UNION STEAMSHIP COMPANY OF NEW ZEALAND LIMITED v. WENLOCK

[1959] N.Z.L.R. 173, S.C. and C.A.

It is to be regretted that the New Zealand Legislature, when enacting the Evidence Amendment Act 1945, followed substantially the terms of the Evidence Act, 1938 (Eng.), without taking the opportunity to improve upon the English statute, which has been described as "not felicitously drafted"[1] and "a difficult Act to construe".[2]

Part I of the Evidence Amendment Act 1945 radically alters the common law rules of evidence in the case of civil proceedings. It makes admissible various kinds of documentary evidence which previously would have been excluded as hearsay. Section 3(1) provides that where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if certain stated conditions are satisfied. One of those conditions requires that the maker of the statement should be called as a witness in the proceedings, but the proviso to s.3(1) goes on to say that this condition need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success. In addition, s.3(2) authorises the Court in its discretion to admit the document "notwithstanding that the maker "is available but is not called as a witness", if the Court is satisfied, having regard to all the circumstances of the case,"that undue delay or expense would otherwise be caused".

The Act imposes certain limits upon the admissibility of statements. One of the principles upon which the Legislature has based those limits is that of interest. Thus, s.3(3) provides that

> Nothing in this section shall render admissible in

---

1. Wigmore, The Law of Evidence (3rd ed.1940), vol.5, p.437.
2. Robinson v. Stern [1939] 2 K.B. 260, C.A. at 267 per Scott L.J.

> evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish.

The Evidence Act 1938 (Eng.) has been considered by the Courts in England in a number of cases.[3] An examination of these cases demonstrates a wide diversity of opinion as to the proper interpretation to be given to the word "interested" in s.1(3), the equivalent of s.3(3) of the New Zealand Act, quoted above. This is not surprising, because it is a word of such wide and general import that diversity of opinion is perhaps inevitable.[4] The position is further complicated by the fact that, at common law, "interest" acquired a variety of technical meanings:

1. It may mean a material interest in the outcome of the proceedings or an interest in the outcome of the proceedings for the purposes of the witness's own liability. Both these types of interest rendered a witness incompetent at common law to give evidence. That rule was abolished in England by the Evidence Act 1843, s.1(cp.s.3 of the Evidence Act 1908).

2. It may mean the interest preventing the admission of declarations as to pedigree and public rights or those made in the course of duty. (Section 2 (2) (b) of the Evidence Amendment Act 1945 excludes from the operation of the Act declarations relating to a matter of pedigree; see also the equivalent provision in s.6 (2) (b) of the Evidence Act 1938 (Eng.)). Declarations as to public rights are inadmissible if they were made to serve the interest of the declarant. Those made in the course of duty will be excluded if the maker of the declaration had an interest to misrepresent the facts, e.g. to negative his own liability: see The Henry Coxon (1878) 3 P.D. 156, 158.

3. It may mean a pecuniary or proprietary interest. A declaration by a deceased person against his pecuniary or proprietary interest is admissible.

---

3. See also Shepherd v. Shepherd [1954] V.L.R. 514 and Tobias v. Allen (No.2) [1957] V.L.R. 221 on the substantially similar Victoria Evidence Act 1946.
4. Cp. Wenlock's case (supra. at p.189 per Gresson P.).

4. It may mean the interest underlying admissions. Evidence of such admissions may be received, provided the admission is not in favour of the person who made it.

"Apparently embarrassed by the richness of the law, the draftsmen [of the Act] chose poverty, and di not say what they meant by interest": Nokes, Introduction to Evidence (2nd ed. 1956), p.317.

The Evidence Amendment Act 1945 is an enabling Act: s.2 (2) (a) provides that nothing in Part I of the Act shall prejudice the admissibility of any evidence which would, apart from the provisions of Part I, be admissible. This suggests that little, if any, assistance may be derived in the construction of the words "a person interested" from a comparison with the common law. It is submitted that this conclusion is supported by the fact that the Act provides a number of safeguards which are unknown to the common law. For example, where the proceedings are with a jury, the Court may in its discretion reject the statement, notwithstanding that the requirements of s.3 are satisfied with respect thereto, if for any reason it appears to be inexpedient in the interests of justice that the statement should be admitted: s.3(5). Furthermore, in estimating the weight, if any, to be attached to a statement rendered admissible by the Act, regard shall be had to various factors, including the question whether or not the maker of the statement had any incentive to conceal or misrepresent facts: s.4(1).

Thirteen years after its enactment, Part I of the Evidence Amendment Act 1945 was for the first time judicially considered in Union Steamship Co. of New Zealand Ltd. v. Wenlock [1959] N.Z.L.R. 173, S.C. and C.A. In the Court of Appeal, Gresson P. dealt at some length with the scope and effect of s.3 (3); and it is with this aspect of the case that this note is concerned.

The facts of the case (as far as material for present purposes) are as follows: In an action commenced in September 1957 Wenlock claimed damages in respect of injuries suffered when he slipped on a patch of oil lying on one of the plates of the engine-room of the defendant's motor vessel "Kaituna" which was tied up alongside a wharf. There was no evidence how the oil got where it did. Gordon was fourth engineer on the "Kaituna" at the time of the plaintiff's accident. He resigned from the defendant company and left for Sydney

in February 1958 and his whereabouts thereafter we not known. During the course of the trial, which began on March 6 1958, application was made orally to the trial Judge to admit, under s.3 of the Evidence Amendment Act 1945, a letter which had been written by Gordon to the defendant company on September 13 1957.

In the Supreme Court, Hutchison J. held (supra. at p.175) that Gordon was not "a person interested". Gordon had no pecuniary interest in the matter, and his responsibility to the defendant company must have been slight, as he was the fourth engineer only, and the second and third engineers were both on duty, and the third engineer was alongside him at the time of the accident. Nevertheless, the learned Judge disallowed the statement on the ground that the condition set out in the last part of the proviso to s.3(1) had not been complied with.

The defendant company appealed on the ground, inter alia, that evidence had been improperly rejected.

In the Court of Appeal, Gresson P., North and Cleary JJ. held that the learned trial Judge was right in not admitting Gordon's letter.

Counsel for the plaintiff had accepted the finding of the trial Judge that Gordon was not "a person interested". Strictly speaking, therefore, the Court of Appeal was not called upon to pronounce upon that question. Nevertheless, Gresson P. dealt at some length with s.3(3) because

> . . . it is difficult to consider the scope of the Act without some reference to that aspect. It may often be the ground upon which the admissibility of a statement under the statute is resisted, and a decision will usually have to be made by a trial Judge in the course of a trial without adequate time to examine the authorities, or to deliver a formal reasoned judgement. (supra. at p.188).

After referring to a number of cases decided in England and Victoria, the learned President examined the relation between s.3(3) and s.4(1) of the Act. He said that s.3(3), directing the exclusion of a statement upon the ground that the maker is personally interested, and s.4(1), which directs regard to be had to the amount of weight to be given to such a statement,

overlapped to a certain extent. In his opinion, therefore,

> . . . the Court need not . . . be over-strict in excluding a statement on the grounds of personal interest, unless that interest is one which is real, definite or substantial. (supra. at p.190)

The learned President went on to say that cases in which a personal interest was said to arise because of the relationship to one of the parties, or because the reputation or diligence of the maker might come in issue, could be adequately dealt with under s.4(1). When the statement was that of an employee of one of the parties, the circumstances might or might not be such as to warrant regarding him as personally interested. A relevant circumstances would be how closely connected he was with the happening and just what part he played in it:

> . . . the existence of s.4 shows it to have been in the contemplation of the Legislature that evidence might be admissible which was not altogether disinterested or impartial. Since therefore the Court is required to differentiate between admissibility and weight and since therefore an "incentive to conceal or misrepresent facts" does not necessarily constitute interest, it must, in every case, be a question for the Court to consider, in all the circumstances of the case, whether it can be said that the maker of the statement was personally interested to such an extent, or in such a way, as to call for exclusion of the statement. (supra, at p.190).

Applying this test to the case before him, Gresson P. held that Gordon was not a person interested. He was not the senior engineer present in the engine-room, and he had no special responsibility in respect of the patch of oil, if it existed.

Cleary J. considered it unnecessary to deal with s.3(3). North J., however, while not expressing an opinion one way or the other, did not wish it to be assumed that he was necessarily in agreement with the view expressed by Hutchison J. on the question of whether Gordon was a person interested. The learned Judge said (supra. at p.197) that it seemed to him that the cases cited by Gresson P. showed that there was at least something to be said for the opposite view.

It seems implicit in the remarks of Gresson P. (supra. at p.188;

see ante.p.196)that he intended his observations on the scope of s.3(3) to be a guide to future trial Judges. But in view of the doubts expressed by North J., it is possible that the test proposed by the learned President, while undoubtedly entitled to great respect, may not be accepted without reservation in future cases, particularly as his remarks were clearly obiter.

It is quite clear that far from supporting the test proposed by Gresson P., some of the English cases, particularly the early ones, lay down a very different test. The first case in which s.1(3), the equivalent of s.3(3) of the New Zealand Act, was considered, was Robinson v. Stern [1939] 2K.B. 260, C.A. Goddard L.J. said, at p.268, that the construction of the words "a person interested" should be governed by the principle laid down by Lord Eldon in respect of the admission of various types of written statements at common law, namely,

> . . . that they are the natural effusions of a party, who must know the truth; and who speaks upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth. (Whitelock v. Baker (1807) 13 Ves.511, at 514)

There are, however, several factors which detract considerably from the validity of the above test. Firstly, whether or not the defendant in Robinson v. Stern was a person interested was not really in dispute. The point was mentioned, but there is no indication in the report that it was really argued. Scott L.J., at p.265, merely said that it was obvious that the defendant was a person interested. Clauson L.J. did not advert to this point at all. The main question was whether the statement of the defendant which was admitted at the trial had been made at a time when proceedings were pending or anticipated. In seeking to apply the principle laid down by Lord Eldon to the construction of the words "a person interested", Goddard L.J. was apparently motivated by his desire to put a stop to the growing practice in running-down cases of using the Evidence Act, 1938, to tender statements made to the police.

Secondly, when the extract from Whitelock v. Baker which was quoted by Goddard L.J. is read, as it should be, in its context, it becomes clear that the principle laid down by Lord Eldon cannot properly be applied to the different situations envisaged by the Evidence Act, 1938. After stating that tradition generally was not evidence, even of pedigree, Lord Eldon went on to say (supra.

at p.514):

> . . . the tradition must be from persons, having such a connection with the party, to whom it relates, that it is natural and likely, from their domestic habits and connections, that they are speaking the truth, and that they could not be mistaken. The whole goes upon that: declarations in the family, descriptions in Wills, descriptions upon monuments, descriptions in Bibles, and Registry Books, all are admitted upon the principle, that they are the natural effusions of a party, who must know the truth; and who speaks upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth.

Lord Eldon appears to have been referring to evidence which is admissible in pedigree cases. But these cases are excluded from the operation of the Act both in New Zealand and in England. Furthermore, the statements made admissible by the Act are not confined to those described by Lord Eldon. It is therefore submitted, with respect, that the common law principle cannot properly be applied to the construction of the words "a person interested" in the statute which is an enabling Act, leaving the common law untouched.

Thirdly, Goddard L.J. did not consider the implications of s.2(1), the equivalent of s.4(1) of the New Zealand Act. The effect of that provision is considered more fully later.

Robinson v. Stern (supra) was not cited in Plomien Fuel Economiser Co.Ltd. v. National Marketing Co. [1947] Ch.248, a passing-off action. However, the approach adopted by Morton J. in that case to the construction of the words "a person interested" was not dissimilar to that of Goddard L.J. Morton J. said, at p.250, that "a person interested" must mean a person interested in the result of the proceedings pending or anticipated.

> . . . a useful test, though perhaps not the only one, is: was it better for [the maker of the statement] . . . that the plaintiffs should succeed in the present action or was it a matter of indifference to him?

The learned Judge held that the object of the action was to prevent the plaintiff's trade being damaged. If the action was successful, their amount of work might increase, and the remuneration of the maker of the statement might be augmented. He therefore refused

to admit the statement, as it had not been made by an independent person.

In Manser v. London Passenger Transport Board [1948] W.N. 206, the plaintiff claimed damages from the defendant Board for personal injuries he had received. Streatfeild J., in a very brief judgment, said that he did not think the words "a person interested" were confined to a person whose conduct was or might be in question in the litigation. The words had a wider meaning (which was, however, not specified). He accordingly rejected a statement made by an assistant to the resident engineer of the defendant's plant.

The test propounded by Morton J. in Plomien's case (supra) was, however, cited without disapproval in Bain v. Moss Hutchison Line, Ltd. [1947] 1 K.B. 51 and in Barkway v. South Wales Transport Co.Ltd. [1949] 1 K.B. 54, C.A., at p.60 per Asquith L.J.; it was approved in Evon and Evon v. Noble [1949] 1 K.B. 222.

In Bain's case, the widow of a purser who had died in a fire on a ship, brought an action for damages for negligence against the owners of the ship. Birkett J. refused to admit statements made by the master and the second and third officers of the ship. The learned Judge held, at p.545, that while it was manifest that those three men had no financial or pecuniary interest, in the direct sense, at all, they were persons who were personally interested in the result of the action. If the allegations of negligence made in the action were established, their certificates might be cancelled or suspended under s.470(1) of the Merchant Shipping Act, 1894.

Bain's case may be compared with The Atlantic and The Baltyk (1946) 62 T.L.R. 461, decided two years earlier. The Atlantic and the Baltyk had collided at sea with another ship. Only the statement made by the master of The Atlantic was rejected, but those made by two engineers and a look-out man were held to be not affected by s.1(3). Birkett J. referred to The Atlantic and The Baltyk in Bain's case (supra. at p.53), but without comment. Morton J.'s test was apparently the basis of the decision in Barkway's case (supra. at p.60) where Asquith L.J., delivering the judgment of the Court, refused to admit the statement of a tyre tester because

---

5. In Evon and Evon v. Noble [1947] 1 K.B. 222, at 224, Birkett J.observed, in referring to Bain's case, that it had been decided on its own special facts.

> [h]is reputation as a tyre-tester was involved, and apart from that he was interested as an employee in his employers winning the case.

Evon and Evon v. Noble [1949] 1 K.B. 222 involved a claim in negligence by a small girl and her father. The girl had been injured while under the charge of her parents' domestic servant. The servant had made a statement which it was sought to introduce in evidence. Birkett J., at p. 225, after referring with approval to the remarks of Morton J. in Plomien's case (supra) said:

> If a party to a dispute is to have a statement, to which no cross-examination can be directed, adduced in evidence against him, that party obviously labours under a great disability, and one must always therefore keep in mind the fact that if a statement is admitted under s.1 of the Evidence Act it is a statement to which there can be no cross-examination. It is imperative therefore that if such a statement is admitted it should have been made by an 'independent' person in the ordinary sense of that word.

The learned Judge went on to define an "independent" person, in language reminiscent of that of Lord Eldon in Whitelock v. Baker (supra. at p.514) as

> . . . a person who has no temptation to depart from the truth on one side or the other, a person not swayed by personal interest, but completely detached, judicial, impartial, independent.

Applying this test to the case before him, the learned Judge (supra. at p.226) rejected the statement on the ground that the nursemaid was a person interested in the sense that she had been left in the charge of these children. Their safety was her peculiar care, and in that sense her reputation was involved in the result of the action.

It is submitted, with respect, that it is difficult to see why the absence of cross-examination should be relevant to the construction of s.3(3) of the Evidence Amendment Act, 1945. In the first place, not all statements admitted under s.3 are statements to which there can be no cross-examination. The primary rule in s.3 specifically requires that the maker of the statement should be called as a witness; but this condition need not be complied with if the maker of the statement, for various reasons, is unable to attend. The Court has also a discretion to dispense

with the condition, if it is satisfied that undue delay or expense would otherwise be caused.

It would seem to follow from Birkett J.'s emphasis on the undesirable results of an absence of cross-examination, and the consequent necessity for "independence" on the part of the maker of the statement, that, when the maker of the statement is called and is available for cross-examination, there is less need for such a stringent test. It is submitted, with respect, that the language of the Act does not justify the application of varying tests of "interest", depending on whether or not the maker of the statement is called as a witness.

It is to be noted that neither in Evon's case (supra), nor in any of the other English cases which have been cited, did the Courts consider the implications of s.2(1), the equivalent of s.4(1) of the New Zealand Act. It is difficult to see how the question "whether or not the maker of the statement had any incentive to conceal or misrepresent facts" can be considered, as required by the sub-section, if only statements made by persons "who have no temptation to depart from the truth" and who are "completely detached judicial, impartial and independent" are admissible in the first place. One cannot escape the conclusion that if Birkett J.'s stringent test is applied, the words in s.4(1) are completely meaningless and superfluous.

It is true that the opening words in s.4(1) refer to "a statement re dered admissible as evidence by this Part of this Act". This may lead to the conclusion that s.3(3) has to be constructed without reference to s.4(1). But it is a clear principl of statutory interpretation that, in construing an Act, the whole Act must be looked at; and it must be interpreted so as to give meaning to all the words in it and not so as to make any one word or phrase redundant.

It is therefore submitted, with respect, that Gresson P.'s emphasis in Wenlock's case (supra. at p.190) on the difference between weight and admissibility and the conclusions he drew from the existence of s.4 (the equivalent of s.2(1) of the English Act) are to be preferred to the approach adopted in the above cited English cases.

This submission is supported by the judgment of the English Court of Appeal in Jarman v. Lambert & Coke Contractors Ltd. [1951] 2 K.B. 937. In that case, where the maker of the statement was

admittedly an interested person, Evershed M.R. said, at p.940, that s.2(1) clearly showed that the Legislature must have contemplated that under the Evidence Act documents might be properly admissible which did not have that impartiality to which Lord Eldon alluded. The learned Master of the Rolls went on to say at p.941 that Parliament "was content to rely on the experience of the judges not to give to a document, which might in a manner be tendentious, any more weight than it deserved." Both Evershed M.R. and Denning L.J. held that the Act should be interpreted liberally, because this was more in accord with the policy of the legislation than the view of Goddard L.J. in Robinson's case (supra).

It may be mentioned at this point, that whatever approach may be adopted to the interpretation of an Act by an English Court, the New Zealand Courts are required to give to every Act "such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act . . . according to its true intent, meaning, and spirit": Acts Interpretation Act 1924, s.5(j).

The charge to a liberal construction of the Evidence Act is reflected in two cases which were decided after Jarman's case: Galler v. Galler [1955] 1 W.L.R. 400 and Kelleher v. T.Wall and Sons Ltd. [1958] Q.B. 346.

In Galler v. Galler, a contested divorce suit based on a charge of constructive desertion arising out of the husband's alleged impropriety with a Danish nursemaid, Barnard J. admitted a questionnaire which had been answered and signed by the nursemaid. He rejected the wife's counsel's contention that the questionnaire should be excluded because the nursemaid had grounds for bias, and thus a material interest. The learned Judge said, in his judgment, however, that as the nurse had not been available for cross-examination, a great deal of weight could not be attached to her statement.

Finally, in Kelleher's case, Barry J. observed, at p.351, that he was satisfied that some qualification must be placed on the very broad proposition stated by Asquith L.J. in Barkway's case (supra. at p.60). The learned Judge went on to say (at p.352):

> Having regard to that decision (i.e. in Plomien's case) I do not think that Asquith L.J.'s words can properly be read as laying down any general proposition that because

> the maker of the statement is in the employment of one or other of the parties to an action, that fact in itself must necessarily render any statement which he made inadmissible on the ground that he must necessarily be "a person interested".

Reverting to Wenlock's case and to the observations of North J. (supra. at p.197) it is submitted, with great respect, that there is really notvery much to be said for the opposite view, i.e. for the view that Gordon was "a person interested".

In conclusion, it is submitted, that the "personal interest" which renders a statement inadmissible, must be real, definite or substantial: Wenlock's case (supra. at p.190 per Gresson P.).

It is impossible to determine in advance what type of "personal interest" falls within the above categories. In every case, as was said by Wallington J. in In the Estate of Hill [1948] p.341, 344, the facts must be ascertained both as to the person whose statement is sought to put in evidenoe, as to the character and subject-matter of the "proceeding", and the relation of the person to the subject-matter of the proceeding.

E.M.S. *

* Mrs. Eva M. Schellevis LL.B., now Junior Lecturer in the Department of English and New Zealand Law.