VIDYA WATI v RASIK KUMAR and Anor (HBC0214 of 2003)

HIGH COURT — CIVIL JURISDICTION

WINTER J

26 March 2004

Evidence — admissions — admissibility of evidence — medical and police reports — admissibility of hearsay evidence in civil proceedings — expert evidence in civil cases — Civil Evidence Act 1995 — Civil Evidence Act 2002 ss 4, 5, 7(3), 7(4), 17 — High Court Rules O 38 r 3.

This was an application by the Plaintiff pursuant to O 38 r 3 of the High Court Rules for the admission as evidence of the following: (a) medical report dated 9 May 2003 by Doctor Jeffrey U Boquiren; and (b) police report dated 5 May 2003 confirming the conviction of the first Defendant. Plaintiff submitted that the admission of the doctor's report will minimise the cost and shorten the duration of the trial. However, the doctor concerned had left Fiji to practice in Australia.

In answer, the Respondent argued that the medical evidence was important as this would give rise to an opportunity to cross-examine the doctor. Accordingly, the Respondent claimed that there will be a breach of natural justice if he will not be able to cross-examine the medical expert.

Held — (1) Section 6(a) of the Civil Evidence Act 2002 (the Act) indicates that where a party has unreasonably failed to produce the one who made a statement at trial, the court may consider the witness to be unreliable and give the hearsay evidence little weight. However, where the reason for the witness' absence is that he is unavailable by being overseas, it is likely that a judge would give "full weight" to the evidence but the Defendant may also consider the issuance of a summons to the doctor. Thus, the application by the Plaintiff with respect to the doctor's evidence is granted.

(2) With respect to the second issue, the application for admission of the police report is declined. The fact of conviction was admissible in the terms of s 17 of the Act. The conviction of the first Defendant was admitted in para 5 of the statement of defence. Beyond that admission, the Plaintiff should have called evidence or provided witness statements concerning the other factual matters raised in the police document.

Application granted in part.

No cases referred to

V. Maharaj for the Plaintiff

H. Nagin for the first and second Defendants

Winter J. This is an application by the Plaintiff pursuant to O 38 r 3 of the High Court Rules for orders:

(a) that a medical report dated 9 May 2003 by Doctor Jeffrey U Boquiren following examination and treatment of the Plaintiff be admitted in evidence, and

(b) that a police report dated 5 May 2003 confirming the conviction of the first Defendant be admitted in evidence.

The motion was supported by an affidavit of Bindula Devi.

The application is opposed by the Defendant. Counsel have filed helpful submissions. I have considered all this material and in addition the provisions of the Civil Evidence Act 2002.

The application

The affidavit in support says in respect of the doctor's report that its admission into evidence will minimise cost and shorten the duration of the trial. I am advised that the doctor concerned was engaged at the Nausori Health Centre but has now left Fiji to take up practice in Australia. Although not clearly argued in the papers I infer from the facts in the affidavit and its annexures that an appropriate notice was sent by the Plaintiff's counsel to the Defendants' counsel under s 4 of the Civil Evidence Act of 2002.

The response

The Respondent/Defendant says that the medical evidence is important and accordingly wants the opportunity of cross-examining the doctor. This ground is not well-argued in the written submission. It is unsupported by fact and or proper inference. In effect the Respondent claims that there will be a breach of natural justice if he does not have a right to cross-examine the medical expert. However, I note again that this proposition is unsupported by any direct fact or proper inference of an example of prejudice to the Defendant beyond the general descriptive term of "great prejudice".

Preliminary observation

The application and opposition are poorly pleaded. The consideration of the law is sparse. For that reason in this judgment I will briefly detail the background of the enabling legislation and then issue my ruling.

Reform of civil evidence

The evolution of the rule against hearsay and many of the exclusionary rules of evidence were developed as a response to the involvement of lay people in the fact-finding process. The common law had a healthy skepticism of the ability of a jury and lay magistrates not to be unduly influenced by hearsay evidence such as character and opinion. Jury reform and the development of professional adjudicators ameliorated those concerns. Gradually these prejudices have been swept aside by evidential law reform.

In England the Law Commission in its Report No 216 (The Hearsay Rule in Civil Proceedings) recommended a simplification of the law and procedure relating to the admission of hearsay evidence in civil proceedings, so that as a general rule all relevant evidence including hearsay should be admissible. The Law Commission specifically proposed that the hearsay rule in civil cases should be abolished. The commission saw no need for complex procedural safeguards but rather preferred the checks and balances of the court assessing the probative value of evidence and according it appropriate weight. The commission's report led to the introduction of the Civil Evidence Act 1995. That Act runs in conjunction with the CPO Pt 33 which deals with miscellaneous rules of evidence in civil proceedings and provides the procedural framework for the admission of hearsay evidence for trial.

In Fiji the Civil Evidence Act of 2002 mirrors the English legislation. Accompanying rules for the legislation have yet to be developed. These rules would compliment and provide a practical framework for the implementation of the sensible reforms contained in the Act. In the meantime however some practical sense can be applied to these procedures from the existing rules and inherent directive powers of the court.

The Civil Evidence Act 2002

The Act makes virtually all hearsay evidence admissible in civil proceedings and then provides procedural safeguards to prevent the other side from being surprised at trial about the introduction of such evidence.

Section 4 of the Act requires notice of hearsay evidence to be given. There is no prescribed form for notice under s 4. However, the notice should generally:

- indicate that the evidence to be tendered is hearsay;
- identify the hearsay evidence;
- identify the person who made the hearsay statement to be given as evidence;
- state why the person who made the statement cannot be called to give the evidence; and
- where appropriate refer to which part of the witness statement the hearsay evidence is contained.

When either the Plaintiff or the Defendant receive a hearsay notice there are a number of actions they may take before or at trial; to ameliorate the prejudicial effect of this evidence.

Before trial a party receiving hearsay notice may simply accept that the evidence will be given. This should happen in most cases where the reasons given for the witness not attending trial to give oral evidence are that he is unavailable to the court. Any prejudice can be ameliorated by requesting further information relating to the evidence including clarification of the circumstances in which the statement was made, or more details about the evidence to be introduced as hearsay or a confirmation of the present whereabouts of the witness.

In addition, however, and in appropriate circumstances where for example the witness's whereabouts is ascertained and his availability is known the party receiving notice may also apply to the court for leave to serve a witness summons on that witness to attend the trial and be cross-examined. The power to call a witness for cross-examination is contained in s 5 of the Act and O 38. In effect these provide that where a party adduces hearsay evidence but does not call the maker of the statement the other party may call the maker and cross-examine to test the accuracy of the statement and the witness's credibility.

The English provide that such an application should be made not more than 14 days after the day on which a notice of intention to rely on hearsay evidence is served. Where the application is granted directions will usually be given as to how and where the witness will testify.

The policy behind s 5 of the Act is to prevent a party gaining unfair advantage by failing to call a witness to give oral evidence and tendering his hearsay evidence in the witness's absence. This section preserves the long cherished common law right that where possible a party's witness should be cross-examined by his opponent.

At trial s 7(3) of the Act permits the other side to attack the credibility of the absent hearsay witness and thereby criticise the weight that should be given to his evidence.

Section 7(3) and (4) provide:

> 7(3) If in civil proceedings hearsay evidence is adduced and the maker of the original statement, or of any statement relied upon to prove another statement, is not called as a witness—
>
> (a) evidence which if the maker has been so called would be admissible for the purposes of attacking or supporting his or her credibility as a witness is admissible for that purpose in the proceedings; and

(b) evidence tending to prove that, whether before or after the person made the statement, he or she made any other statement inconsistent with it is admissible for the purpose of showing that the person had contradicted himself or herself.

(4) Evidence may not be given under subsection (3) of any matter of which, if the person had been called as a witness and had denied the matter in cross-examination, evidence could not have been adduced by the cross-examining party.

The purpose of this section is to ensure that evidence relating to the credibility of a witness not called to give evidence is admissible as if the person had been called as a witness. As a result evidence attacking the credibility of the absent hearsay witness will be allowed to suggest that the witness is biased in favour of the party calling him in effect preventing the calling party circumventing the issue of a witness's credibility by tending his evidences as hearsay.

The English support this provision in the act by requiring notice of attack on credibility to be given.

Another important development introduced by the Act is the power given to the court to ensure the more relaxed rules allowing the admission of hearsay evidence are not abused. While evidence can no longer be excluded at a civil trial on the sole ground that it is hearsay the judge is still required to ensure that the evidence put before the court under the Act is reliable and that parties do not take advantage of this more liberal evidential regime in admitting hearsay evidence. In fulfilling this "policing" role the courts are required to take into consideration the guidelines provided by s 6 in determining the weight to be adduced to the hearsay evidence. This section provides:

6. In estimating any weight to be given to hearsay evidence in civil proceedings, the court must have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence, and in particular to the following—

(a) whether it would have been reasonable and practicable for the party by whom the evidence was adduced to have produced the maker of the original statement as a witness;

(b) whether the original statement was made contemporaneously with the occurrence of existence of the matters stated;

(c) whether the evidence involves multiple hearsay;

(d) whether any person involved had any motive to conceal or misrepresent matters;

(e) whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose;

(f) whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight.

The grounds identified in s 6 are guidelines for the court to adapt to the specific facts of each case and not hard and fast rules which the courts are bound to follow.

For our purposes the most significant "policing" provision is provided by s 6(a). Where a party has unreasonably failed to produce the maker of a statement at trial the court may consider the witness to be inherently unreliable and as a result give the hearsay evidence little if any weight. Where the reason for the witnes's absence is that he is unavailable by being overseas however it is likely that a judge would give "full weight" to the evidence.

In my view each subsection merely recasts in statute the classic tactics of credibility attack on any witness:

6(a) unreasonable unavailability;
6(b) contemporaneous authorship;
6(c) distortion or misinterpretation by intermediaries;
6(d) concealment;
6(e) editing;
6(f) bad faith use of the Act will no doubt be used in conjunction with 6(a).

Expert evidence in civil cases

In conjunction with these provisions the Fiji Act again mirrors the English legislation on expert and opinion evidence.

The introduction of this section echoed the findings of Lord Wilberforce in his "Final Report". At p 137 he said:

> A large litigation support industry, generating a multi-million-pound fee income, has grown up among professions such as accountants, architects and others, and new professions have developed such as accident reconstruction and care experts. This goes against all principles or proportionality and access to justice. In my view, its most damaging effect is that it has created an ethos of what is acceptable which has filtered down to smaller cases. Many potential litigants do not even start litigation because of the advice they are given about cost, and in my view this is as great a social ill as the actual cost of pursuing litigation.

It was recognised that under the old system of civil litigation the need for each party to instruct an expert was a common source of increased cost complexity and delay.

In response to these criticisms it was recommended that there be a radical change to the philosophy practice and procedure of expert evidence in civil proceedings. The principle recommendation was that the admission of expert evidence should be under the complete control of the court through the exercise of the court's case management powers at the pre-trial direction stage.

We have as yet to fully develop rules to complement the sensible reforms introduced by Pt 4 our Civil Evidence Act 2002.

For the purposes of this proceeding however the principle is very applicable. Expert evidence should be restricted to that which is reasonably required to resolve the proceedings. The overriding objective being to enable courts to deal with cases "justly" including ensuring that the parties are on an equal footing, saving expense and dealing with cases in ways which are proportionate.

Decision

Although wide-reaching in its implications the revision of the rules of evidence provided by the Civil Evidence Act of 2002 must be welcomed and embraced. Economies of scale and proportionality particularly in countries like Fiji with a limited ability to allocate scarce court resources must inevitably lead to a design of systems that encourage efficiency and even-handedness in civil litigation. Constructing and arguing cases by ambush and winning them by virtue of economic power alone should no longer be acceptable.

This is a case with a very modest claim for damages. It would in my view be out of all sense of proportion to require the Plaintiff to produce the doctor to speak to his report only because of some vague notional prejudice raised by the Defendant.

I emphasise that the Defendant has not specified any prejudice to its case. However the legislation assumes there will be prejudice and balances that out in the ways I have described. I find it very poor indeed that this Defendant claims prejudice but has done nothing to refine his argument by way of requiring obvious extra particulars from the Plaintiff or perhaps a notice that he intends discussing the matter with the doctor concerned.

I will of course when considering the evidence apply the appropriate statutory weight in estimating its value for or against the Plaintiff's case.

Each of the factors detailed in s 6 of the Act should ameliorate most if not all of the Defendant's concerns.

However the Defendant might also consider the issue of a summons to the doctor. There is no property in a witness. If there are genuine criticisms of him or his evidence to be made then that choice is open to the Defendant.

Accordingly for these reasons I grant the application made by notice of motion in respect of the doctor's evidence. However, I do observe that this statement will have to be presented to court in the proper form and should:

(1) give details of the doctor's qualifications;
(2) give details of any material he relied on to make the report;
(3) summarise any range of opinion and give reasons for the reporting of the doctor's own opinion;
(4) contain an adequate summary of the conclusions reached;
(5) contain a statement that the doctor understands his duty to the court and has complied with that duty; and
(6) contain a verification of the statement as truth such as:

> I believe that the facts I have stated in this report are true and the opinions expressed are professionally responsible and correct.

If the report is not submitted in this form then I reserve leave to debar the evidence from being tendered in the case.

Convictions as evidence in civil proceedings

The second part of this application related to admissibility of convictions and in part admission of particulars of fact for the purposes of a civil proceeding.

The application was not fully-made nor properly considered in my view. Counsel should read s 17 of the Civil Evidence Act and familiarise themselves again with the Whitebook provisions on admissions of particular fact for the purposes of hearing.

The conviction of the first Defendant was admitted in para 5 of the statement of defence dated 20 June 2003. Beyond that admission the Plaintiff in my view would have to call evidence or provide witness statements concerning the other factual matters raised in the police document.

Accordingly I refuse the application in respect of the police statements.

Conclusion

In the result I grant the Plaintiff's application for admission of a medical report dated 9 May 2003 by Doctor Jeffrey U Boquiren provided the report is consolidated and presented in terms described in this judgment. If those terms are met it will be admitted at trial.

I decline the application for admission of the police report dated 5 May 2003 but note in any event that the fact of conviction is admissible in terms of s 17 of the Civil Evidence Act 2002.

I fix costs for the Plaintiff in the sum of $650.00.

Case management

Counsel are to prepare the case for hearing and in that regard I direct the following mode of proceedings at App "A" to this judgment.

Application granted in part.