SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Case Title:	**Lardner v Australian Capital Territory**
Citation:	**[2018] ACTSC 77**
Hearing Date:	20 March 2018
Decision Date:	20 March 2018
Reasons Date:	23 March 2018
Before:	McWilliam AsJ
Decision:	1. Pursuant to r 6703 of the *Court Procedures Rules 2006* (ACT) the evidence of Dr Paul Belt and Dr John Cummine be given by audiovisual link.
Catchwords:	**PRACTICE AND PROCEDURE –** applications for two witnesses to give evidence via audiovisual link from a location outside the Australian Capital Territory – pre-conditions in s 20 of the *Evidence (Miscellaneous Provisions) Act 1991* (ACT) – applications allowed
Legislation Cited:	*Evidence (Audio and Audio Visual Links) Act 1998* (NSW) ss 5B, 13, pts 2, 3 *Evidence Act 1977 (Qld)* ss 39E, 39PB, pt 3A *Court Procedures Act 2004* (ACT) s 5A *Evidence (Miscellaneous Provisions) Act 1991* (ACT) ss 20, 32 *Court Procedures Rules 2006* (ACT) r 6703
Cases Cited:	*ASIC v Rich* [2004] NSWSC 467; 49 ACSR 578 *Brodie v Streeter* [2003] ACTSC 88; 180 FLR 176 *R v BNS* [2016] ACTSC 51
Parties:	Mr Barry Ronald Lardner (Plaintiff) Australian Capital Territory (First Defendant) Dr Graeme Harrison (Second Defendant)
Representation:	**Counsel** Mr A Bartley SC with Mr R Ingram (Plaintiff) Mr H Chiu (First Defendant) Mr G Diehm QC (Second Defendant) **Solicitors** Commins Hendriks Solicitors (Plaintiff) ACT Government Solicitor (First Defendant) Moray & Agnew (Second Defendant)
File Number:	SC 378 of 2015

Introduction

1. On 20 March 2018, the Court heard two similar interlocutory applications by each defendant in these proceedings, filed in Court on 19 March 2018, on the second day of a final hearing that had been listed for five days.

2. The applications seek orders pursuant to r 6703 of the *Court Procedures Rules 2006 (ACT)* (**the Rules**) that various expert medical witnesses give evidence by telephone.

3. The plaintiff consented to two of the first defendant's expert medical witnesses being cross-examined by telephone.

4. However, the plaintiff opposed cross-examining Dr John Cummine, orthopaedic surgeon, and Dr Paul Belt, plastic surgeon, by either telephone or audiovisual link. Dr Cummine resides in Sydney, New South Wales, and Dr Belt resides in Brisbane, Queensland.

5. Following the hearing of the applications, I directed that the evidence of those two doctors be given by audiovisual link and these are my reasons for the order.

Evidence

6. In support of the applications, the defendants relied upon the affidavits of Ms Jessica May Steele and Ms Lauren Gail Smith, the instructing solicitors for the first and second defendant respectively, with both affidavits either sworn or affirmed on 19 March 2018. The second defendant also relied on some email correspondence with the solicitors for the plaintiff.

7. The plaintiff read the affidavit of Ms Cassandra Leigh Hanlon sworn 20 March 2018, instructing solicitor for the plaintiff, and a schedule of damages handed up by the first defendant (who has admitted liability in part).

8. The evidence will be discussed further below.

Court's power to make the order

9. The Court has power to receive evidence in the manner sought by the defendants under s 20 of the *Evidence (Miscellaneous Provisions) Act 1991* (ACT) (**the Act**). It relevantly provides:

> **Territory courts may take evidence and submissions from participating States**
>
> (1) A territory court may, on the application of a party to a proceeding before the court or on its own initiative, direct that evidence be taken or a submission made by audiovisual link or audio link, from a participating State.
>
> (2) The court may make the direction only if satisfied that—
>
> (a) the necessary facilities are available or can reasonably be made available; and
>
> (b) the evidence or submission can more conveniently be given or made from the participating State; and
>
> (c) the making of the direction is not unfair to any party opposing the making of the direction.
>
> (3) The court may exercise in the participating State, in relation to taking evidence or receiving a submission by audiovisual link or audio link, any of its powers

that the court is permitted, under the law of the participating State, to exercise in the participating State.

(4) The court may at any time amend or revoke a direction under this part, either on the application of a party to the proceeding or on its own initiative.

New South Wales and Queensland are 'participating States'

10. The words 'participating State' are defined in the Dictionary to the Act to mean 'another State where provisions of an Act in terms substantially corresponding to this chapter are in force.'

11. Relevant to Dr Cummine's evidence, in New South Wales, the *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) (**NSW Act**) applies, and 'participating State' is defined in similar terms.

12. Section 13 of the NSW Act provides that a 'recognised court' may, for the purposes of a proceeding before it, take evidence or receive submissions, by audio link or audiovisual link, from a person in New South Wales.

13. The definition of 'recognised court' includes a court from a 'participating State' that is authorised by the provisions of a law of that State in terms that correspond to pts 2 and 3 of the NSW Act to direct that evidence be taken or submission made by audio link or audiovisual link from NSW.

14. The NSW Act thus contains provisions substantially corresponding terms to s 20 of the Act.

15. With regard to Dr Belt's evidence, in Queensland, pt 3A of the *Evidence Act 1977* (Qld) deals with audiovisual links and audio links. Sections 39E and 39PB of that statute contain provisions that also substantially correspond to those in the Act set out above, albeit they are slightly more prescriptive, in that they focus separately on expert witnesses and specify that regard is to be had to matters such as the nature and scope of the evidence, and whether the technology used is likely to affect the court's ability to assess the credibility or reliability of the person's evidence.

Interaction between the Act and the Rules

16. The Rules the Court are not expressly or impliedly excluded by the Act. Rule 6703 provides:

Evidence by telephone etc

(1) The court may receive evidence or submissions by telephone, video link or another form of communication in a proceeding.

(2) The court may, by order, impose conditions for subrule (1).

17. For the present applications, there was no issue about the interaction between the Rules and the Act. It appears that the two can operate in harmony. The Court's discretion under r 6703 may be exercised so that the matters set out in s 20(2) of the Act are also preconditions under the Rules to any direction that evidence be given other than by attendance in the courtroom of the hearing. However, in neither case are the preconditions exhaustive of the matters that the Court may take into account in the exercise of its discretion.

18. For example, the Court's discretion under the Rules must also be exercised with a view to resolving the proceedings as quickly, inexpensively and efficiently as possible,

including at a cost proportionate to the importance and complexity of the matters in dispute: s 5A of the *Court Procedures Act 2004* (ACT).

Principles applicable to the exercise of the Court's discretion

19. Refshauge J has given consideration to the principles applicable when considering whether to make a direction as to the giving of evidence by audiovisual or audio link under the Act in *R v BNS* [2016] ACTSC 51 with his Honour stating at [29]-[30]:

> Such an application as is here made will not necessarily be granted. The court has a discretion. The courts still value the opportunity to see a witness physically present. Applications have been refused in a number of cases, including *R v TI (No 2)* [(2015) 11 ACTLR 58]*; Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2007] FCA 1502; *Australian Competition and Consumer Commission v StoresOnline International Inc* [2009] FCA 717*; Cessnock City Council v Bimbadgen Estate Pty Ltd* [2011] NSWLEC 136; *Stuke v ROST Capital Group Pty Ltd* [2012] FCA 1097; (2012) 207 FCR 86 and *Picos v Healthengine Pty Ltd* [2014] FCCA 640.
>
> Such cases provide helpful examples of the considerations relevant to the exercise of the discretion in any case. While they provide some guidance as to what a judicial exercise of the discretion may have to take into account, each case must be decided on its merits and the discretion exercised judicially and not arbitrarily.

20. His Honour's comments were in the context of an application under s 32 of the Act, which applies to places other than 'participating States', however the same considerations apply.

21. The defendants relied upon *ASIC v Rich* [2004] NSWSC 467; 49 ACSR 578 (***ASIC v Rich***) where Austin J was considering (among other things) s 5B(1) of the NSW Act, which was in terms of like effect to s 20 of the Act. His Honour stated at [16] that the Court would not make an order under the provision unless it was appropriate to do so and similarly referred to the fact that the exercise of the discretion will depend upon the particular circumstances of the case.

22. Austin J in *ASIC v Rich* then referred to a range of authorities which dealt with the issue and displayed differing approaches to the exercise of the discretion. His Honour drew from the authorities what were described (at [19]) as some 'recurring themes' in the exercise of the court's discretion. They include:

    (a) The appropriateness of audiovisual facilities for centrally important evidence;

    (b) The assessment of credit where evidence is given by audiovisual link;

    (c) Difficulties raised by the use of documents for cross-examination in audiovisual evidence;

    (d) Technological difficulties due to lapse of time between transmission and receipt of questions and answers; and

    (e) Difficulties posed by the use of audiovisual facilities where cross-examination is lengthy.

23. Of particular resonance for this case was Austin J's reference to two principal propositions at [43]:

> It seems to me that these conflicting approaches can be resolved by adopting two principal propositions. First, the court should strongly encourage the use of current-generation electronic aids to its work, provided they are cost-effective and their reliability has been

> adequately established, recognising that a technological innovation which saves time and money may be acceptable even if it delivers a product not quite as good as the traditional alternative. Secondly, there will be exceptional cases where, presented with a choice between taking evidence by electronic means or using the tried and true viva voce method, the court will decide that there are good grounds for proceeding by viva voce evidence. …

24. Along with the statutory considerations referred to in s 20 of the Act above, these considerations also have relevance to the present case, and indeed, partially overlap.

Discretionary considerations in the present case

(a) The necessary facilities are available or can reasonably be made available

25. The defendants have made arrangements for the necessary facilities to be available during the hearing time allocated and have agreed to take steps to test the efficacy of those facilities to ensure that there are no technological difficulties arising from the chosen technology.

(b) The evidence can more conveniently be given or made from the place

26. The concept of what is 'more convenient' has been given a wide interpretation to include the convenience of the court, the parties and the witness in question. See *Brodie v Streeter* [2003] ACTSC 88; 180 FLR 176 per Higgins CJ at [14]-[17].

27. The evidence before the Court was that it would be far more convenient for each witness to be cross-examined by audiovisual link. Giving evidence in person in Canberra would be highly disruptive to the professional lives of each doctor. I accept Dr Belt has long standing and pre-existing surgery lists and patient appointments in Brisbane. He is unable to travel to Canberra at any stage during the week the hearing was listed.

28. I also accept that Dr Cummine is now similarly unavailable. He had made himself available to come to Canberra for the first day of the hearing. After that day he has surgical clinics, is required to give evidence in the Supreme Court in New South Wales and is then travelling overseas later in the week. Regrettably, no one among the parties saw fit to raise the issue of the urgency of taking Dr Cummine's evidence on the first day of hearing so as to avoid the necessity for the making of this application in respect of him.

29. Mr Bartley, Senior Counsel for the plaintiff, submitted that adducing the evidence in cross-examination by audiovisual means would not be convenient, as there would be difficulties in taking the doctors to photographs and other material in the court book. That difficulty could be accommodated by the plaintiff communicating overnight what documents the doctors were required to have before them, and the defendants agreed to ensure that each doctor had the necessary documents. The evidence in this case spans a number of folders, but on no view is the evidence vast or the documents unwieldy to navigate.

30. In terms of convenience to the court, assuming that the concerns about the adequacy of the technology were accommodated, it did not seem to me that either of these particular doctors giving evidence by audiovisual link would impose any particular burden on the resources of the Court.

31. In this regard, I consider that the obligations under s 5A of the *Court Procedures Act 2004* have some influence on what might be 'convenient' to the Court. Saving the costs to the parties of interstate expert witnesses travelling has some relevance. That provision also resonates when considering one of the alternatives available, which was to adjourn the hearing of those aspects of the evidence to a later date. The busy work load of the Court meant that there would be a delay in subsequently listing this matter to hear evidence at a time when it was convenient to both doctors to travel to Canberra. I considered it highly desirable to avoid prolonging this matter, which I note was commenced in 2015.

32. Overall, I am of the view that any inconvenience to the plaintiff and the Court is outweighed by the fact that it is plainly far more convenient to each doctor to be relieved of the significant disruption caused by requiring them to travel to Canberra to give evidence. However, this is but one factor in the overall balancing of considerations that the Court must take into account and such a finding has been formed having regard to the nature of the evidence to be given by these particular expert witnesses, discussed separately below.

(c) The nature of the evidence to be given

33. At its most basic, the substantive allegations in the case are of medical negligence of a hospital and a general practitioner in the treatment and care given to the plaintiff after he suffered a wound to his right shin, which was contaminated and was sutured at the hospital without proper debridement of the wound. The contamination was then not identified for a number of months, during which time the wound failed to heal and ultimately required further surgery. The plaintiff alleges this had further consequences for the injury and now disability to his right ankle and his present state of mental health.

34. The nature of the evidence to be given by Dr Belt and Dr Cummine concerns what steps ought to have been taken in terms of treatment and ongoing care, and the reasonableness of the steps that were taken by the defendants.

35. The evidence to be given under cross-examination is likely to require reference to the expert medical reports filed in the proceedings, to clinical notes, and to photographs.

36. While the testing of an expert opinion as to what ought to have occurred, or whether what did occur was reasonable, might require assistance from experts and the use of medical terms that are not in common parlance, the explanations of their opinions are not what I would consider to be particularly complex evidence in the circumstances of this case.

37. Dr Belt and Dr Cummine are significant witnesses for each defendant (and therefore for the plaintiff in cross-examining them), and I would describe their evidence as centrally important. However, as stated by Austin J in *ASIC v Rich* at [22] the fact that the evidence of a witness will be centrally important should not of itself persuade the court against using audiovisual facilities.

38. In this case, that matter does not, of itself, mean that audiovisual facilities are inappropriate. Neither expert witness will be challenged on their credit. Mr Bartley SC submitted that observations about the demeanour of the witnesses may still be relevant because of independence considerations required of expert witnesses and I accept that argument, and indicated during the hearing of the application that permitting cross-examination by telephone was inappropriate in light of that submission.

39. Again however, as explained by Austin J in *ASIC v Rich* at [24]-[25] (and the cases there-cited), demeanour of a witness can be observed quite satisfactorily by the use of televised evidence and any subtle nuances of a reaction by a doctor to a question that might not be detectable on a video camera is not a matter that weighs heavily in the balance here.

40. Further, the estimated duration of cross examination here may be measured in hours, not days, and I do not consider that to be particularly lengthy in a case that has been listed for five days.

(d) The making of the direction is not unfair to any party opposing the making of the direction.

41. The plaintiff is somewhat aggrieved by the timing and content of these applications. That is understandable. His legal representatives indicated that the doctors in question were required for cross-examination many months before the hearing, and further indicated that they were required to attend in person.

42. As Mr Bartley SC contends, expert medical witnesses are fully aware when they prepare their reports that they may be required to attend the hearing for cross-examination and there is no suggestion that the doctors were not on notice of the hearing dates well in advance.

43. The applications should have been made to the Court prior to the hearing commencing and I have made clear that dealing with applications for how material witnesses are to attend upon the Court to give evidence on the second day of a hearing is far from satisfactory, from an efficient case management perspective and the orderly running of a trial.

44. Nevertheless, accommodating professional witnesses where it does not prejudice a party's case is something that in my view, the Court must strive to do. Notwithstanding that experts may be paid to undertake the task of providing expert evidence, they are nevertheless third parties to a dispute between others and where particular specialties (or indeed, the nature of a party) mean that a party must look interstate for appropriate experts, it is reasonable to expect that the Court may facilitate the use of technology to ease the burden of the evidentiary task in appropriate cases.

45. Other matters touching upon considerations of fairness to the plaintiff have already been discussed in terms of convenience above. Having regard to all these matters, and while sympathetic to the situation in which the plaintiff finds himself at the commencement of a hearing, I was satisfied that ultimately the making of the direction would not be unfair to the plaintiff.

46. I further indicated to the plaintiff that if it transpired that at any time that the position changed, so that any unfairness was apparent, I would have no hesitation invoking the power pursuant to s 20(4) of the Act above to revoke the direction and require the experts to appear in person in the courtroom, either on the Court's own volition or on further application. While no unfairness has arisen, I note that since the making of the order, a change in the balance of considerations has come to pass and the first defendant and the plaintiff subsequently reached agreement to call Dr Cummine in person in Canberra at a later date.

Conclusion

47. For the above reasons, the direction of the Court was as follows:

    1. Pursuant to r 6703 of the *Court Procedures Rules 2006* (ACT) the evidence of Dr Paul Belt and Dr John Cummine be given by audiovisual link.

I certify that the preceding forty-seven [47] numbered paragraphs are a true copy of the Reasons for Judgment of her Honour Associate Justice McWilliam

Associate:

Date: