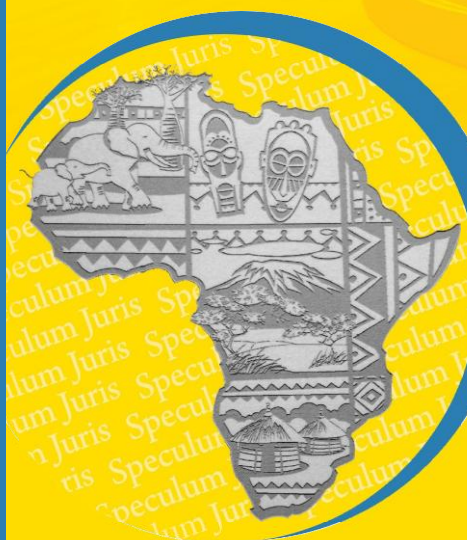




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The Presentation of Witness Testimony in Civil Matters — Time for a New Approach? (Part 2)

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Abstract

The problems related to access to justice in civil matters are not unique to South Africa but are of global concern. After the adoption of the final Constitution in 1996, several initiatives were implemented in South African law in an attempt to enhance access to justice in civil matters, as guaranteed by section 34 of the Constitution. Some of these initiatives concerned the presentation of evidence at a civil action trial. More than twenty years ago, there were several unsuccessful pleas from academic writers advocating that a similar position to those of England and Wales should be considered in South Africa concerning the compulsory exchange of witness statements before trial. Therefore, it seems an opportune time to revisit developments about the exchange of witness statements in South Africa over the past few decades. Moreover, it is important not only to embark on an analysis of the exchange of witness statements, but also to look at the presentation of all evidence during action trials, including affidavit evidence. Part 1 of this article provided a comparative study between the presentation of witness evidence at trial in South Africa, England and Wales. The discussion firstly focused on the presentation of witness testimony in South Africa and the exceptions to the general rule that it should be presented orally in court. Secondly, the position in England and Wales was critically

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evaluated, as well as the latest developments in relation to the presentation of witness evidence during trial. In part 2 of this article, some of the developments regarding the presentation of witness evidence in trial actions in Australia are critically examined. Lastly, some possible alternatives to the current presentation of witness testimony in South Africa are considered.

Keywords: witness statement; witness summary; England and Wales; Australia; affidavit evidence; oral evidence; evidence at trial; section 34 of the Constitution

1 INTRODUCTION

In Part 1 of this article, the development relating to the presentation of witness evidence during civil trials in South Africa, England and Wales were critically discussed. It was concluded that although certain provisions of the English law may be incorporated successfully in South Africa, the full-scale adoption of the English model is not recommended. In a South African context, the default position with regard to the compulsory exchange of witness statements standing as the evidence in chief of a witness may prove to be problematic.

In this Part 2 of the article, some developments in certain Australian states in relation to the presentation of witness evidence during civil trials are critically examined. It is contended that the overall Australian approach would be a more suitable model to incorporate in the South African civil justice system and certain recommendations for legal reform are made, based on both the English and Australian models.

In conclusion, it is contended that the default position, which requires that witnesses should present their testimony *viva voce*, should remain. It is, however, recommended that the Rules of Court in relation to the presentation of witness testimony should be amended to provide for the compulsory disclosure of detailed witness summaries before trial and the presentation of affidavit evidence and witness statements as part of the judicial case management process or by agreement between the parties. The scope of the presentation of affidavit evidence during the trial and applications for default judgment, without judicial intervention, should also be broadened. This should result in a drastic reduction of the time spent on the examining of witnesses in civil matters and therefore indirectly make a valuable contribution to access to justice as enshrined in section 34 of the Constitution.

2 AUSTRALIA

2.1 Introduction

As in England and Wales, there are four justifications advanced in Australia for evidence in chief at a trial being adduced by way of affidavit or witness statement rather than verbally:

- (a) Firstly, it is believed that the presentation of evidence by way of affidavit or witness statement saves valuable court time in the adjudication of civil disputes. Similarly, there is an assumption that this will save costs and inconvenience to both parties and witnesses.¹

¹ Emmett “Practical Litigation in the Federal Court of Australia: Affidavits” (2000) *Australian Bar Review* 28; *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 229 CLR 577 635; Sullivan “Written Evidence: Witness Statements and Affidavits as an Alternative to Oral Evidence” (2015) *New South Wales Bar Association Practice Course* 2.

- (b) Second, it is argued that the prior disclosure of witness evidence encourages early settlement between the parties.²
- (c) Third, the disclosure of affidavits or witness statements before trial ensures the early appraisal of the opposite party with information about the matters truly in dispute. This enables the saving of time and money wasted in trials by ambush.³
- (d) Finally, it provides for the practical cooperation of parties to ensure that only the real issues in dispute are brought forward for the trial. It therefore compels the parties to be clear and precise in highlighting the genuine issues for trial.⁴

The prior disclosure of witness evidence is universally referred to as the “cards on the table” approach and it has been argued that the advantages of having evidence in chief served in writing on the other party before trial are so compelling that it should even be applied to fraud cases or cases where credit is at issue.⁵

Over time, the perceived advantages of the exchange of witness statements seemed to be somewhat illusory and outweighed by the numerous problems encountered in practice.⁶ The presentation of evidence in chief by way of witness statements was therefore severely criticised in a number of reported decisions. In *Belgravia Nominees Pty Ltd v Lowe [No 6]*⁷ for example, Tottle J remarked as follows in relation to the witness statement evidence in chief for one of the witnesses during the trial:

Further, Bill’s evidence about the preparation of his witness statement did not encourage reliance on it. Bill accepted the statement included terms which he did not understand or only understood vaguely and contained expressions he did not use. Bill said that most of the information in his statement was ‘put together talking to Colin Heath’. Bill agreed that the Page 8 witness statement did not contain a reference to the Joondalup project in respect of which project management fees and selling fees totalling 7%, rather than 10%, had been charged because the statement had been prepared by someone else. Bill did not seem to understand how statements in the witness statement conflicted with answers given by him in cross-examination. Bill said he had no recollection of being involved in the preparation of his witness statement. Bill was unable to explain how other matters came to be included in his statement other than on the basis that others had included the information. As noted in the preceding paragraph Bill was unable to answer a number of questions put to him in cross-examination about matters contained in his statement which, in the context of the contents of the statement and the detail contained in it, were relatively straightforward.

² *Akins v Abigroup Limited* (1998) 43 NSWLR 539 551; *Hodgson v Amcor Ltd* (2011) 32 VR 495 521; Sullivan *New South Wales Bar Association Practice Course* 2.

³ *Akins v Abigroup* 551; *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* 635; *Saad v State of New South Wales* [2013] NSWSC 154 para 52; *Hodgson v Amcor Ltd* para 82; Sullivan *New South Wales Bar Association Practice Course* 2.

⁴ *Saad v State of New South Wales* para 51; Sullivan *New South Wales Bar Association Practice Course* (2015) 2–3.

⁵ *Boyes v Colins* (2000) 23 WAR 123 para 64–68; *Mercer v Chief Constable of the Lancashire Constabulary* [1991] 1 WLR 367; *Digby v Essex County Council* [1994] PIQR P53, CA 57; Sullivan *New South Wales Bar Association Practice Course* 3.

⁶ *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* para 175; Robertson “Affidavit Evidence” (2014) *Fed J Schol* 3 4; Sullivan *New South Wales Bar Association Practice Course* 15.

⁷ [2019] WASC 5 para 39.

Other problems routinely encountered with witness statements in Australia can be summarised, as follows:

- (a) Frequently, the exchanged witness statement does not provide an accurate representation of the evidence in chief of the witness, but a sterile and constructed effort by the lawyer who drafted it.⁸
- (b) Witness statements are extremely time consuming and expensive to prepare.⁹
- (c) Too much inadmissible material are included in witness statements. These include arguments, conclusionary observations, downright inadmissible hearsay and submissions, which were often only exposed at the trial itself. Where the other party objected to the inclusion of such material, last ditch attempts at correction made at the trial wasted inordinate amounts of time.¹⁰
- (d) The time-saving and efficiency theories underlying the exchange of witness statements, had too many practical flaws to be regarded as an aefficiency measure.¹¹
- (e) The “grand theatre” of a civil trial is damaged, if not lost completely, by the parsing out of the examination in chief of a witness before cross-examination is undertaken. In this regard the most valuable evidentiary component of the entire process becomes remote, sterilised and devalued, all in the name of efficiency.¹²
- (f) Witness statements standing as evidence in chief is unfair to a witness, in terms of the witness being immediately exposed to vigorous cross-examination before they had an opportunity to develop some level of familiarity with a hostile process of answering questions in the confronting environment of a court room. Witnesses tend to settle and adjust to their surroundings after a few loosening questions. For example, a somewhat tense key witness who is thrust into an immediately confronting cross-examination upon an extensive witness statement by a skilled crossexaminer is immediately, and perhaps irretrievably, put on the back foot.¹³

The approach in the presentation of witness evidence differs to some extent in Australian states, as well as the Federal Court. Before the position in these states are discussed, it is prudent that the differences between the various ways in which evidence may be presented before Australian courts in civil proceedings are examined.

8 *Belgravia Nominees Pty Ltd v Lowe [No 6]* para 39. Martin “Examination in Chief Using Witness Outlines in Civil Actions in the Supreme Court of Western Australia” (2020) *Continuing Professional Development Session Perth* 13 where he stated that: “On the whole, I would have to say that across 17 years at the bar and nearly 12 more now as a civil trial judge, that with notable exceptions, more often than not the exchanged witness statements I saw for use as the proposed evidence in chief in a civil trial, usually had a defect of some kind.”

9 Martin *Continuing Professional Development Session* 13.

10 *Ibid* 13–14.

11 *Ibid* 14.

12 *Ibid* 15–16.

13 *Ibid* 16.

2 2 Differences between Witness Statements, Witness Summaries and Affidavits

In Australia, the role and function of a witness statement is exactly the same as that of an affidavit in that it represents the exclusive source of a witness's evidence in chief at a trial. The differences between witness statements and affidavits are based more on form rather than substance.¹⁴

A witness must swear to or affirm the truth of the contents of an affidavit, but a witness statement is merely signed by a witness. At the trial an affidavit is being read out in court whereas a witness statement is tendered as evidence. An exhibit number is therefore allocated to a witness statement, but not to an affidavit.¹⁵

At the trial a witness statement must be sworn to or affirmed by the witness to qualify as evidence and must be in admissible form. The same process of objection to various parts of a witness statement is also applicable to that of an affidavit. When any objections have been dealt with, the relevant witness is called and asked a few formal questions to ensure confirmation that the contents of the witness statement are true and that the opinions expressed therein are honestly held by the witness.¹⁶

When all of the formalities are finalised, the evidence, as set out in a witness statement, is of precisely the same character, nature and weight as that included in an affidavit. It is therefore clear that there are no significant differences between affidavits and witness statements when it comes to the presentation of evidence during a trial.¹⁷

2 3 Federal Court

The dominant practice in the Federal Court of Australia is that critical evidence or at least critical evidence which is contentious, should be presented orally in court, without creating a surprise to the opposing party.¹⁸

A common direction therefore is that critical or contentious evidence not be presented by affidavit but *viva voce*. In such cases, it is usually ordered that an outline or a proof of evidence expected to be presented at the trial, should be served on the other party. Often the court will issue a further direction to the effect that there may be no cross-examination on the outline or proof of evidence, except with leave from the court.¹⁹

Robertson states that the procedure has the following two important purposes:

- (a) Each witness can present their critical or contentious evidence orally to enable them to get comfortable with the process before being cross-examined. Otherwise the first time that a judge observes a witness presenting oral evidence is during cross-examination which is usually not intended to bring out the full version from the witness's perspective.²⁰

14 Sullivan *New South Wales Bar Association Practice Course* 6.

15 *Ibid.*

16 *Ibid* 6–7.

17 *Ibid* 7–8. for examples of factors to take into account where the litigant is given a choice between whether to use affidavits on the one hand or witness statements on the other.

18 Robertson (2014) *Fed J Schol* 7. Also see Rule 5.04 para 3 Item 20 of the Federal Court Rules of 2011 which provides that a court may make a direction in relation to the presentation of evidence at the hearing, including whether the evidence in chief of witnesses is to be given orally or by affidavit or both.

19 *Ibid.*

20 *Ibid.*

- (b) The judge can watch and hear the witness presenting his or her evidence orally and thus be in a better position to properly assess the cogency of the evidence. This makes the decision-making process by the judge simpler.²¹

Witness testimony may also be given by affidavit at the trial if the parties so agree and the court does not otherwise order.²²

2.4 New South Wales

In terms of Rule 2.1 of the Uniform Civil Procedural Rules of New South Wales,²³ the court may, at any time and from time to time, give such directions and make such orders for the conduct of any proceedings as appear convenient for the just, quick and cost-effective disposal of the proceedings.

The court may, at any time and from time to time, on its own accord, schedule a date for a hearing at which it may give the directions or make the orders referred to in UCPR 2.1.²⁴

Directions and orders of the court in terms of UCPR 2.1 may, *inter alia*, relate to the service and filing of affidavits, witness statements or other documents to be relied on and the giving of evidence at any hearing, including whether evidence of witnesses in chief must be given orally, by affidavit or witness statement, or both.²⁵

Where a trial of proceedings is commenced by statement of claim,²⁶ a witness's evidence at a trial must be given orally before the court.²⁷ The court may, however, order that all or any of a witness's evidence at a trial must be given by affidavit or by witness statement.²⁸

Unless the court orders otherwise, evidence of facts must be given by affidavit if the only matters in question are:

- (a) interest up to judgment in respect of a debt or liquidated claim;
- (b) the assessment of damages or the value of goods under Part 30;²⁹ or
- (c) costs.³⁰

Unless the court otherwise orders at any trial on an assessment of the amount to be recovered by a plaintiff after default judgment has been given, the following evidence may be given by affidavit:

21 *Ibid.*

22 Section 47(5) of the Federal Court of Australia Act of 1976.

23 Of 2005. Hereafter referred to as "UCPR".

24 UCPR 2.2.

25 *Ibid* 2.3 para (k).

26 *Ibid* 31.1(1).

27 *Ibid* 31.1(2).

28 *Ibid* 31.1(3).

29 Part 30 applies to proceedings in which judgment is given for the value of goods to be assessed (with or without damages).

30 UCPR 31.1(4).

- (a) evidence of the identity of any motor vehicle;
- (b) evidence of the damage sustained by a motor vehicle in a particular collision; and
- (c) evidence of the reasonable cost of repairing that damage.³¹

The court may direct any party to serve on any other party a written witness statement of the oral evidence that the party intends to adduce in chief on any questions of fact to be decided at any hearing.³² A direction under this subrule may make different provisions concerning different questions of fact or different witnesses, and may require that notice be given of any objection to any of the evidence in a witness statement and of the grounds of any such objection.³³

Each witness statement must be signed by the intended witness unless the signature of the witness cannot be procured or the court orders otherwise.³⁴

If an intended witness to whose evidence a witness statement relates does not give evidence, no party may put the statement in evidence at the hearing except by leave of the court.³⁵

If the party serving the statement calls as a witness at the hearing any person whose witness statement has been served pursuant to a direction under subrule (1) that person's witness statement is to stand as the whole of his or her evidence in chief, so long as that person testifies to the truth of the statement, and except by leave of the court, the party may not adduce from that person any further evidence in chief.³⁶

A party who fails to comply with a direction given under this rule may not adduce evidence to which the direction relates, except by leave of the court.³⁷

In commercial cases that commenced in the Supreme Court of New South Wales, there still seems to be a presumption that evidence in chief be presented by way of witness statement, although it is not such a strong presumption as existed in the past.³⁸

Sullivan is, however, of the opinion that in commercial litigation one should not start with the *a priori* assumption that the evidence in chief should be presented by way of affidavit or witness statement. Rather, it is necessary to determine, considering all of the issues in the case, whether it is more suitable for all or some of the evidence to be adduced orally or whether written form would be preferable.³⁹

2.5 Queensland

In terms of rule 390 of the Queensland Uniform Civil Procedural Rules, subject to the rules or a direction by the court, evidence at the trial of proceedings commenced by a claim may only be presented *viva voce*, and evidence in proceedings commenced by an application may only be presented by affidavit.

31 *Ibid* 31.1(5).

32 *Ibid* 31.4(1).

33 *Ibid* 31.4(2).

34 *Ibid* 31.4(3).

35 *Ibid* 31.4(4).

36 *Ibid* 31.4(5).

37 *Ibid* 31.4(6).

38 Sullivan *New South Wales Bar Association Practice Course* 10.

39 *Ibid*. Legal practitioners must therefore be vigilant to ensure that an appropriate order has been made by the court in relation to the written or oral presentation of evidence.

In civil litigation in the Supreme Court of Queensland, the parties must draw up a reliable trial plan which *inter alia* ensures that witnesses are not unnecessarily inconvenienced.⁴⁰ As early as possible in the proceedings, the parties must schedule a meeting to draw up a basic plan for the trial, which must be submitted to the court. This basic trial plan should include the estimated duration of opening statements, the estimated duration of each witness's evidence; the sequence in which witnesses will be called; the calling of expert witnesses (if any); the calling of witnesses by telephone or video-link; the estimated duration of submissions and the estimated duration of the trial.⁴¹

The conference must be attended by the counsel or solicitor bearing the responsibility for the conduct of the trial. The parties should also critically consider the need to call and cross-examine certain witnesses if matters that are not in serious contention can be proven in some other form or be admitted.⁴²

2 6 Western Australia

Before 1990, the default position in the Supreme Court of Western Australia was for witnesses to testify orally at the trial of action proceedings. In the early 1990s directions were introduced for the general use of witness statements as the default position for civil trials in the Supreme Court.⁴³

According to Martin, witness statements were introduced as an efficiency measure to reduce time-consuming evidence in chief. The idea had been that a witness statement could be produced, verified and tendered through the witness, to enable the trial to proceed immediately to the cross-examination of the witness. If the other party did not desire to cross-examine the witness, the statement could simply be tendered in evidence as an exhibit and the witness would be excused from attending court.⁴⁴

As a result of problems encountered during trials in relation to the exchange of witness statements, a new Witness Outline Practice Direction was promulgated in the Supreme Court of Western Australia.⁴⁵ The provisions in terms of this Practice Direction can be summarised as follows:

- (a) Evidence in chief at trial may be presented orally or in writing, at the direction of the case manager and subject to any further order at trial. These directions will be made before a matter is entered for trial.⁴⁶
- (b) The default position is that evidence in chief will be presented orally, without the exchange of witness statements.⁴⁷
- (c) An order for the exchange of witness statements⁴⁸ (and for these witness statements to stand as evidence in chief) will only be made where a party satisfies the case manager that

40 Practice Direction 18 of 2018 para 30.

41 *Ibid* para 31.

42 *Ibid* para 32.

43 Martin *Continuing Professional Development Session 3*.

44 *Ibid*.

45 Supreme Court of Western Australia Practice Direction 4.5.1 under the heading "Evidence in Chief - Witness Outlines and Witness Statements".

46 Practice Direction 4.5.1 para 1.

47 *Ibid* para 2.

48 Referred to as a witness statement order.

this course will be a better way of achieving the objects of efficiency, just determination of litigation and proportionality than evidence given orally in the usual way.⁴⁹

- (d) Usually, the exchange of witness statements will not be appropriate where contentious evidence of facts dependent on the recollection of the witness is presented, or where the reliability of the witness is likely to be challenged on the topic.⁵⁰
- (e) The case manager may order that witness statements be presented by specific witnesses only, or that only part of the evidence in chief of a witness be presented by way of witness statement.⁵¹
- (f) Where witness statement orders are not made, the case manager will ordinarily order the exchange of a witness outline.⁵²
- (g) A witness outline must be directed only to matters at issue.⁵³
- (h) A witness outline must clearly identify all the topics in respect of which evidence will be presented and the substance of that evidence. This includes the substance of each important conversation.⁵⁴
- (i) Where a witness refers to a document in a witness outline, the witness must identify the document by its description and its discovery number.⁵⁵
- (j) Where a witness outline is ordered, the case manager will ordinarily order that no party may use any part of the contents of that document to cross-examine the witness, without leave by the trial judge. Where a witness outline order is made, the practice at the trial will be that a witness's evidence in chief must be presented orally, in the usual manner.⁵⁶
- (k) Objections will be dealt with in the course of a witness's evidence. Where a witness statement order or a witness outline order is made, a party may not, without leave, adduce from the witness evidence in chief other than evidence included in the witness statement, or in relation to a topic referred to in the witness outline.⁵⁷

2 7 South Australia

Uniform Civil Rule⁵⁸ 154.7 in South Australia deals with written lay evidence and provides, *inter alia*, as follows:

- (a) A party may, not less than 35 days before the scheduled commencement of trial, serve a notice on each other party that the party intends to present evidence from a witness in the form of an affidavit that has been filed in the proceedings.⁵⁹

49 *Ibid* para 3.

50 *Ibid* para 4.

51 *Ibid* para 5.

52 *Ibid* para 6. Referred to as a witness outline order.

53 *Ibid* para 7.

54 *Ibid* para 8.

55 *Ibid* para 9.

56 *Ibid* para 10.

57 *Ibid* para 18.

58 Hereafter referred to as "UCR".

59 UCR para 1.

- (b) Any other party to the proceedings may, not less than 21 days before the scheduled commencement of trial, serve on the party intending to adduce the evidence by affidavit a notice in response objecting to any evidence being adduced from the witness in the form of an affidavit; or requiring that the witness attend the trial for examination.⁶⁰
- (c) Unless the court otherwise orders, if no party serves a notice of objection, the proponent may tender the affidavit at trial and the witness need not attend to present oral evidence.⁶¹

In terms of UCR 154.8:

- (a) The court may order, or the parties may agree, that some or all of the evidence in chief of some or all witnesses at trial be presented in the form of affidavits or signed written witness statements.⁶²
- (b) The court may order that the deponent of an affidavit or author of a written witness statement to be tendered at trial need not attend at trial to adduce the evidence set out in the affidavit or written witness statement.⁶³
- (c) Unless the court makes an order to excuse a witness from attending trial, the deponent of an affidavit or author of a written witness statement must attend the trial to adduce evidence.⁶⁴

UCR 154.12 provides that:

- (a) When an order or agreement is made that some or all of the evidence in chief of some or all witnesses at trial be presented in the form of affidavits or signed written witness statements, it may specify the extent to which a party serving written evidence is entitled to present oral evidence from the relevant witness.⁶⁵ The order or agreement may provide that the witness may adduce oral evidence confined to elaborating upon certain matters addressed in the written evidence. The order or agreement may furthermore provide that the witness may give oral evidence limited to a certain time.⁶⁶
- (b) If a party wishes to give evidence at trial from a witness in respect of whom written evidence was not served, or evidence outside the scope of the written evidence that should have been included in it, the party must first obtain leave of the court; and the party must ordinarily pay the incremental costs of each other party, caused by this failure.⁶⁷
- (c) If a deponent of an affidavit or author of a written witness statement who is required to attend trial to present evidence, fails to attend, the court may exclude the affidavit or written witness statement from evidence.⁶⁸

The court may also order that a party give notice in writing, identifying the witnesses proposed to be called to adduce evidence at trial, the nature or detail of the evidence to be given by

60 *Ibid* para 2.

61 *Ibid* para 3.

62 *Ibid* para 1.

63 *Ibid* UCR 154.7 para 3.

64 *Ibid* UCR 154.8 para 4.

65 An example would be that the order or agreement may provide that the witness may give oral evidence concerning oral communications between the parties.

66 *Ibid* para 1.

67 *Ibid* para 2.

68 *Ibid* para 3.

the witnesses, the nature or detail of documents proposed to be tendered at trial or any other evidence proposed to be given at trial.⁶⁹

UCR 154.14 provides that if a party believes that the attendance of a witness at trial will not be necessary because the witness's evidence or documents proven by the witness will be of a formal nature or uncontroversial, the party may serve a notice in writing on each other party at least 14 days before the scheduled commencement of trial stating this belief, identifying the witness and specifying the facts that the evidence or documents would tend to prove or establish.⁷⁰

If, 7 days after service of the aforementioned notice, no other party has served a notice of objection stating detailed reasons for the objection the witness need not attend the trial and the content of the notice will be taken to be admitted.⁷¹

2.8 Victoria

Previously in the Commercial Court of the Supreme Court of Victoria, evidence in chief at trial may have been led orally or in writing, at the direction of the list judge and subject to any further order at trial.⁷²

A party seeking to utilise a witness statement for the purpose of leading evidence in chief would have had to satisfy the list judge that this course would better achieve the overarching purpose than if evidence were to be given orally in the usual way.⁷³

Generally, the use of a witness statement was not appropriate where contentious evidence was to be given of facts dependent on the recollection of the witness or where the credit of the witness was likely to be challenged on the topic. The list judge may have ordered that witness statements be provided only by some witnesses, or that only part of the evidence in chief of a witness be provided by way of witness statement.⁷⁴

In February 2024, the previous provisions were substantially shortened and amended by a new Practice Note.⁷⁵ These amendments can be summarised as follows:

- (a) In the experience of the Commercial Court, oral evidence is a more efficient and cost-effective means of leading evidence, avoiding unnecessary evidence in, and lengthy objections to, witness statements.⁷⁶
- (b) As a result, it is more common for the Commercial Court to order witness outlines that first, summarise the evidence (with sufficient detail of the substance of the evidence) on each topic or conversation on which the witness will give evidence and, secondly, list all the documents to be tendered through that witness.⁷⁷

69 *Ibid* para 1.

70 *Ibid* para 1.

71 *Ibid* para 2.

72 Supreme Court of Victoria Commercial Court Practice Note SC CC 1 of 30 January 2017 para 15.12. This practice note must be read with the provisions of the Civil Procedure Act 2010 (Vic) (specifically s 9 which requires the court to further the overarching purpose when making orders or giving directions) as well as the Supreme Court (General Civil Procedure) Rules 2015 (Vic).

73 Practice Note SC CC 1 (2017) para 15.13.

74 *Ibid*.

75 Supreme Court of Victoria Commercial Court Practice Note SC CC 1 (Second Revision) of 26 February 2024.

76 Practice Note SC CC 1 (2024) para 6.4.

77 *Ibid*.

- (c) However, in appropriate cases witness statements or affidavits may be ordered. Regardless, the parties should expect evidence of important contested conversations to be given orally.⁷⁸

Annexure C of the Practice Note sets out the standard form of orders to be made in respect of witness outlines, which includes:

- (a) briefly outlining the evidence the witness will give;⁷⁹
- (b) identifying the topics in respect of which evidence will be given and the substance of that evidence, including the substance of each important conversation;⁸⁰ and
- (c) identifying the documents which the party filing the witness outline intends to tender into evidence through that witness. The documents should be referred to in chronological order in the body of the witness outline or, if not possible, listed in chronological order in a schedule to the witness statement.⁸¹

In a CPD seminar to the Victorian Bar, four commercial court judges explained the new position in Victoria as follows:

- The default preference is for parties to prepare outlines of evidence, and not witness statements.
- This is as a result of the long-held criticism that witness statements are over-engineered by lawyers and because most commercial cases turn on evidentiary documents. Outlines of evidence must, therefore, refer to the documents to be relied upon.
- In the Commercial Court's experience, the most efficient way to obtain the best evidence is to refer to documents in the outline of evidence, and supplement this with oral evidence in the witness box. This will reduce the time spent on objections to irrelevant evidence. Non-contentious evidence can usually be led by consent, which would free up more time to focus on the contentious evidence before court.
- The preference for outlines of evidence is, however, flexible in approach. If the case requires the exchange of witness statements or affidavits, it may be used in appropriate circumstances. An example would be where there is detailed oral evidence about what was said in a meeting.
- An outline of evidence should not be used to avoid providing information, for example that the witness will give evidence of what happened at a certain meeting. The outline must summarise the evidence with sufficient detail and a failure in this regard may be viewed as a procedural unfairness. Also, if more detail is provided at a later stage only, it may create the unfavourable impression that the details were made up after being prompted.
- From the above it is clear that the default position has now been amended from the exchange of witness statements to the exchange of witness outlines.⁸²

78 *Ibid.*

79 *Ibid* Annexure C para 4(b).

80 *Ibid* Annexure C para 4(c).

81 *Ibid* Annexure C para 4(d).

82 The Commercial Law Barrister "New Commercial Court Practice Note – Supreme Court of Victoria" <https://www.comlawbarrister.com/blog/2024/3/20/new-commercial-court-practice-note-supreme-court-of-victoria-february-2024> (accessed 29-06-2024).

3 CRITICAL ANALYSIS

3 1 Introduction

In part 1 of this article, the submission was made that, although several aspects of the presentation of evidence during civil trials in England and Wales can be incorporated successfully in the South African law, there are also certain aspects that may not represent the most suitable model to follow. It is specifically the default position in relation to the exchange of witness statements before trial (which then stands as a witness's evidence in chief) that may be problematic in a South African context where case management is still only applicable to a minority of actions and still very under-developed. It is contended that the Australian position in relation to the presentation of evidence during a trial would be a much better model to follow in a South African context.

3 2 Affidavit Evidence during a Trial

As discussed in part 1 of this article, affidavit evidence during trial in South Africa is only allowed in exceptional circumstances, and in most instances, only where a party makes a formal application in terms of Uniform Court Rule 38(2). Even in default judgment applications, the plaintiff is generally required to present oral evidence in the High Court to prove, for example, the quantum of damages sustained.⁸³

During a pre-trial conference in the High Court, the minutes of the pre-trial conference shall be prepared and signed by, or on behalf of, every party which should, *inter alia*, set out any agreement regarding the production of proof by way of affidavit. As the drafting of the content of pre-trial minutes, more often than not entail a pure checklist approach by the parties, it is a seldom occurrence that the parties would come to such an agreement.

Unfortunately, there is, no mention of the presentation of affidavit evidence during the judicial case management process in terms of Rule 37A.

It is contended that the presentation of affidavit evidence can provide a useful tool to reduce the duration and costs of trial proceedings and that its use is severely under-utilised in South Africa.

As a result of the compulsory exchange of witness statements in England and Wales the distinction between affidavits and witness statements has fallen away to a great extent.⁸⁴ In this regard, affidavit evidence has lost its worth in reducing court time and costs. An affidavit evidence at trial in several of the states of Australia can, however, serve as a useful guide for any future reform of the South African law.

In New South Wales, for example, certain evidence must be presented by affidavit during a trial such as interest, the assessment of damages or the value of goods and costs. Similarly in trials where default judgment has been granted, certain evidence, such as the identity of any motor vehicle, the damage sustained by a motor vehicle in a collision, and the reasonable cost of repairing that damage, may be presented afterwards by affidavit.⁸⁵

Substantive provisions exist in South Australia, that allow a party to present evidence by way of affidavit by mere notice to the other party.

⁸³ In contrast to the position in the Magistrates' Courts. See the discussion in Part 1 of this article at para 2 3.

⁸⁴ See the discussion in Part 1 of this article at para 3 4 2.

⁸⁵ *Ibid* para 2 4.

Should there be no objection against the proposed affidavit evidence, the proponent may tender the affidavit at trial, without any judicial intervention, and the witness need not attend the trial to give oral evidence.⁸⁶

Similarly, if a party believes that the attendance of a witness at trial will be unnecessary because the witness's proven evidence or documents would be of a formal nature or uncontroversial, the party may serve a notice in writing on the other party and should there be no objection, the witness need not be present at trial and the content of the notice is taken to be admitted. Moreover, the court may order, or the parties may agree, that some or all of the evidence in chief of some or all witnesses at trial be adduced in the form of affidavits.⁸⁷

Even in the Federal Court, testimony may be given by affidavit at a trial if the parties so agree and the court does not otherwise order.⁸⁸

It is contended that certain categories of evidence should be singled out for affidavit evidence during a trial and during an application for default judgment and that a similar procedure for the presentation of affidavit evidence without judicial intervention should be adopted in a South African context. The presentation of affidavit evidence during a trial should also be incorporated in the judicial case management process under Rule 37A, where the case management judge should have the sole discretion in this regard. Lastly, the parties should be more empowered to agree on the presentation of affidavit evidence during trial in matters not subject to judicial case management.

3 3 Witness Statements

3 3 1 The Default Position

As pointed out in part 1 of this article, there are currently no provisions allowing for the exchange of witness statements under South African law. In contrast, the default position in England and Wales is that witness statements must be exchanged before trial and that it will stand as the evidence in chief of a particular witness.

It was argued that in some instances the exchange of witness statements before trial can play a valuable role in South African law to enhance access to justice, but it should not be the default position, as in England and Wales.

In certain states of Australia in the recent past, the exchange of witness statements was the default position. As a result of the problems encountered during trials in relation to the exchange of witness statements, almost all the states in Australia have, however, reverted back to the default position that oral evidence should be adduced at a trial. Even in the Federal Court of Australia the dominant practice is that critical contentious evidence should be given *viva voce*.

The dangers inherent in providing for the exchange of witness statements standing as the evidence in chief and as the default position, was aptly described by the High Court of Australia in *Queensland v Masson*:⁸⁹

The oft unspoken reality that lay witness statements are liable to be workshopped, amended and settled by lawyers, the risk that lay and, therefore, understandably deferential witnesses do not quibble with many of the changes made by lawyers in the process – because the changes do not appear to many lay witnesses necessarily to alter the meaning of what they intended to convey – and the danger that, when such changes are later subjected to a curial

⁸⁶ *Ibid* para 2 7.

⁸⁷ *Ibid*.

⁸⁸ *Ibid* para 2 3.

⁸⁹ (2020) 94 ALJR 785 112.

analysis of the kind undertaken in this matter, they are found to be productive of a different meaning from that which the witness intended, means that the approach of basing decisions on the ipsissima verba of civil litigation lay witness statements is highly problematic. It is the oral evidence of the witness, and usually, therefore, the trial judge's assessment of it, that is of paramount importance.

Witness statements are especially problematic where the evidence presented is controversial and the credibility of witnesses are at stake. These considerations were summarised as follows by Emmett:⁹⁰

Where evidence is uncontroversial it is clearly convenient that the evidence be adduced in a written form. Such a procedure is capable of saving time and avoiding misunderstanding and confusion. However, where evidence is controversial, particularly where credibility of the witness is involved, the adducing of the evidence in written form is often undesirable and can be quite unfair. An honest witness, albeit nervous in unfamiliar and overbearing surroundings, will be better able to defend in cross-examination evidence given by the witness in his or her own words. With the very best of intentions, a lawyer who settles an Affidavit or a Witness Statement will invariably reduce the language of the witness to the lawyer's own language. That may entail changes in meaning and emphasis that, although not intended, may expose a witness to unnecessary difficulties in the course of cross-examination. On the other hand, a dishonest witness will always be assisted by having evidence put into credible form by a lawyer. Where an assessment of credit is required, a judge will have a much better prospect of assessing a witness who gives evidence in chief orally rather than being exposed to cross-examination immediately upon entering the witness box.

There are, however, many instances where the exchange of witness statements before trial, serves a legitimate purpose in that it could be the best evidence at trial.

The default position in relation to the presentation of witness evidence by way of witness statement or *viva voce*, becomes important in those matters that are not subject to judicial case management. In England and Wales, where most cases are actively case managed it does not make such a big difference, but in South Africa, where only a minority of cases are subject to judicial case management, the default position is of paramount importance. It is therefore important to make a distinction between those matters that are subject to judicial case management and those that are not.

3 3 2 Judicial Case Management

As stated in part 1 of this article, a formal judicial case management process was introduced in South Africa in 2019. The provisions relating to the presentation of evidence at a trial of action proceedings are scant when it comes to judicial case management. Party control also prevails and, for the most part, the judicial case management judge's power is limited only to an attempt to reach consensus between the parties on the evidence to be presented at trial. Moreover no mention is made of witness statements in Uniform Court Rule 37A.⁹¹ Lastly, only certain matters are singled out for judicial case management and even those have proved to be problematic in practice.⁹²

90 Emmett "Practical Litigation in the Federal Court of Australia: 'Affidavits'" (2000) 20 *Australian Bar Review* 28.

91 See the discussion in Part 1 of this article at para 2 6.

92 See, for example, the *Moratorium on Case Management Assignments in Johannesburg High Court* (29 November 2023) where a moratorium was imposed on fresh assignments of case management duties of judges in the Gauteng Local Division, Johannesburg. The reason for the announcement of the moratorium was the unsustainability of the case management system in Johannesburg due to time-constraints and a lack of resources.

In stark contrast, judicial case management in England and Wales is now firmly entrenched in their civil justice systems and the courts are required to further the overriding objective by actively managing cases.⁹³ Sorabji points out that since it was introduced in 1999, case management has become an integral and effective part of English civil procedure and is now fully embedded in all areas of litigation and across claims of all values and types. The age of the passive English judge has now long gone and consistently with the overriding objective, it is applied to promote access to trial and judgment.⁹⁴

By the end of the 1990s, most Australian courts had implemented case management procedures, that appeared in various guises,⁹⁵ for instance, to make, to a greater or lesser extent, provision for the case management of witness evidence to be produced during a trial.

For instance, the Federal Court has an individual docket system in place. Every judge is responsible for the matters contained in their docket and the rationale is to promote a more active and effective judicial case management in order to streamline processing, encourage early settlement and, overall, to dispose of cases more efficiently. The first of several direction hearings is arranged by the Registrar when the originating process is filed. At any such hearing the court may, *inter alia*, make a direction for the filing and exchange of signed statements of evidence and their use in evidence at the hearing.⁹⁶

In New South Wales the court may, at any time and from time to time, give such directions and make such orders for the conduct of any proceedings as appear convenient for the just, quick and inexpensive disposal of the proceedings. These directions may include the service and filing of affidavits, witness statements or other documents to be relied on and the giving of evidence at any hearing, including whether evidence of witnesses in chief must be given orally, or by affidavit or witness statement, or both.⁹⁷

In Western Australia and Victoria the case manager will only make a direction for the exchange of witness statements and for witness statements to stand as evidence in chief where a party satisfies the case manager that this course will better achieve the overarching purpose or objects of efficiency, just determination of litigation and proportionality than if evidence were to be given orally in the usual way.⁹⁸

In Queensland and South Australia the courts rely more on the participation of the parties when it relates to the presentation of evidence at trial. In the Supreme Court of Queensland the parties must, as early as reasonably possible in the proceeding, confer for the purpose of developing a basic plan for the trial of the proceeding, and thereafter submit to the court a basic trial plan. During this meeting the parties must, *inter alia*, seriously consider the need to call and cross-examine certain witnesses if matters not in serious contention can be proven in some other form.⁹⁹

93 See the discussion in Part 1 of this article at para 3 4 1.

94 Sorabji *Structure of the Court System and Case Management: Lessons from England & Wales* (2021) 151.

95 Eyland *et al. Case Management Reform: An Evaluation of the District Court of NSW and County Court of Victoria 1996 Reforms* (Law and Justice Foundation of NSW, July 2003) 2–3; Allsop “Judicial Case Management and the Problem of Costs” (2014) *FedJSchol* 16.

96 Allsop (2014) *FedJSchol* 16.

97 See the discussion above at para 2 4.

98 *Ibid* para 2 6 and 2 8.

99 *Ibid* para 2 5 and 2 7.

In South Australia, the parties themselves may agree, that some or all of the evidence in chief of some or all witnesses at trial be adduced in the form of affidavits or signed written witness statements.¹⁰⁰

It is contended that the approach followed in New South Wales, Western Australia and Victoria can serve as a useful example for reform of the South African law in cases that are subject to judicial case management. The approach followed in Queensland and South Australia, on the other hand, may be incorporated in South Africa in those matters that does not fall under the auspices of case management.

3 4 Witness Summaries/Outlines

It seems clear that in all instances where parties are not required, or are unable, to exchange witness statements before trial, it is at least a requirement that they should exchange witness summaries or outlines.

In the Federal Court, for example, it is general practice that critical contentious evidence should be given *viva voce* but that an outline of evidence or a proof of evidence be served on the other side. Often there is also a direction that no cross-examination on that outline or proof will be allowed without leave of the court.¹⁰¹

In Western Australia, where witness statement orders have not been made, the case manager will ordinarily order the provision of a witness outline (witness outline orders), which must clearly identify all the topics about which evidence will be given and the substance of that evidence, including the substance of all important conversations.¹⁰²

In the Commercial Court of Victoria, the default position has now changed from the exchange of witness statements to the exchange of witness outlines, which should summarise the evidence (with sufficient detail of the substance of the evidence) on each topic or conversation on which the witness will give evidence and, secondly, list all the documents to be tendered through that witness.¹⁰³

As can be seen from the above, witness outlines play an important role in those matters where witness statements are not required to inform the other party what evidence is going to be presented at trial, thereby eliminating the element of surprise and encouraging early settlement.

4 CONCLUSION AND RECOMMENDATIONS FOR LEGAL REFORM

South Africa is one of the few jurisdictions worldwide that still conducts civil litigation on a “trial by ambush” basis where the oral evidence of lay witnesses are not disclosed to the other side before trial. This remains the unfortunate position even after the adoption of active judicial case management processes in both the High Court and magistrates’ courts in 2019. In a country where access to justice in civil matters is guaranteed by its Constitution, such an approach is no longer tenable.

It is not only the disclosure of witness testimony before trial that remains problematic but also the presentation of witness evidence during civil trials in general, where party control

¹⁰⁰ *Ibid* para 2 7.

¹⁰¹ *Ibid* para 2 3.

¹⁰² *Ibid* para 2 6.

¹⁰³ *Ibid* para 2 8.

still prevails for the greater part. Therefore, these issues are in urgent need of reform in South African law.

It is contended that certain provisions of both English and Australian law can be incorporated successfully into South African law with regard to the presentation of evidence during a civil action trial. Thus, the following proposals are recommended for possible legal reform:

- (a) An overriding objective similar to that applicable in England and Wales should be inserted into the Superior Courts Act and/or Uniform Rules of Court.¹⁰⁴ This would lead to a drastic reduction in party control, giving the courts more powers to manage cases more efficiently during the presentation of evidence at trial. In matters not subject to judicial case management, the parties should bear more responsibility to ensure that the evidence presented during trial will be in line with the aims of the overriding objective.
- (b) The default position should be that all evidence during a trial should be presented orally in court, similar to the approach followed in most Australian states.¹⁰⁵ Provisions should, however, also be incorporated in the Rules of Court for the presentation of evidence during trial by way of affidavit or witness statement, or a combination of both.
- (c) The Uniform Rules of Court should be amended to make provision for the presentation of more extensive affidavit evidence during trial, where such evidence is not contentious and the reliability of the witness concerned is not in question. Parties should be allowed to present the evidence by mere notice and without any judicial intervention, except where there is an objection against the affidavit evidence being presented at trial by the other side.
- (d) The ambit of the presentation of affidavit evidence during default judgment applications should be broadened in the Uniform Rules of Court, for example evidence relating to the quantum of damages in motor vehicle collisions.¹⁰⁶
- (e) Where affidavit evidence is presented by a witness during a trial, the witness should be excused from attending the trial, except if a case management judge is of the opinion that the presence of such a witness is indeed necessary.¹⁰⁷
- (f) In all defended matters, each party should, as part of the discovery process in terms of Rule 35, serve compulsory, detailed witness summaries on the other parties about all witnesses which a party intends calling to present oral evidence at the trial.¹⁰⁸ Each party should identify the factual witnesses whom it intends to call and which of the pleaded facts the various witnesses will prove, as part of the summary. Witness summaries should also be filed in the court file and it will be presumed that a party waives any privilege relating to the evidence of such witness contained in the summary.

104 *Ibid* para 3 4 1 in Part 1 of this article. Only the position in the High Court will be referred to, but all of these recommendations are also applicable to the magistrates' courts and similar provisions should be inserted in the Magistrates' Court Act and Rules.

105 See the discussion above at para 3 3 1.

106 Uniform Rule 31(2)(a) can, for example, be amended in line with Magistrates' Court Rule 12(4) to provide that either oral or affidavit evidence may be presented of the nature and extent of the claim, whereupon the court shall assess the amount recoverable by the plaintiff and give an appropriate judgment.

107 This may be, for example, where the case management judge is of the opinion that certain aspects of the affidavit evidence should be clarified by *viva voce* evidence.

108 This will hopefully pave the way for early settlement of matters before they proceed to trial. In this regard it can even be considered that these summaries should be delivered much earlier in the process, for example, as part of the plaintiff's summons and the defendant's plea. It is, however, conceded that this approach may not be practical in most defended civil matters, as the analysis and gathering of evidence usually only takes place during the pre-trial phase after *litis contestatio*.

- (g) Witness summaries must be expressed in the first person, be in the intended witness's own words and should only contain:
- a clear identification of all the topics in respect of which evidence will be given and the substance of that evidence, including the substance of each important conversation;
 - evidence as to matters of fact that need to be proved at trial by the evidence of witnesses in relation to one or more of the issues of fact to be decided at trial;
 - a clear division of which of the statements are made from the witness's own knowledge and which are matters of information or belief, and the source of such matters; and
 - matters of fact of which the witness has personal knowledge that are relevant to the case, and must identify by list what documents, if any, the witness has referred to or been referred to for the purpose of providing the evidence set out in their trial witness statement.
- (h) At the trial, and if there is no contrary direction by the court or case management judge, the witness summary will not stand as the witness's evidence in chief and the witness will present his or her evidence orally in court. The witness may not be cross-examined on the contents of the witness summary, except by leave of the court.
- (i) A witness will only be allowed to deviate from his or her witness summary in exceptional circumstances. The witness may, however, with the permission of the court amplify his or her witness summary and give evidence in relation to new matters which have arisen since the witness summary was served on the other parties.
- (j) In all matters subject to judicial case management, the presentation of evidence at trial should be under the full control of the case management judge. During the case management hearing, the case management judge should be afforded the sole discretion, taking into account all witness summaries already served and filed, to give directions as to:
- the issues on which the court requires evidence;
 - the nature of the evidence that it requires to decide those issues; and
 - the way in which the evidence is to be placed before the court.¹⁰⁹
- (k) A case management judge must only be allowed to make a direction for the exchange of witness statements and for witness statements to stand as evidence in chief where a party satisfies the case manager that this course will better achieve the aims of the overriding objective. This may include any direction that a witness summary already delivered may stand as a witness statement or that the summary be amplified in certain aspects before it may serve as a witness statement.
- (l) Generally, critical evidence, evidence, which is contentious and evidence where the credibility of a witness may be in question should be given *viva voce*.
- (m) Where the evidence is of a formal nature, or uncontentious, the case management judge should as far as possible direct that the evidence be presented by way of affidavit or witness statement.
- (n) Where the case management judge directs that evidence be presented by witness statement, which will stand as the evidence in chief of a witness, he or she should also, as far as practicable, give directions limiting the length and format of the statement.
- (o) To guard against the overlawyering of a witness statement, it should be accompanied by a signed declaration by the witness concerned that he/she has read the contents of the

¹⁰⁹ This is in line with CPR 32(1) in England and Wales.

summary and the documents referred to in it and that he or she is satisfied that it is a proper summary of all the evidence in chief which he/she wishes to give at the trial. The confirmation should be in the following format:

I understand that the purpose of this witness statement is to set out matters of fact of which I have personal knowledge. I understand that it is not my function to argue the case, either generally or on particular points, or to take the court through the documents in the case. This witness statement sets out only my personal knowledge and recollection, in my own words. On points that I understand to be important in the case, I have stated honestly (a) how well I recall matters and (b) whether my memory has been refreshed by considering documents, if so how and when. I have not been asked or encouraged by anyone to include in this statement anything that is not my own account, to the best of my ability and recollection, of events I witnessed or matters of which I have personal knowledge.¹¹⁰

- (p) The witness summary must also be endorsed with a certificate of compliance by the relevant legal representative.
- (q) In matters that are not subject to judicial case management, the parties should, during the pre-trial conference in terms of Rule 37, draw up a basic plan for the trial, which should include the best way to present witness evidence during the trial while taking into account the overriding objective. The basic guideline in this regard should be that all contentious evidence (or where credibility of a witness is at issue) should be presented *viva voce*, and all formal or uncontentious evidence by way of affidavit¹¹¹ (where presence of the witness is not required at trial), and all other uncontentious evidence by way of witness statement (where the presence of the witness is indeed required at the trial).

110 If the witness is not proficient in English, they should certify this in their home language, to be translated into English by a sworn translator.

111 This should be the case even if it is an expert witness whose testimony or credibility is not contentious.