Renehan v Leeuwin Ocean Adventure Foundation Ltd & Anor
[2005] NTSC 11

PARTIES:	TRACEY ANN RENEHAN BY HER LITIGATION GUARDIAN GERALDINE RENEHAN v LEEUWIN OCEAN ADVENTURE FOUNDATION LIMITED and COMMONWEALTH OF AUSTRALIA
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	No 33 of 1998 (9803191)
DELIVERED:	2 March 2005
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JUDGMENT OF:	MILDREN J

CATCHWORDS:

PRACTICE AND PROCEDURE – exchange of witness statements – statements to be used as evidence-in-chief – whether such procedure unfair to defendants – factors relevant to exercise discretion – duties of solicitors and counsel

Evidence Act, s 26D, s 26D(1), s 26D(3); *Practice Directions (Vic)*, No 3 of 1995; *RSC*, Ord 38r2A; Supreme Court Rules (NT), O 40.02, O 40.03(1)(b), O 48.25(1)(a), O 48.25(1)(b), O 48.25(3); *The Rules of Professional Conduct and Practice of the Law Society of the Northern Territory*, r 17.28, r 17.29

Cross on Evidence, Australian Edition, loose leaf

Boyes v Colins (2000) 23 WAR 123 at 140; *Mercer v Chief Constable of the Lancashire Constabulary* [1991] 2 All E R 504; *Toll (FGCT) P/L v ALPHAPHARM P/L* (2004) 79 ALJR 129; *West Australian Newspapers Pty Limited v Nationwide News Pty Limited* (1991) 4 WAR 554; *ZYX Music GmbH v King and others* [1995] 3 All E R 1; *ZYX Music GmbH v King and others* [1997] 2 All E R 129; referred to

REPRESENTATION:

Counsel:

Plaintiff:	A. Lindsay
First Defendant:	J. Reeves QC
Second Defendant:	L. Silvester

Solicitors:

Plaintiff:	Cridlands
First Defendant:	Ward Keller
Second Defendant:	Australian Government Solicitor

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Renehan v Leeuwin Ocean Adventure Foundation Ltd & Anor
[2005] NTSC 11
No. 33 of 1998 (9803191)

BETWEEN:

TRACEY ANN RENEHAN BY HER LITIGATION GUARDIAN GERALDINE RENEHAN
Plaintiff

AND:

LEEUWIN OCEAN ADVENTURE FOUNDATION LTD
First Defendant
COMMONWEALTH OF AUSTRALIA
Second Defendant

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 2 March 2005)

[1] This is an action in negligence for damages for personal injuries. The plaintiff claims damages as the result of a fall that occurred when she was attempting to climb a mast aboard the sailing vessel *Leeuwin*.

[2] The action is brought against the first defendant, the owners of the *Leeuwin*, and against the Commonwealth of Australia whose officers, it is alleged, negligently arranged for the plaintiff to undergo training aboard the *Leeuwin*. There are also claims for contribution as between the defendants.

[3] There are a number of significant issues in the trial going both to liability as well as to the quantum of damages.

[4] The case has been case flow managed by me for a considerable period of time.

[5] Sometime ago I made an order pursuant to O 48.25(1)(a) of the Supreme Court Rules that the parties exchange witness statements. It is plain that although no order to this effect was made, it was contemplated by me as early as 24 February 2004 that the witness statements would stand as the evidence-in-chief of the witnesses.

[6] The rules do not automatically provide that where the Court orders that the parties exchange witness statements that the witness statements so exchanged are to stand as the evidence-in-chief of those witnesses.

[7] Order 48.25(3) provides:

> Where a witness statement is exchanged or delivered in pursuance of an order under subrule (1), the witness must confine his or her evidence-in-chief at the trial to the matters dealt with in the statement.

[8] Under O 48.25(1)(b) at a directions hearing or listing hearing a Judge or Master may "give the directions the Judge or Master thinks necessary to give effect to the order or give directions about the use to which the statements may be put".

[9] It was submitted by Mr Reeves QC for the first defendant that the ordinary rule is that witnesses are required at trial to give their evidence orally.

[10] Order 40.02 provides that "except where otherwise provided by an Act or this Chapter, and subject to an agreement between the parties, evidence shall be given – (b) at the trial of a proceeding commenced by writ, orally…"

[11] Order 40.03(1)(b) provides that notwithstanding r 40.02, the Court may order that evidence be given by affidavit at the trial of a proceeding commenced by writ.

[12] My attention was also drawn by Mr Reeves QC to the provisions of s 26D of the Evidence Act. Section 26D(1) permits a statement made by a person in a document and tending to establish a fact to be admissible evidence of that fact in certain circumstances. Section 26D(3) provides that nothing in s 26D "shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish".

[13] The learned authors of the loose-leaf edition of *Cross on Evidence*, Australian edition, para [35010] observe, in a paragraph strongly supportive of the argument of Mr Reeves QC:

> Examination in chief by question and answer without leading questions on matters in dispute plays an important part in the Anglo-Australian oral adversary mode of trial. Witnesses often do not come up to proof in examination in chief, and their inability to do so is often helpful to justice in that it avoids prepared statements carefully devised by lawyers being foisted on the court, particularly where

> those statements contain material that the witness is not very confident about. An oral system of trial is bound, and not without justification, to favour oral evidence over self-serving written evidence.

[14] The particular witnesses to whom the first defendant takes objection are the plaintiff, the plaintiff's mother and the plaintiff's father. It was submitted that irrespective of which of the different tests is used as to the meaning of "person interested" in s 26D(3) the plaintiff and her parents would clearly fall into that category. The two schools of thought on the meaning of "person interested" are discussed by authors of *Cross on Evidence* at paras [35080]-[35090]. I accept the submission of Mr Reeves QC that on either test the plaintiff and her parents would be persons interested within the meaning of s 26D(3).

[15] However, as has been observed in more recent cases, there has been a sea change in the approach taken by superior courts both in England and Australia to the admission of statements prepared even on behalf of parties to the litigation standing as the witness's evidence-in-chief. In Victoria a practice direction was introduced, No 3 of 1995, permitting the exchange of witness statements. The practice direction provides:

> If witness statements are ordered, then subject to any contrary order of the trial judge, each witness statement will stand as the whole of that witness' evidence-in-chief.

[16] In England the exchange of witness statements is governed by RSC Ord 38r2A. In *ZYX Music GmbH v King and others* [1997] 2 All E R 129, Hirst LJ said at 147:

> The exchange of witness statement under RSC Ord 38, r 2A is now standard practice, and their purpose and significance is known to all those who conduct litigation, as described in *The Supreme Court Practice 1997* para 38/2A/2 as follows:
>
> > '(1) the fair and expeditious disposal of proceedings and the savings of costs… (2) the elimination of any element of "surprise" before or at the trial as to the witnesses each party intends to call at the trial or as to the substance of their evidence. The parties will no longer be able to spring or to be exposed to surprises as to the trial witnesses or their evidence, but will be required to "place their cards on the table"; (3) the promotion of a fair settlement between the parties. With all or substantially all the factual evidence before them, subject to cross-examination, the parties will be able to make a more realistic appraisal of the strengths and weaknesses of their own and each other's cases, which should contribute toward the fair and expeditious disposal of the proceedings by settlement or otherwise; (4) the avoidance of a trial, thereby saving a great deal of wasteful time, effort and cost on the part of the practitioners, the judiciary and the Court staff, as well as the parties and their witnesses; (5) the identification of the real issues and the elimination of unnecessary issues; (6) the encouragement of the parties to make admission of facts, which they often are reluctant to do; (7) the reduction of the number or pre-trial applications, such as for further and better particulars of pleadings or for further discovery of documents or for interrogatories; (8) the provision of the framework whereby routine and evidence-in-chief can be given in summary form … (9) the improvement of the process of cross-examination.'

[17] I do not consider that the plaintiff needs to establish an exceptional case in order to obtain an order from the Court that the statements are to stand as the witness' evidence-in-chief. In *West Australian Newspapers Pty Limited v*

Nationwide News Pty Limited (1991) 4 WAR 554, the Full Court held that the West Australian equivalent of O 40.02 does not confer any prima facie entitlement upon any party. That was a case admittedly where the court was dealing with an order that the evidence be by way of affidavit rather than by way of witness statement, but it is plain that the members of the court relied upon the observations of the Court of Appeal in *Mercer v Chief Constable of the Lancashire Constabulary* [1991] 2 All E R 504 which was a case which dealt with the exchange of witness statements. Furthermore the Court has a discretion to order the exchange of witness statements on its own motion.

[18] In the later case of *Boyes v Colins* (2000) 23 WAR 123 at 140, Ipp J observed:

> The trend throughout the common law world is for greater disclosure and an open trial system. More and more jurisdictions require the exchange of witness statements prior to trial. That is indeed the case in trials before this Court. I do not accept that there is any difference between personal injuries litigation and commercial and other kinds of litigation that fall within the jurisdiction of this Court, warranting a different kind of treatment for the former.

[19] In *Mercer v Chief Constable of the Lancashire Constabulary*, supra, Lord Donaldson MR said at 507 that whilst time and expense will always be saved if this kind of procedure is adopted injustice may be done. His Lordship said:

> It is one thing to use this procedure with expert witnesses giving opinion evidence. It is another to use it with witnesses giving evidence as to matters of fact. It is one thing to use it in a trial before a judge alone. It is another to use it in a trial before a judge and jury, since a jury may be more able to absorb evidence presented to it

> orally rather than in written form … there will be many cases in which it will be right to make such an order, but it will be more appropriate in the case of expert witnesses than in the case of witnesses as to fact and, other things being equal, it will be more appropriate in the case of a trial by judge alone than in a trial by judge and jury. But perhaps the most important factor of all will be the extent to which the evidence of a particular witness is likely to be controversial and his credibility in issue. If so, the way in which he responds to oral examination-in-chief may be of great importance.

[20] One factor that I think also needs to be borne in mind is the responsibility of those lawyers who are engaged in the preparation of these statements. In *ZYX Music GmbH v King and others* [1995] 3 All E R 1 at 11 when it was heard at first instance by Lightman J, His Lordship observed in relation to this procedure:

> This procedure requires of all participating in the process of the preparation and making of such statements (solicitors and witnesses alike) the obligation to take the greatest care to ensure that the statements contain the truth, the whole truth and nothing but the truth.

[21] In a joint judgment of five Judges of the High Court in *Toll (FGCT) P/L v ALPHAPHARM P/L* (2004) 79 ALJR 129 at [35] the Court said:

> Written statements of witnesses, no doubt prepared by lawyers, were received as evidence in chief. Those statements contained a deal of inadmissible material that was received without objection. The uncritical reception of inadmissible evidence, often in written form and prepared in advance of the hearing is to be strongly discouraged. It tends to distract attention from the real issues, give rise to pointless cross-examination and cause problems on appeal where it may be difficult to know the extent to which the inadmissible material influenced the judgment at first instance.

[22] It goes without saying that there must be no coaching by solicitors in the preparation of these statements. I remind practitioners of r 17.28 and r 17.29

of the Rules of Professional Conduct and Practice of the Law Society of the Northern Territory which provide as follows:

> 17.28 A practitioner must not suggest or condone another person suggesting in any way to any prospective witness (including a party or the client) the content of any particular evidence which the witness should give at any stage of the proceedings.
>
> 17.29 A practitioner will not have breached Rule 17.28 by expressing a general admonition to tell the truth, or by questioning and testing in conference the version of evidence to be given by a prospective witness, including drawing the witness' attention to inconsistencies or other difficulties with the evidence, but must not coach or encourage the witness to give evidence different from the evidence which the witness believes to be true.

[23] The new system places a great deal of trust and responsibility upon the solicitors who prepare statements of this kind. Solicitors should take particular care to ensure that inadmissible material is not contained in such statements and when in doubt should seek the advice of counsel. It is the responsibility of counsel to ensure that inadmissible material is not placed before the Court and counsel should check this material before it is tendered in evidence and consult with each other to eliminate or at least reduce the time of the Court in having to rule on the admissibility of evidence.

[24] The second observation I would make about the credibility of witnesses is that appeal courts in this country have, in recent times, stressed the need for trial judges to be careful about the over reliance on demeanour when determining issues of credibility. Encouragement is given to trial judges to determine questions of credibility wherever possible upon more substantial

grounds although that is not to say that demeanour does not have its place. Usually the weapon that is most available to any trier of fact is to see how the witnesses perform under cross-examination because it by this process that weaknesses in their evidence-in-chief will be exposed. I note for example that in *ZYX Music GmbH v King and others* that weaknesses in the evidence of the three principal witnesses whose evidence was given in that case by exchange of witness statements were soon exposed. As the learned judge said "this false scenario could not survive any examination at the trial and did not".

[25] On the other hand it is true that by this process witnesses are able to in effect give their evidence in leading form. Their statements may contain matters of fact, which at the trial they have no memory of or only have an imperfect memory of or which, when the evidence is tested, turns out not to be evidence of their own knowledge. It is for these reasons that the observations of Lightman J upon the duty of those involved in the process of the preparation and making of the statements to take the greatest possible care have considerable importance. As Pidgeon J observed in *West Australian Newspapers Pty Limited v Nationwide News Pty Limited* at 557:

> I agree with the observation of Murray J that O 36, r 1 does not confer any prima facie entitlement upon any party. Wallwork and Murray JJ refer to authority where increasing use is being made of exchanging affidavit evidence or, in some jurisdictions, of exchanging written evidence. This has come to the fore in recent years by reason of necessity to quicken the trial process and to shorten it to avoid expense. It is a question of how the issues can best be resolved. It is, however, essential to ensure that there is no

injustice to the parties by resolving the question in a particular manner.

[26] In my view the question of discretion is ultimately to be determined by a consideration of whether or not the exchange of witness statements as standing as the evidence-in-chief of a witness is likely to enhance the proper conduct of the trial or cause the trial to become unfair.

[27] Counsel for the first defendant, Mr Reeves QC, submitted that to allow the plaintiff and the plaintiff's parents to give their evidence in this manner would place the defendants at a considerable disadvantage. It was submitted that the plaintiff's statement is a reconstruction of her evidence because the statement itself demonstrates first that the plaintiff needed the assistance of her mother in recalling dates, secondly that she needed the assistance of her mother to read the statement over to her and to explain it to her, thirdly that there were a number of matters referred to in the statement where she refers to things that she told others but at some earlier time, including her solicitor, but is now unable to remember. Further there is an issue in the trial as to whether the plaintiff has intellectual difficulties, which is the subject of different opinions by various medical witnesses to be called at the trial.

[28] Mr Lindsay points out that those matters are plain on the face of the statement. It was suggested by Mr Lindsay, although there was no evidence before me to support it, that the plaintiff, who in these proceedings is suing by a litigation guardian, is likely to suffer catatonic episodes when

confronted with having to give evidence over long periods of time. The editors of *Cross on Evidence* observe at para [17155]:

> Leading questions may be employed where is desired to direct the witness's mind to particular points which are vague in the testimony of that witness given in response to non-leading questions. Probably witnesses who are frightened, ignorant, very young, mentally feeble, or not fluent in English may more readily be led than others. Wigmore stated a wider exception:
>
> > Where the witness is unable without extraneous aid to revive his memory on the desired point – ie, where he understands what he is desired to speak about, but cannot recollect what he knows – here his recollection, being exhausted, may be aided by a question suggesting the answer. The trial judge's discretion must be relied upon to prevent imposition.
>
> There seems to be no leading case suggesting that the law goes so far, though Best agreed; the technique is often employed in practice, and this illustrates the width of the judge's general discretion to control the forms of questions.

[29] However, even if that principle applied in this case, that does not permit evidence which is inadmissible in evidence or which the witness after prompting does not recall. On the other hand if there is material which on its face is inadmissible that can be objected to at the proper time and if it is plainly inadmissible it can be excised from the document. It may well be that parts of the statement to which Mr Reeves QC referred would fall into this category.

[30] On the other hand I also have to consider the expeditious disposition of this matter. This matter has been set for trial for seven weeks. The statement of the plaintiff's evidence-in-chief I am told is 98 pages long. I am told that the

mother's statement is 124 pages long and the father's statement is 32 pages long. The parents' evidence is primarily concerned with a claim for damages for gratuitous services or *Griffiths v Kerkemeyer damages*. There is no doubt that if the evidence-in-chief of these witnesses is to be given orally that will greatly extend the length of the trial. Mr Silvester, counsel for the second defendant, while supporting the contentions and submissions of Mr Reeves QC, conceded that in that event the time allocated for the hearing of this trial would probably not be adequate. Should the trial not be completed there is likely to be a considerable delay in the completion of the trial depending of course upon my own future commitments and the amount of additional time need to complete the case. Furthermore this is likely to add significantly to the costs of the trial.

[31] Also I have to consider that an order has already been made for the exchange of witness statements so that if the plaintiff and her parents are not able to rely upon their statements as evidence-in-chief they may nevertheless be cross-examined upon them which may give the defendants an unfair advantage.

[32] I am not persuaded that the plaintiff will gain an unfair advantage if the plaintiff and her parents are permitted to give their evidence-in-chief by the tendering of their statements of evidence. I consider that any inadmissible evidence can be dealt with and that material excised. I think it is likely that in a case such as this, although there are significant credibility issues, it is unlikely that material which is false or which cannot be supported or

properly proved will not be able to be exposed by the process of cross-examination. If this occurs, then it is likely to have a bearing on the credit of such a witness on other issues, a matter I expect to have been explained to such witnesses by the solicitors concerned. I consider that there is a considerable saving of time and costs which favour the making of the order sought by the plaintiff. There is also the consideration that this course will significantly shorten the trial and make it less likely that the case will be unable to be completed in the time allotted.

[33] Taking all of these matters into account I consider that the appropriate order to be made in the exercise of my discretion is to order that that witness statements of each of the witnesses to be called in this case is to stand as that witness' evidence-in-chief and that no further evidence-in-chief is to be led except by leave.

[34] There will be an order accordingly.