

he or she must record the objections and state his or her opinion on their validity.<sup>5</sup> It is then up to the parties to apply to the court to determine any objections.

**CONCLUSION**

Examining witnesses outside Australia is sometimes in the interests of justice, and applications for the appointment of examiners should, therefore, be made in appropriate cases. However, the path to making an application is often long and difficult. This article has delineated the key steps that should be taken to increase the probability that such applications will succeed. ■

**Notes:** **1** It does not set out the strict legal requirements for taking evidence outside Australia in personal injury cases; these can be found in Part 24 of the Uniform Civil Procedure Rules 2005 (NSW) (UCPR), and in various practice notes – especially Supreme Court of NSW SC Gen Practice Note No. 9. **2** Travel insurers have an incentive to expedite the expatriation. The faster an insured traveller leaves Australia, the sooner the insurer's liability for medical expenses comes to an end. **3** UCPR, r24.4(1). **4** See further Practice Note SC Gen 9, cl6. **5** UCPR, r24.11.

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