

Speak for yourself

Robert Schultz, LLM Candidate, Columbia University, on the United States deposition as a flexible and potent civil procedure tool for New Zealand

INTRODUCTION

The Rules Committee is presently considering areas of potential reform to the High Court Rules 2016 and the District Court Rules 2014. In that context, this article seeks to raise awareness of the potential value of the deposition as it is practised in the United States in civil proceedings. There are substantial potential benefits in making the procedure available in civil litigation. Accordingly, this article suggests that introduction of the procedure, at least in a pilot program and/or controlled by appropriate leave of the court, should be seriously considered. A natural place for an amendment exists in pt 9, subpt 2 of the Rules, which already contains a narrow deposition jurisdiction where a witness will be unavailable for trial.

CONTEXT

The deposition is one of the most central and flexible devices in United States civil procedure. Describing its purposes is a matter of nuance but the core purposes are (with some interrelation) (1) advancing discovery; (2) promoting case development and progression (or settlement or discontinuance); and the (3) preservation of evidence. That is, the deposition has a discovery function and actual, or at least potential, evidential functions. The deposition also represents one of the most striking differences between United States civil procedure and civil procedure in other Anglo-common law jurisdictions (except Canada) where depositions generally do not exist, except, if at all, in specialised fora, or for limited purposes (typically the preservation of evidence where a witness may or will be unavailable at trial).

The modern trial in all common law jurisdictions, including the United States, has moved away from “trial by ambush” toward a specialised, potentially lengthy and costly, pre-trial procedure. Under the English (and antipodean) model, the first opportunity to orally question the opposing party’s evidence is usually at trial, months or even years after a proceeding is launched. “Trial by ambush” is avoided, at least in theory, through detailed pleadings and the preparation and service of briefs of evidence before trial. This step follows the close of discovery and, ideally, is in good time before trial, but in practice may sometimes be close to trial, or even during trial in the form of supplementary briefs. Some exceptions exist, the largest one being written interrogatories, although this procedure is subject to significant limitations of scope.

In contrast, the United States deposition procedure, which exists alongside, rather than instead, of the more limited Anglo-common law procedures (interrogatories and requests for admission), allows each parties’ advocates to have unfettered access to the other party (or its corporate representa-

tives) and its witnesses from early in the life of a proceeding, typically without leave of the court (although subject to other limits discussed below).

ORIGINS AND THE FEDERAL COURT RULES

The origins of the United States deposition go back to state practice and the pre-revolutionary oral evidence-taking originating in English Chancery proceedings. The procedure developed in the 19th century but only took its modern form, expanding significantly in scope, with the promulgation of the Federal Rules of Civil Procedure (FCRP) in 1938 (Ellen Sward “The History of the Civil Trial in the United States” (2003) 51 U Kan L Rev 347 and Ezra Siller “The Origins of the Oral Deposition in the Federal Rules: Who’s in Charge?” (2013) 10 Seton Hall Circuit Rev 43).

The 1938 rules represent a watershed in United States civil trial practice: they also effected the merger of law and equity, already well-established in both England and the United States, in Federal Court procedure, and effectively birthed the “modern” United States trial.

The FCRP as amended in December 2018, principally r 30, still govern the deposition at the federal level and are effectively a template for state practice. Federal jurisdiction in a civil proceeding is engaged either by a question of federal law or by “Diversity Jurisdiction”: a jurisdiction which can be invoked when parties to a non-trivial case are citizens of different states, essentially, to avoid perceived or actual “home state” partiality issues in state court: 28 US Code §1331 and §1332. Accordingly, all manner of civil claims can and do come before the United States District Court.

CORE FEATURES OF THE DEPOSITION

The fundamental features of a deposition are:

- (1) Parties are generally entitled to take the oral testimony, under subpoena if necessary, of anyone who they believe has information relevant to the case (that is, any person) (FCRP, r 30(a)(1)). They generally set the time and place of deposition and meet the witness’s costs of attendance.
- (2) Testimony proceeds by examination and cross-examination under oath, generally as at trial (FCRP, r 30(c)(1)).
- (3) Testimony is recorded by audio, audiovisual, or stenographic means, as chosen by the parties unless directed by the court, and any party may produce a transcript (FCRP, r 30(b)(3)(A)).
- (4) There is generally no judicial officer present. An independent “officer in charge” is present but does not have the power to rule on admissibility (FCRP, r 30(b)(5)).

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and r 28) (effectively, the deposing party must ensure they ask admissible questions for deposition evidence to be admissible at trial).

- (5) The witness's attorney may object to questions in a concise, non-suggestive and non-argumentative manner and those objections are preserved on the record, but, unless there is a danger of violating the attorney-client or similar privileges, the witness will be required to answer (FCRP, r 30(c)(2)).
- (6) The default length of a deposition is limited to 7 hours on a single day (FCRP, r 30(d)(1), compare r 26(b)(1) and (2)).
- (7) The use of depositions is not generally controlled by leave of the court. Leave is required, however where (a) deposition is sought before the parties' initial discovery conference has taken place (that is, 20 days after the commencement of an action); (b) more than 10 depositions have been taken; or (c) a party seeks to depose a witness again (FCRP, r 30(a)(2)).
- (8) The procedure is more generally protected from non-compliance and abuse by:
 - (a) The ability of the court to sanction a person (including by awarding costs) for impeding a deposition; and
 - (b) The right of a party at any time to apply to limit or terminate a deposition which is oppressive, unreasonable or being conducted in bad faith (FCRP, r 30(d)).

KEY ADVANTAGES OF THE DEPOSITION

A, perhaps the, core advantage of the deposition is case development, assessment and the promotion of settlement or discontinuance, in which it plays a central part in the United States. The deposition procedure yields a rich picture of the case, in the words of witnesses themselves, at an early point in the life of the case. It is based on the underlying purpose of finding out early in a proceeding what a witness did, saw, heard or thinks. In the American view the interposition of opposing counsel in the form of carefully prepared written answers (such as interrogatories) is not consistent with this purpose (and so United States courts consistently reject written answers as a substitute for the oral deposition). The deposition is intended to be a question-and-answer conversation between deposing lawyer and witness. There is no legitimate need for the witness's own lawyer to be an intermediary, interpreting questions or shaping answers.

This differs from the Anglo-common law model in at least three ways:

- (a) First, the process of preparing lengthy, formal, document-referenced written briefs, by its nature, inevitably involves the risk, despite best intentions, that a lawyer will be interposed in the moulding of the facts of the case, and that they will be over-reconstructed. The process is a technical one and many witnesses are not able to complete it without significant lawyer assistance. Counsel for a friendly witness have no incentive to bring adverse facts to the fore, or to emphasise them in a manner potentially unhelpful to the case. The unfortunate result may be that a written brief or parts of it must be unwound at trial.

- (b) Second, the process of written briefing is static. There is (with limited exceptions, such as interrogatories) little scope for matters to be followed up and clarified, at least by the other side.
- (c) Third as mentioned, briefing comes substantially later in the life cycle of the trial, after the close of document discovery rather than being available from shortly after the initial steps in a case (or even earlier with leave).

More specifically, depositions, based on their core purpose support a number of interrelated case development goals in ways which the Anglo-common law model does not:

- (a) Once key witnesses have been deposed, a deposing party is able to make an informed evaluation of the merits of a case early on, because they have seen how witnesses respond to the competing case narrative of the case, and have had the chance to follow-up unforeseen matters or assertions and to observe a witness's credibility and demeanour. This has obvious and significant power in encouraging settlement.
- (b) The deposed witnesses will often include the opposing party itself or its representatives. The experience of deposition can provide a powerful "reality check", encouraging settlement or engagement with a proceeding.
- (c) Virtually inevitably, deposing at least key witnesses narrows the issues in dispute early in the case. Each party has the opportunity to test its view of the facts with the other side's witnesses. In answering, witnesses are required to identify the facts they disagree with and their reasons for disagreeing. While, in a complex case, disagreements may be numerous, there will also be many points of agreement which no longer need to be addressed before the court, which can focus on the key issues and a more efficient trial process.
- (d) The deposition often has the effect of "locking in" witness testimony. Any damaging witness admissions or positions adopted cannot be changed at trial without attracting adverse inferences (and so efficient trial testimony focussing on the key issues is also promoted).
- (e) The deposition record facilitates summary judgment applications in appropriate cases because the court can take a much more informed "hard look" at whether facts are truly contestable (there would seem to be similar potential benefit to such an approach in New Zealand under the applicable standard: *Eng Mee Yong v Letchumanan* [1980] AC 331 (PC) at 341 as restated in *Krukziener v Hanover Finance Ltd* [2008] NZCA 187, (2008) 19 PRNZ 162 at [26]).
- (f) The deposition may have significant productive value for the defence if a blind spot or important area of factual investigation is unearthed in the course of depositions.
- (g) Depositions may support other procedural applications besides summary judgment including, significantly, discovery applications (addressed below).
- (h) Lawyers are required to prepare a case sooner in time, so that they can take and defend depositions.

An interconnected, also critical, function of depositions is the potential value and efficiency they add to the discovery process. This has two core aspects. First, depositions add an

additional dimension to discovery so that the facts of the case are better understood. Not only is this generally promoted by the fact-engagement involved in depositions generally, deponents, including document custodians, can be asked open-ended and specific questions to establish the existence of relevant custodians and the existence and nature of potential discovery documents. While the United States deposition may address the same topics as documentary discovery or written interrogatories, the deposition process and its responsive format is so different that it is (or at least can be) a much more efficient discovery tool, yielding significantly more, highly relevant, information (some comparison might be made to interview powers in New Zealand, for example the interview powers of liquidators under the Companies Act 1993). Second, depositions provide a device for discovery disputes to be tested and resolved. A discovery deposition may be used where the parties dispute discovery compliance. A deponent may be questioned about why expected types of discovery documents have not been provided and the nature and extent of the search undertaken. If the adequacy of discovery cannot be resolved, a deposition will likely provide a clearer or more substantial basis for a discovery application to court. The existence of the procedure itself arguably provides an incentive for the efficient agreement of discovery categories and explanations of the whereabouts of documents.

Finally, the deposition permits the testimony of a potential witness to be preserved. This guards against the possibility that a witness may be unavailable, ill, or even deceased by the time of trial. The New Zealand civil procedure rules enable a form of this deposition under DCR/HCR 9.17. However, the New Zealand rule has significant differences: it is discretionary and so can only effectively be invoked when witness unavailability is expected, and it takes place before a Judge, Registrar or other court-appointed examiner, rather than an advocate.

ACTUAL OR POTENTIAL DISADVANTAGES: COST/ABUSE

The chief drawback of the deposition is cost, and the increase of costs by “abusive” party conduct. Lawyers are required to prepare to defend a deposition for their witness, and take the deposition of opposing witnesses, which entails significant costs. The Federal Court has sought, by repeated rules amendments, to contain costs and to prevent oppressive discovery or other procedural abuse, including by the limitations in r 30 set out above (that is, time limits, costs sanctions, and the ability to apply to court). Judicial supervision is also maintained by the United States judges making themselves available by telephone to rule on issues.

It is also important that a discussion of costs be seen in comparative context. A party in litigation in New Zealand, England or Australia incurs significant costs instead in assisting witnesses to prepare written briefs of evidence or affidavits. Further, while the adoption of a deposition would require parties to incur the expense of having lawyers take and defend depositions, costs issues may not arise to the same degree given relevant differences in aspects of the United States and New Zealand legal systems:

- (a) United States courts generally operate under the “American Rule” that a party must generally bear its own costs, even if successful in litigation (as noted above, some exceptions may apply to protect the deposition process, but costs are not the rule). In contrast, scale

costs typically follow the event in New Zealand, and higher costs may be awarded. The risk of adverse costs would likely disincentivise the incurring of undue costs, at least to some degree.

- (b) The Federal Court takes a simplified approach to pleadings, which, in combination with a historically liberal approach to discovery, can create issues of scope. Modern New Zealand courts arguably tend towards more pragmatic balancing of discovery proportionality and pleading standards (although these are complex issues).
- (c) United States legal culture is arguably characterised by social-cultural differences emphasising a more aggressive and formalistic approach to litigation (although that assertion may be controversial to some).

Nor should the problems of the deposition be overstated. While the abuse of procedures is hard to measure, abuses appear to be linked to a minority of cases. Perhaps surprisingly, one study in the United States found that seven or fewer people were deposed in 75 per cent of cases (Thomas E Willging, Donna Stienstra and John Shapard “An Empirical Study of Discovery and Disclosure Practice under the 1993 Federal Rule Amendments” (1998) 39 Boston College Law Review 525 at 540). Further, the risk of abuse of process and exacerbated costs is not unknown in the briefs-centric system of trial evidence which currently exists in New Zealand. (As noted, a hearing can be unduly extended if a written brief of evidence has to be “unwound” in oral examination at trial.)

POTENTIAL USE IN NEW ZEALAND

For the reasons set out, there would appear to be substantial potential benefits to the adoption of some form of a deposition procedure in New Zealand, if the risks can be appropriately controlled. As no procedure exists in a vacuum, and depositions exist in a different procedural and socio-legal context, adapting a workable procedure for New Zealand might not be straightforward. The tool is one which de-emphasises the briefs and affidavit-based mode of current practice in which the trial is the preeminent event at which the case and witnesses are tested.

The adoption of the tool would require adaptation to a New Zealand context by practitioners and the judiciary. As in the American case of judges available by phone, judicial adaptation might also present challenges (although perhaps not particularly troublesome ones in the age of efficient and frequent judicial teleconferencing with parties).

Nonetheless, the possible advantages seem worth an attempt at a legal transplant. The suggestion of exporting depositions is not unprecedented. It has been the tentative conclusion in law reform review and academic comment in Australia: see the detailed summary and consideration in Michael Legg “The United States Deposition — Time for Adoption in Australian Civil Procedure?” (2007) 6 MULR 146 (Legg concludes that the use of the deposition in Australia would provide tangible benefits, while also identifying matters for concern).

What would a broader deposition regime look like in New Zealand? Given the difference in trial practice, it seems difficult to imagine that it would be other than without significant limitations, at least in the first instance. The most obvious of these would be requiring leave of the court to depose in appropriate cases. A limited regime, perhaps in a

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- (b) An agreement, express or found by implication, or the means of achieving an agreement (eg an arbitration clause), on every term which: (i) was legally essential to the formation of such a bargain; or (ii) was regarded by the parties themselves as essential to their particular bargain.

Fletcher had the burden of proof and had attempted to argue that a contract did, in fact, exist. It was alleged to be partially written, in the form of the LOIs, and partially oral, being the agreement reached in negotiations where Electrix had accepted Fletcher's standard terms and conditions.

However, while Electrix may have accepted standard terms and conditions, the parties did not intend them to have an immediate binding effect. Nor did the Court find any contemporaneous evidence suggesting either party considered the outcome of the meeting to mean there was a contract in place. The key failure of the meeting was that there was no agreement on the services being delivered, the essential elements of a contract.

As for the LOIs, not only did they note the fact that further formal negotiations were intended, but Fletcher had been paying well over the amount authorised by the LOIs. To the extent that the LOIs were of any legal effect, it was a way for Fletcher to authorise Electrix to spend money in advance for procurement. In short, at no time did either party agree to a contract nor was there any intention one be created, except by way of formal negotiations.

Amount deserved

The issue turned to the claim of quantum meruit and the amount deserved by Electrix. Palmer J noted comments from

High Court of Australia in a recent case of *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32, where the Court had reviewed the history and evolution of what constitutes a quantum meruit claim.

As discussed by Palmer J at [73], quantum meruit initially originated as a remedy from the cause of action of breach of contract. This evolved away from the idea that a contract was needed for quantum meruit to be applicable and into something more akin to unjust enrichment. The promise to pay by a defendant, while initially needed to be express, can now be implied, regardless of the intentions of the parties.

Through a review of the applicability of quantum meruit in the New Zealand Courts, Palmer J, at [80], relied heavily on the Court of Appeal's authoritative decision in *Morning Star (St Lukes Garden Apartments Ltd) v Canam Construction Ltd* CA90/05, 8 August 2006. The Court had taken the view that quantum meruit is generally seen as a restitutionary claim, which exists in order to fairly compensate a plaintiff on services provided, rather than to disgorge something wrongfully obtained by the defendant. In fact, there need not be any benefit granted to the defendant, the primary purpose being the plaintiff's entitlement to reasonable reward for time and effort. The essential elements are services being provided and payment requested for those services, with the defendant having accepted the services performed. On review of the decisions, Palmer J concluded that (at [85]):

The New Zealand law of non-contractual quantum meruit is not exclusively tethered to unjust enrichment, but there is a reasonable coherence in what is required as a matter of practice.

The Court accepted that the elements of quantum meruit fit the facts of the case, but the question remained on how to value such services. Palmer J reviewed the principles of unjust enrichment, so far as it provided for non-contractual claims of quantum meruit, holding (at [97]):

But, in New Zealand law, benefit to the defendant is not always necessary. Information about the market value of the services is still relevant to assessing the reasonable cost of the services provided. But just as relevant is the cost to the plaintiff of providing the services in the circumstances of the work at the time. That may be different from the market value of the work done.

As there was no contract and no agreement for price, the Court was reluctant to put value on amounts or prices that were discussed in negotiations. The Court held the best determinative of value for the services and the amount deserved by Electrix was actual costs for the services. Cost should reflect the market value of the services at the time they were carried out. Palmer J said (at [98]):

Together with the addition of a market-related profit margin, I consider that will reflect the reasonable costs of the services to the service supplier. If the defendant can show that the actual costs incurred were more than what was reasonable in the market conditions at the time for the work undertaken, they should be reduced by that amount.

The Court then turned to the various experts as to reasonable costs electrical works carried out, including any project-specific difficulties encountered by Electrix, which should be factored into the cost calculation. □

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pilot context, would appear to offer the chance to maximise the main advantages of the deposition in the New Zealand context, while minimising the risk, and providing a chance to evaluate the effectiveness of the procedure. An obvious, but by no means the only possible appropriate circumstance for its use might be the deposition of key witnesses in cases of significant value implicating significant disputed facts. The criteria for the exercise of discretion would seem to have to

essentially involve an assessment of whether allowing the procedure would promote the efficient and just resolution of proceedings. Surely that goal is one worth pursuing, including by novel and comparative methods. For all the fashion of criticising aspects of United States law as arcane and unreasonable, its gifts to the wider common law are significant, notably in areas such as antitrust/competition law and science and the courts. There might be more value to be had, and, in this author's view, the possibility is worth investigating. □