

Evidence by Satellite Television

A problem that arose in a recent patent extension case, *Bayer A.G. v. Blewett* (Minister for Health), was that an expert witness who was required for cross examination was not readily able to leave the United States where he lived to give evidence in NSW. By consent of the parties and with Mr. Justice Young, the trial judge's concurrence, arrangements were made with the Overseas Telecommunication Commission for the evidence to be taken by satellite television.

At 8 am one morning, counsel and the Judge proceeded to the Sydney offices of OTC and we could there see the witness sitting in the corresponding offices in Boston. The parties had booked three hours of time for the evidence and the available time was continually signalled by a clock on the wall.

The Judge's request that space be available for the public who wished to hear what was going on was met, at least to a limited degree in that there were about three rows of seats for interested public though naturally enough these were occupied by persons associated with the parties and the press. After ensuring that all systems were in order, the witness was sworn in by a notary public in Boston according to the law of Massachusetts. A theoretical problem arises here in that it might be argued that a witness who tells a lie on oath when he has never left America does not commit perjury in NSW. Query whether he can be prosecuted in Massachusetts. This would depend on the local law. The Judge felt there might be some problems as to whether the witness might be in peril about giving evidence on oath when physically in the United States to a foreign tribunal, but was informed by the parties that this was not a problem.

Evidence in the case was by affidavit. The witness was thus asked by the counsel calling him for his name, address and occupation and to affirm the correctness of the two affidavits which he had sworn. He was then asked, by leave, several supplemental questions. Cross examination then took place. The cross examiner had available to him facilities of a facsimile machine by which documents could be transmitted from Australia to Boston or vice versa and there was also a screen available on which one could put documents face down so that they could be seen on a screen at the other end. The only document that was put on the screen, unfortunately, was a blurred copy which did not reproduce with sufficient clarity but as another copy was available at the other end, this did not cause any problem.

The procedure had the advantage that Judge and cross examiner could see the demeanour of the witness and could see if he referred to anyone else or to any piece of paper at his end. Although perhaps a little was lost in the way of projection of the witness's personality in much the same way as one loses a little in the difference between a live performance and a video tape of a song, this loss did not make any difference in the case of an expert witness. In the patent extension case the method of taking evidence was extremely successful and enabled the material from the witness to be put before the Court relatively inexpensively in almost as pure a form as if he had been in a witness box in Sydney.

The present cost of the service is \$5,000 per hour to the United States and \$10,000 per hour for England or Europe.

Apart from the minor matter referred to above, the only inconvenience to be put against the large expense that would

otherwise be caused in moving the Court to the United States or bringing the witness to Sydney, is having to assemble the Court at odd hours in relatively cramped quarters for an hour or so. However, the Judge thought that was a small price to pay in this instance.

In case there was failure of the equipment, two shorthand reporters from the Court Reporting Service were present. However, in due course a transcript was prepared from the video tape of the evidence which is available as part of the service because the accommodation for the shorthand writers was not sufficiently well positioned to enable them to catch every word of the evidence over the legitimate conversations between the lawyers for the various parties who were stationed between the Court reporters and the screens.

The taking of the evidence of this witness is to be contrasted with that of a British witness. This eminent person was evidently so busy that he could only be available in Court on a Friday intending to arrive in Sydney at 6 am on a Friday and fly out back to England at 9 pm the same night.

Unfortunately for him the plane was delayed in Bangkok and he only arrived in Sydney at 3.30 pm on the Friday. The Court sat between 4 pm and 6 pm to take his evidence and he was back at the airport two hours later for his plane back to London so that he could be at work the following Monday. In the circumstances his evidence was remarkably clear and he showed no signs of jet lag. One wonders, however, how one can really expect people who are as busy as this person to travel thousands of kilometres for two hours of cross examination when the facilities are now available to take the evidence in a far more convenient way. □

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Some leading Commonwealth lawyers will be among speakers at the 1990 Commonwealth Law Conference to be held in Auckland, New Zealand, between 16 and 20 April 1990.

As at 1 March 1989, the Organising Committee has already received acceptances to speak from many, including

- . Lord Mackay of Clashfern, the Lord Chancellor of England.
- . Justice Mchamed Shahabuddeen of the International Court of Justice.
- . Dr. F.M.B. Reynolds, Editor of the Law Quarterly Review.
- . Sir William Wade of Cambridge University, one of the Commonwealth's leading academic writers and expert on administrative law.
- . Justice Sujata V. Manohar of the High Court of Bombay.
- . Justice James Muirhead of the Supreme Court of Western Australia.

For further information and a pre-registration form contact:
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