Report of the Witness Evidence Working Group in the UK

By Mark J Steele SC

'Truth may sometimes leak out from an affidavit, like water from the bottom of a rusty bucket'[1]

Most litigation is determined by findings of fact, based at least in part on the evidence of witnesses. Since late last century, the practice of the civil courts in Australia (as in England and Wales), has been for the evidence-in-chief of witnesses to be given in writing.

Accordingly, it is of great importance for the just and effective resolution of litigation that witness statements or affidavits are as true a record as possible of a witness's recollection. In current practice, however, witness statements often do not achieve this, with potentially profound implications for the accuracy of judicial fact-finding and confidence in the legal system.

Systemic problems

The recent report of the Witness Evidence Working Group in England and Wales has highlighted a number of deficiencies in current practice, which will be familiar to Australian practitioners. The Working Group of judges and senior practitioners was formed in early 2018[2], in response to a 'fairly widespread feeling' among users of the Commercial Court that evidence-in-chief in written form was not the 'best evidence'[3]. It reported on 6 December 2019[4].

In late 2018, the Working Group undertook a survey of court users, which attracted 932 responses. Only 6% of participants thought that the current system 'fully achieved' the aim of producing the best possible evidence and 45% considered that it did so only partly, or not at all. Alarmingly, fully 55% of participants thought that witness statements 'failed to reflect the witness's own evidence'[5]. Participants also complained that witness statements were too long, strayed into legal argument, included irrelevant material and extensively recited the contents of documents.

A consistent theme of these complaints was that witness statements are typically 'lawyer-led', 'heavily crafted by solicitors' and 'a vehicle for the lawyer's view of the case'[6]. As the Working Group reported:

> '… the process of preparation of witness statements in larger cases, involving the polishing of numerous drafts and iterations, results in the final version being far from the witness's own words even if it started life as such.'[7]

This echoed the observation of Lord Woolf, as long ago as 1996, that:

> 'Witness statements have ceased to be the authentic account of the lay witness; instead they have become an elaborate, costly branch of legal drafting.'[8]

These concerns resound with practitioners in Australia and are echoed in recent observations by Australian judges, including that of Callinan J in *Concrete Constructions Pty Ltd v Parramatta Design and Developments Pty Ltd*[9] that:

'It is … impossible to avoid the suspicion that statements on all sides are frequently the product of much refinement and polishing in the offices and chambers of the lawyers representing the parties, rather than of the unassisted recollection and expression of them and their witnesses.'[10]

The corruption of recollection

Most seriously, it is clear that the process of preparing a witness statement can irremediably *corrupt* the witness's recollection. As the Working Group observed:

> '… developing statements through numerous drafts, getting the witness to retell the story over and over, is a process which may corrupt memory …'[11]

In fact, extensive psychological research in the last 40 years, particularly in the USA, has established that memory is essentially a process of reconstruction and is inherently fragile, highly malleable and susceptible to the influence of even subtle and unconscious suggestion[12]. In contrast, as Leggatt J recently observed, many practitioners operate on the basis of:

> *'… a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved.'*[13]

This has profound implications for lawyers when interviewing a witness to prepare a statement. Exposing a witness to information in documents, the recollections of other witnesses, leading questions and even subtle cues on the part of an interviewer can each operate, not to assist the witness to recall an event, but to actually *construct* or *change* the witness's recollection of it.

Further, because this tainting or corruption of recollection can occur without either the witness or the interviewer being conscious of it, the resulting, false memory can be sincerely held. This process can produce witness evidence which is, at the same time, honest, compelling and quite wrong and 'can wreak havoc within the legal system'[14].

Lack of detailed guidance

These dangers are exacerbated by a general lack of education and guidance, with most lawyers receiving limited formal education in the nature of memory and little, if any, training in how to take a witness statement. Nor is there any clear ethical guidance, with professional rules turning on the distinction, often elusive in practice, between 'coaching' a witness, on the one hand, and 'questioning and testing in conference the version of evidence to be given by a prospective witness', on the other[15]. As the Working Group cautioned:

> '… the lawyers who are in charge of drafting witness statements have very little guidance as to that process … Junior solicitors may be given the function of preparing the first drafts of evidence when they have limited experience of the function and role of the witness statement in the trial process.'[16]

Litigation privilege

The risk that flawed witness preparation will undermine the fairness of the trial process is also increased by the operation of litigation privilege, which prevents detailed inquiry into how a witness's recollection was refreshed and recorded by a party's lawyers[17]. This will frustrate an attempt to cross-examine a witness, for example, about what they were shown and told by a party's lawyers in order to 'refresh' their memory, or what they were told about the evidence of other witnesses or the significance of particular facts in the case.

Response of the Courts

As these dangers have become increasingly apparent, judges have responded in various ways. For instance:

- Many Australian judges direct that evidence of contentious conversations or events be given orally. It has been said, for instance, that 'the dominant practice in the Federal Court in New South Wales is that critical evidence, or at least critical evidence which is contentious, should be given *viva voce*'[18]. In England, in contrast, the Working Group noted that the option for a judge to order that evidence-in-chief be given orally, although available under the Rules, is 'rarely invoked or exercised'[19];
- Judges have rejected grossly deficient witness statements[20] and made adverse costs orders, including against practitioners[21];
- Some courts provide specific guidance for practitioners, for example, that a witness statement should 'if practicable be in the intended witness's own words'[22] and 'not contain lengthy quotations from documents'[23]; and
- Some judges simply give little, if any, weight to uncorroborated witness evidence. As Leggatt J said in *Gestmin SGPS S.A. v Credit Suisse (UK) Limited* [2013] EWHC 3560 at [22]:

> '… the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations …'[24]

The recommendations of the Working Group

Radical reform rejected

The Working Group canvassed and reported on a wide range of potential reforms. The more radical of the proposed reforms were not supported by an overwhelming majority of the participants in the 2018 survey[25]. The Working Group concluded that 'there was little appetite for radical reform of the current system'[26] and did not propose any such radical change. The reforms rejected on this basis included:

- Lifting privilege in the production of witness statements, with disclosure of all witness communications and drafts (91% against);
- Permitting an opposing party's representative to be present at witness interviews (89% against);
- All evidence-in-chief to be given orally at the trial (83% against); and
- Examining witnesses prior to trial, along the lines of US-style depositions (76% against).

An authoritative statement of best practice

The Working Group recommended the promulgation of an authoritative statement of best practice on the preparation of witness statements, to guide practitioners and assist in the training and education of the profession. This statement is a work in progress, but the group recommended that it provide, *inter alia*, that:

- A witness statement be confined to evidence a witness would give if asked non-leading questions about their recollection of the events;

- Witness statements be required to:
  - use the witness's own words, with revisions limited to aiding brevity and clarity, without changing meaning or emphasis and without 'spin'; and
  - focus on utility to the trial judge and 'not as a tool for internal purposes or presentation to the other side';
- Legal input into the preparation of a witness statement should be provided with 'conspicuous care' and 'conscious of the risk of corrupting memory through the process'.

Other procedural reforms

The Working Group also recommended that:

- Witness statements should contain a more developed statement of the truth, to ensure 'that the witness really does understand the proper parameters of a statement' and a statement by a solicitor certifying compliance with the rules and guidelines;
- Oral examination-in-chief on specific issues and topics should be ordered in appropriate cases; and
- Witness statements should be limited to 30 pages, with extensions granted only rarely and after a review by the judge of the full proposed statement.

A further suggested reform, which attracted 'a significant divergence of views' and a 'bare majority' among the members of the Working Group, was that, in conjunction with the filing of witness statements, the parties should exchange detailed narratives of their factual cases, to avoid the temptation to expand witness statements to fill that role[27]. This was left for further consideration by individual courts[28].

The Business and Property Courts Board has endorsed all of the Working Group's recommendations in-principle and preliminary work to implement them is underway.

Conclusion

The extent to which the implementation of these reforms will lead to substantive change is uncertain. Much will depend upon the specificity and prescriptiveness of the statement of best practice and the zeal of judges in enforcing the reforms. As one UK law firm has observed in response to the Report:

> 'Our expectation is that practitioners will not change the process by which witness statements are produced, nor the end product, unless the judiciary is seen to apply costs sanctions and express criticism of non-compliance with the rules …'[29]

Further, it may be doubted whether these measures go far enough to address the underlying danger of corruption of witness recollection. All too often, in current practice, witness statements are much more 'the product of careful reconstruction of events and states of mind, based on a meticulous examination of all the documents in the case by the large teams of lawyers involved'[30] than an untainted record of the actual recollection of the witness. One may doubt whether the procedural reforms recommended by the Working Group will do much to change this.

In this context, it is a pity the Report does not contain a discussion of the perceived advantages and disadvantages of the more radical reforms which were initially flagged for consideration. In particular, the proposal for a limited relaxation of litigation privilege, to make transparent the process by which a witness's recollection has been 'refreshed', surely merits detailed consideration.

As a matter of commonsense and expert opinion[31], understanding what occurred in witness interviews can be critical to assessing the reliability of a witness's evidence. Accordingly, the use of privilege to prevent such inquiry has been the subject of judicial criticism[32]. Further, attaching privilege to communications with non-party witnesses is not justified by the need to preserve the confidentiality of communications between lawyer and client, but only by the less compelling rationale that parties in adversarial proceedings should be free to investigate and prepare their cases in secret[33]. As French J observed in *J Corp Pty Ltd v Australian Builders Labourers Federated Union of Workers*:

> 'The privilege attaching to statements taken from potential witnesses may not be supportable by public interest considerations of the same order as those enunciated in *Grant v Downs*[34] … The confidentiality which attends their taking is of a limited character … It may be that the time has come to reconsider whether such privilege as attaches to witness statements ought to continue …'[35]

As is increasingly clear from the experience of the courts and a substantial body of psychological research, current practices in witness preparation carry profound risks to the reliability and fairness of proceedings, which have the potential to corrode public confidence in the legal system. It is likely that these risks will need to be addressed by more than procedural reforms. BN

ENDNOTES

1 Lord Griffiths, 'Civil Litigation in the Nineties' (1991) 57(3) *Arbitration* 168.
2 The group, initiated by the Commercial Court Users' Group, was subsequently expanded to cover all the Business and Property Courts.
3 See https://www.judiciary.uk/publications/commercial-court-users-group-meeting-report-march-2018/
4 'Factual Evidence in Trials Before the Business & Property Courts – Report of the Witness Evidence Working Group' (**Report**) – https://www.judiciary.uk/publications/commercial-court-users-group-meeting-report-march-2018/
5 Report [30].
6 Report [31].
7 Report [13].
8 Lord Woolf, *Access to Justice: Final Report*, 1996 at [54].
9 (2006) 229 CLR 577 at [175].
10 See also Hon J J Spigelman AC, 'Truth and the Law' (The Sir Maurice Byers Address) (2011) 85 *Australian Law Journal 746; Bar News*, Winter 2011, page 99.
11 Report [14].
12 See, for instance, Daniel L Schacter, *The Seven Sins of Memory: How the Mind Forgets and Remembers*, Houghton Miflan, New York, 2001; E F Loftus, J M Doyle & J E Dysart, *Eyewitness Testimony: Civil and Criminal*, 4th ed, 2007; British Psychological Society, *Guidelines on memory and the law*, 2008.
13 *Gestmin SGPS S.A. v Credit Suisse (UK) Limited* [2013] EWHC 3560 at [17].
14 J J Spigelman AC, op. cit., p. 758, quoting Daniel L Schacter, *The Seven Sins of Memory: How the Mind Forgets and Remembers*). See also, for example, *Recovery Partners GP Limited v Rukhadze* [2018] EWHC 2918 at [10]-[12]; *Estera Trust (Jersey) Limited v Singh* [2018] EWHC 1715 at [91]-[92].
15 Australian Bar Association, *Barristers' Conduct Rules*, 1 February 2020, Rules 68 & 69; *New South Wales Professional Conduct and Practice Rules 2013* (Solicitors' Rules), Rules 24.1 & 24.2.
16 Report [42].
17 See, for instance, *In the Estate of Fuld* [1965] P 405 and *Public Transport Authority of Western Australia v Leighton Contractors Pty Ltd* [2007] WASCA 151.
18 Robertson J, 'Affidavit evidence' [2014] *FedJSchol 3*. Similarly, see the *Federal Court Practice Note on Employment and Industrial Relations Practice* and the *Practice Directions* of the WA Supreme Court, PD 4.5.
19 Report [5], [61].
20 *Thomas v SMP (International) Pty Ltd* [2010] NSWSC 822 at [9]-[30]; *JD Wetherspoon plc v Harris* [2013] EWHC 1088.
21 *Limousin v Limousin* [2008] FamCA 315 at [97].
22 Practice Direction 32 (UK).
23 *Commercial Court Guide* at [H1.1] (UK). See also the *Practice Directions* of the Supreme Court of Western Australia, PD 4.5 at [16] which indicate that orders will ordinarily be made requiring statements to be prepared having regard to the Western Australian Bar Association's *Best Practice Guide 01/2009* on preparing witness statements.
24 See also *Recovery Partners GP Limited v Rukhadze* [2018] EWHC 2918 at [17]; *Estera Trust (Jersey) Limited v Singh* [2018] EWHC 1715 at [92].
25 Report, Appendix 1.
26 Report [3], [41].
27 Report [49]-[52].
28 Report [76].
29 'The Witness Evidence Working Group's Final Report – No Radical Reform After All', Hausfeld – https://www.hausfeld.com/perspectives/the-witness-evidence-working-groups-final-report-no-radical-reform-after-all
30 *Estera Trust (Jersey) Limited v Singh* [2018] EWHC 1715 at [90].
31 See, for instance, Elizabeth F Loftus, James M Doyle & Jennifer E Dysart, *Eyewitness Testimony: Civil and Criminal*, 4th ed, LexisNexis, 2007 at [7-5(b)].
32 For example, *A & E Television Networks LLC v Discovery Communications Europe Ltd* [2013] EWHC 109 at [140]; *Marks and Spencer plc v Interflora Inc* [2012] EWCA Civ 1501 at [153].
33 *ACCC v Cadbury Schweppes Pty Ltd* [2009] FCAFC 32 at [38]-[42]; *Public Transport Authority of WA v Leighton Contractors Pty Ltd* [2007] WASCA 151 at [16]-[18], [32].
34 (1976) 135 CLR 674.
35 (1992) 110 ALR 510 at 515.