A deposition discovery option for New Zealand?

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Depositions in civil proceedings are a very popular interlocutory device in the United States and to a lesser extent in Canada. In New Zealand however the procedure has never been used. In this article, John McLinden, a Wellington barrister, considers the deposition option, and argues that such a procedure would be a very valuable tool for the litigation lawyer.

I. INTRODUCTION

One could say that in almost every civil case the parties vie for supremacy of knowledge - "Knowledge is Power".[1] For the litigator the ultimate weapon in the tactical struggle for information is the chance to cross-examine the other parties' main witnesses before trial. One of the first questions to be asked of such a discovery option is whether it would help to serve the just, speedy and inexpensive determination of any proceeding or interlocutory application (rule 4 of the High Court Rules)?

The adoption in New Zealand of a pre-trial deposition process in our civil law might assist to obtain a better measure of the first object (justice). There would no doubt be anxiety as to whether it would unnecessarily hinder the attainment of the two other objects (speed and value for money). In such an area of potential conflict of priorities it is of some comfort to note that of the competing objects in rule 4, *McGechan on Procedure* suggests:[2]

> ... the principal aim must necessarily be the attainment of justice, and in some circumstances speed and lack of expense will have to be sacrificed to ensure that justice is done.

It is also encouraging to see that in the United States the pre-trial deposition procedure was introduced to meet the very objects expressed in rule 4. In *Nichols* v *Sanborn Co*[3] the United States District Court for Massachussetts stated that the pre-trial oral deposition rules had been framed for the purpose of helping to "... secure the just, speedy, and inexpensive determination of every action, and ensuring that cases might be settled on their merits"[4] If such an option was introduced into the New Zealand

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1 Francis Bacon "De Haeresibus" *Meditationes Sacrae* (1597).

2 *McGechan on Procedure* (Brooker & Friend, Wellington, loose-leaf) paras 4.04 (3).

3 24 F Supp 908 (1938).

4 Ibid 910.

discovery process it would be essential to try and ensure the spirit of rule 4 was maintained. Commonwealth jurisdictions (except Canada) seem to have shrunk from this type of discovery option in a civil case. This article traverses the points for and against a deposition discovery system being implemented in New Zealand.

Among the issues this article considers are:

(a) Whether New Zealand civil procedure offers the litigator an adequate armoury to achieve the objects referred to in rule 4;

(b) Whether the preliminary hearing procedure under the Summary Proceedings Act 1957 provides any assistance in assessing the impact an oral discovery option would have;

(c) Whether there is anything to be learned from any deposition procedure in overseas jurisdictions such as Australia, England, Europe, Canada and the United States of America;

(d) Whether there are any intermediate steps or alternatives which would offer more or less the same benefits as an oral deposition system, but which would avoid any associated expense and delay, thereby meeting the criteria of rule 4 in a more satisfactory manner.

Before considering these issues it may be convenient to make some general observations about the role of the court in modern litigation. It is apparent[5] that some corporations and whole sections of the community are not prepared to remain dependent on a court system which is antiquated, slow and expensive.

This is a serious development because the courts and the lawyers who practise in them may find that in the course of time they serve fewer and fewer needs as clients seek the objects expressed in rule 4 in forums outside the courts. It seems desirable and inevitable that the court should take greater control of litigation to ensure that the objects of rule 4 are met. These observations are made because judicial control of litigation has particular importance for the topic under consideration. There is little doubt from the American experience that although the pre-trial deposition system is capable of conferring considerable benefits it is also capable of abuse and of frustrating all three objects in rule 4.

5 See eg Victoria University of Wellington 1988 LLM Litigation seminar papers: Belinda Cheney *To Litigate or Not to Litigate: The Mini-Trial Option*; Justin Emerson *Mediation of Environmental Disputes*; Catherine E Bibbey *A Commercial List or Court for New Zealand?*; C B Rampton *The Small Claims Tribunal*; Richard Baker *Injunctions in an Industrial Law Context*. See also the trends in T Kennedy-Grant "Dispute Resolution in the Pacific" [1987] NZLJ 294; T Kennedy-Grant "Dispute Resolution in New Zealand" [1989] NZLJ 21; and P T Cavanagh "The Mini Trial: a New Zealand experiment in pre-trial dispute resolution" [1989] NZLJ 23.

If the parties and their lawyers know that they will have to answer to the courts for delays, expense, and abuse of procedure, that knowledge will be a major incentive to do things properly. In that kind of environment the pretrial deposition process would be used at its best.

If present trends continue there will be a slow shift from an adversarial to an inquisitorial style in the administration of justice in the courts. One does not have to be a Jules Verne to see that in the not-too-distant future the court may take control to the extent that:

(a) All proceedings will be adjourned to fixed hearing days until the substantive issue is disposed of; and

(b) On each of the callover days the parties will have to provide a progress report to the court; and

(c) The court will ensure that all interlocutory steps are taken in a manner which ensures compliance with rule 4, as best as the circumstances of the case can permit.

As an American writer[6] has noted, if judges assume a close supervisory role over the interlocutory process of discovery, a natural progression would be for them to become involved in the sifting and gathering of evidence. This perspective will be examined more closely in the section dealing with overseas discovery procedures. However, to conclude this introduction reference is made to observations which suggest (in the long term) the possibility of a merger of the European and English systems of justice to secure the objects of rule 4:[7]

> Having now made the great leap from adversary control to judicial control of fact gathering, we would need to take one further step to achieve real convergence with the German tradition: from judicial control to judicial conduct of the fact gathering process.

II. IS THERE ANY CIVIL PRE-TRIAL DEPOSITION PROCEDURE IN NEW ZEALAND?

The closest New Zealand appears to have got to any form of a pre-trial oral examination[8] was under rule 159 of the Code of Civil Procedure (since replaced by rules 282 and 287 of the High Courts Rules). The essence of rule 159 was that if insufficient answers were provided to an interrogatory, the court could order inter alia that the person interrogated should attend such place before the court, registrar, or such other person as

6 J H Langbein "The German Advantage in Civil Procedure" (1985) 52 U Chicago LR 823.

7 Ibid 825.

8 Excluded from this category are the type of deposition evidence that may be taken due to illness, intended departure from New Zealand, etc, and evidence taken overseas, pursuant to rr 369-381. Such examinations are not for the purpose of discovery.

the court or judge might appoint to be orally examined as to the matters not answered or answered insufficiently. (The court still has this power under rule 287(b)). There are no reported New Zealand cases concerning the application of the rule.

The New Zealand rule is based on an English provision.[9] This provision will be more closely examined later. In the meantime it is enough to say that the power to order an oral hearing under rule 287(b) would probably be used as a last resort. The examination one is permitted to make on such an occasion is strictly limited. The combination of these factors means that effectively there is no pre-trial deposition system to assist in the process of discovery in the civil law.

The absence of any discovery deposition process is the only notable exception to the discovery system which is offered to the litigator by the High Court Rules. In civil discovery there is really only one outstanding but profoundly important step for New Zealand procedure to take the oral pre-trial examination of parties and/or their witnesses.

Unfortunately our litigation tradition has never been partial to oral discovery. There would probably be a natural reluctance by some to take what might be seen as a radical step. Some of those misgivings might be allayed if one was able to point to a process with some of the hallmarks of the deposition system which has operated successfully in New Zealand. Our criminal law may be able to provide just such an example.

III. PRELIMINARY HEARINGS IN THE CRIMINAL LAW

The only pre-trial deposition system operative in New Zealand is the preliminary hearing of an indictable offence under Part V of the Summary Proceedings Act 1957. These provisions require evidence to be disclosed to the defence at a preliminary hearing before an accused can be committed for trial.

How relevant is a comparison between the civil and the criminal process? A number of distinctions can be made immediately.

(1) In a criminal case the disclosure of information is generally one way (prosecution to defence); in a civil case disclosure is expected to be reciprocal.

(2) In criminal proceedings the case proceeds to a series of fixed dates. At each call of the case a new date is set. In civil proceedings there is no such system. To get the civil case before the court one or other of the parties must generally make an application. This allows the civil case a greater opportunity to be delayed.

(3) In a criminal case the State pays for the prosecution whereas in a civil case the costs are met by the parties.

Are the distinctions sufficient to significantly distinguish the criminal preliminary hearing from any useful comparison with a civil deposition hearing?

9 Rule of the Supreme Court ("RSC") O 26 r 5.

Although not exactly on all fours with the civil deposition system which is in force in Canada and the United States, the New Zealand preliminary hearing still provides a useful yardstick to assess the strength of complaints (extra costs, delays, abuse and questionable value) which generally are said to accompany this genre of hearing, whether in the civil or criminal law.

Before commenting on those specific points it may be useful to set out some material developments in relation to the conduct of preliminary hearings to show that a deposition system can provide a streamlined and efficient process for the disclosure of information. Prior to 1976 the Crown was obliged to call viva voce evidence to establish a prima facie case against an accused person before he or she was committed for trial. On many occasions the evidence of the witness was not in dispute and much time was wasted because the deposition system meant that after the evidence was led and cross-examination and re-examination had taken place, the entire record of the proceedings had to be read back to the witness who then had to sign each page.

However in 1976 the whole process was fast-tracked by section 173A at the Summary Proceedings Act, which permitted the prosecution (with the consent of the defence) to tender evidence by written statement.

In 1986 further provisions came into effect relating to preliminary hearings in cases involving sexual violation.[10] In these cases the new provisions require the complainant's evidence to be given in the form of a written statement without examination or cross-examination unless otherwise ordered by the courts.

Despite the opportunity for delay, abuse and excessive costs to be incurred, there appears to be little complaint with the system of preliminary hearings in New Zealand. Most defence lawyers conduct a preliminary hearing in an efficient manner. Although the defence has the power to refuse to accept a witness's statement in writing and to compel the witness to give oral evidence,[11] it is comparatively rare for this to occur. Most prosecution witnesses' evidence in chief is given in the form of section 173A statements. Cross-examination on those statements is not inevitable - more often than not there is none.

The system works very successfully. The object of both proving a prima facie case and fairly advising the accused of the evidence is generally accomplished to all parties' satisfaction. There would be no question that among criminal lawyers the disclosure of information that takes place at a preliminary hearing is of invaluable assistance in the factual preparation of the defence, the assessment of plea, and the isolation of issues for argument at trial.

10 Refer ss 4 and 5 Summary Proceedings Amendment Act 1985 which inserted a new Part VA in the main Act.

11 Section 173A(2)(c) - except in the cases referred to earlier which fall under Part VA Summary Proceedings Act 1957.

There have undoubtedly been occasions in which the process has been abused by prolonged, vexatious and irrelevant questioning - but in a situation where some thousands of lawyers hold individual practising certificates and have the right to conduct their cases in the manner in which they see fit, it is not unexpected that there should be the occasional abuse of process.

Conclusion

The disclosure process which operates in the criminal law works successfully. Realistically the criticisms of abuse, cost and delay do not significantly detract from the advantages the process offers. This offers a degree of support to the argument that a pre-trial deposition system should be an available option in civil litigation.

IV. WHAT ORAL DISCOVERY PROVISIONS EXIST IN OVERSEAS JURISDICTION?

In Australia and the United Kingdom the machinery of discovery is the same in principle. Discovery is primarily documentary. While interrogatories allow some inroads to be made into the silence of an opposite party there are generally no provisions which enable one party to orally interrogate the other party.

A. *The English Position*

In England there is no provision for the pre-trial oral examination of witnesses in the ordinary course of conduct of civil litigation. The only means of obtaining such an examination is in RSC O 26 r 5:

> If any person on whom interrogatories have been served answers any of them insufficiently, the court may make an order requiring him to make a further answer, and either by affidavit or an oral examination as the court may direct.

In relation to this provision *Halsbury* states:[12]

> The order may be that the further answer be by affidavit or by oral examination , but the latter mode is only adopted in exceptional cases. Where it is ordered the scope of the examination is not larger than that of interrogatories, and the party examined can only be required to give such an answer as would have been sufficient if given in the affidavit in answer to the interrogatories.

Halsbury cites *Litchfield* v *Jones* in support.[13] In the *Litchfield* case interrogatories were administered by the plaintiff to the defendant, who answered in an unsatisfactory manner. It was only when the fourth answer to two of the interrogatories was still insufficient that the court ordered the defendant to answer the interrogatories by viva voce examination pursuant to the precursor of O 26 r 5.

12 13 *Halsbury's Laws of England* (4ed) para 140.
13 (1884) 54 LJ Ch 207; (1884) 51 LT 572.

The plaintiff used the opportunity to cross-examine the defendant for four days before the examiner on what was subsequently described by Pearson J as:[14]

> ... a roving cross-examination of the defendant, no question hardly, as far as I can look through the depositions, being directly strictly and plainly to the questions which the defendant was bound to answer.

In the course of his judgment Pearson J referred to the long-standing (and draconian) practice of the court, which was primarily directed at obtaining an answer to the interrogatory. He stated:[15]

> But this order is in conformity with the old practice of the court, and it is the practice which existed as long as I can remember in the profession; and upon referring to the old text-book of Daniel, both the older edition and the more modern edition, I find the same thing stated, that in the old days if an answer was insufficient, all that was required was this: the defendant was put into prison until upon interrogatories directed strictly and solely to so much of his answer as would be sufficient he had put in a sufficient answer, and if the answers that he did put in to those interrogatories after he had been committed were or were supposed to be insufficient, then the judge himself examined him so as to get a sufficient answer, but an answer simply directed to the points in which the former answer had been sufficient.

In *Lawson* v *Odhams Press Limited*[16] Lord Green MR stressed the reluctance of the court to permit oral cross-examination in an interlocutory proceeding. Considerable emphasis is still placed in England on the rarity of orders under O 26 r 5. Atkin cautions that:[17]

> Whilst the court may order an oral examination of the person answering the interrogatories, such an order is infrequently applied for and will only be made where there are special circumstances.

Having regard to those authorities it is easy to understand why such oral examinations are not readily pursued.

The weight of such authority and the fact that English litigators are conditioned to think in terms of documentary discovery probably means that the oral examination has never been given a fair test in that jurisdiction. It is ironical that as early as 1830, long before the enactment of the Federal Rules for Civil Procedure in the United States, the second report of the 1830 Common Law Commission[18] had considered the issue and had been in favour of a limited form of oral examination. Prior to expressing any

14 (1884) 51 LT 572.
15 Ibid 573.
16 [1949] 1 KB 129, 137; [1948] 2 All ER 717, 720-21.
17 22 Atkin's Court Forms (2 ed) at 462 and 486 (Form 17).
18 Parliamentary Papers Vol XI 1830.

recommendation the Commissioners circulated questions on pleading and practice to prominent lawyers. The material inquiry by the Commission was in question 27:[19]

> Would it not be desirable, in order to obtain the benefit of a discovery without having recourse to a Court of Equity, that the parties in a cause should be examined upon oath, either personally, or by interrogatories? At what stage of the proceedings should this be done, and before whom, and what regulations would you suggest for the purpose of carrying this measure in to effect?

The questionnaire was sent out to a total of 12 persons. Of these only three expressed support for the proposal. Five were opposed, three expressed no view and one saw potential benefits. Of those who supported the measure James Manning expressed his answer in terms which are attractive even today:[20]

> I see no objection to the transferring of the power of examining the parties to a cause upon interrogatories to a Court already seised of the cause, from one in which the proceedings must be originated, for the sole purpose of getting at the discovery. I think the object of the inquiry would be less liable to be defeated if the examination proceeded viva voce; not, however, giving the examinant time to evade the inquiry, as before Commissioners of Bankruptcy, but taking down the questions and answers in short-hand, and with the power of cross-examining and re-examining.

The Commission[21] subsequently recommended that a party be ordered to attend before the court to give verbal answers to written questions before a court officer in the presence of the legal representatives of the parties. Apparently no action was taken to implement the proposal. In 1853 another Common Law Commission suggested that a party could be orally examined before a court officer: "... in any ... case in which it may be made to appear essential to justice ..."[22] Again, nothing seems to have happened - apart from the implementation of the provision in RSC O 26 r 5 (formerly O 31 r 11).

A further hundred years later a Law Reform Committee[23] expressed opposition to any discovery by oral pre-trial examination. Among the various measures it discussed (and rejected) were:

(a) The pre-trial conference procedure embodied in rule 16 of the Rules of Civil Procedure for the District Courts of the United States;[24]

19 The 30 questions in the survey are set out in The Common Law Commission 1830 Parliamentary Papers Vol XI 1830 Appendix A.

20 Ibid 38-39.

21 Ibid 21-23, 71-72.

22 Parliamentary Papers Vol XI 1852-3:36-37.

23 *Final Report of the Committee on Supreme Court Practice and Procedure* (Cmnd 8878, July 1953 - the "Evershed Report"). The Evershed Report considered a number of measures relating to discovery and the expedition of the trial process under a section entitled "The Summons For Directions", Section III p 70.

24 Ibid para 215, p72.

(b) Discovery by examination - the Canadian practice;[25]

(c) The (South Australian) summons for immediate relief (which contained a provision for persons to be orally examined);[26]

(d) The pretrial exchange of witnesses' names and proofs of evidence of each party's witnesses.[27]

Fifteen years later English law reformers were still against the idea of pre-trial disclosure.[28] The Winn Report dealt with the issue of pre-trial disclosure conservatively and was dismissive of the pre-trial oral examination[29] which had by then successfully operated for quite some years in Canadian and United States jurisdictions.

Did the Evershed and Winn Committees have convincing reasons for the rejection of the pre-trial examination? The Evershed Report dealt with the Canadian system in three paragraphs.[30] It referred to the evidence of a barrister and solicitor of the Supreme Court of Canada who had given a favourable description of the discovery by examination procedures which existed in the various provinces, and in the District Courts of the United States. Evidence was given of the popularity of this method of discovery and of the fact that it was not only useful for "clearing the decks" but that it also produced a large number of settlements before trial.[31]

The Evershed Report reached a "clear conclusion that it would not be appropriate"[32] as "we feel certain that it would become a costly proceeding".[33] It was alleged[34] that Canadian procedure did not provide the opportunity given by the RSC for defining issues for discovery and that the objectives attained by the Canadian procedure should be attainable by other means under English rules.

The Evershed Report seems to have been reluctant to depart from traditional practice as to the disclosure of information. Its report rejected suggestions for pre-trial conferences,[35] and rejected the idea of exchange of witnesses names and/or proofs of evidence[36] - all measures which were not then part of the English system but which could probably have assisted in orderly and speedy conduct of litigation.

25 Ibid para 219, p73.
26 Ibid para 222, p74.
27 Ibid paras 299-302, pp99-100.
28 *The Report of the Committee on Personal Injuries Litigation* (Cmnd 3691, July 1968 - "The Winn Report").
29 Ibid paras 353-255.
30 Ibid paras 219-221.
31 Ibid para 219.
32 Ibid para 220.
33 Ibid para 221.
34 Ibid para 220.
35 Ibid para 218.
36 Ibid paras 299-302.

The Canadian evidence was that the fees charged by lawyers for deposition attendances were not high and that the costs of making the evidence available in transcript form were relatively low. The Evershed Report was nevertheless able to find that under the English system (a split as opposed to the fused profession which operated in Canada) costs would be significantly higher.

The Winn Committee took a similarly negative view to freeing up the provision of information among litigants. To be fair, this appears to have been no more than a reflection of those who were in practice at the time. As with the 1830 Common Law Commission, the Winn Committee circulated a working paper posing inter alia a question as to whether or not there was an advantage in bringing the parties together at a preliminary stage in the interlocutory proceedings. Most of the replies the Committee received were strongly opposed to the idea. As an example of the general reaction the Report set out the argument of the Protection and Indemnity Association that in its experience pre-trial conferences achieved only rough justice. An American report[37] was also relied on as evidence that pre-trial conferences did not have any marked tendency to get cases settled or to shorten trials. The Winn Report rejected the idea of an exchange of proofs of evidence during the interlocutory stages of an action.[38]

While these views did not directly touch on the merits of pre-trial deposition process they give a pointer to the generally conservative approach taken by the Committee. It is therefore not surprising that a discovery process which would have been a marked departure from longstanding English procedure was treated in a cursory fashion.[39] The Winn Report dismissed the concept of oral examination for discovery as so complicating, delaying and increasing the cost of litigation that it should be rejected.[40]

One wonders if the English rejection of the American and Canadian procedure had any nationalistic flavour. Perhaps it may be facile to suggest that the English reaction was due to a rather disdainful view of Americans and their legal system. However in many ways the English approach reflects the reserve of the traditional English gentleman. On the other hand the American system, in keeping with a more ebullient character, permits virtually open-ended discovery.

The Evershed and Winn Reports did not seem to seriously attempt to analyse the American or Canadian reaction to the use of the pre-trial oral examination despite many favourable articles and analyses of the American system having been published, at least by the time of the Winn Report.[41]

37 Ibid para 354; *Dollars Delay and the Automobile Victim: Studies in Reparation for Highway Injuries and Related Court Problems* (Bobbs-Merrill Company, 1968).

38 Ibid para 368.

39 Paras 353-355.

40 Ibid para 355.

41 See the articles and authorities referred to in J B Levine *Discovery: A Comparison Between English and American Civil Discovery Law with Reform Proposals* (Clarendon Press, Oxford, 1982) Chapter VI notes 7-16 and 31.

In 1961, only seven years before the Winn Report, Columbia University had done a field survey of pre-trial discovery for the purpose of a report to the American Federal Advisory Committee on Rules of Civil Procedure.[42] It had carried out a study of cases in the State Superior Court of Massachusetts where at that time oral pre-trial examination was not available to litigants. Although the survey[43] showed that lawyers practising in the State system used documentary discovery extensively, the gains in terms of information were not seen to match what might have been obtained for a similar type of cost and effort in a jurisdiction which had the right of oral discovery.

Massachusetts would have been an excellent model for the Winn Committee to consider. The pre-trial oral examination of witnesses was introduced into the Massachusetts State Court system in 1967. Although this was only a short time before the Winn Report was published,[44] the introduction of the system obviously made a favourable impression because Levine states:[45]

> In 1971 Chief Justice Tauro of the Massachusetts Supreme Court described it as a "success" and "probably the most significant advance in recent Massachusetts legal history".

At the same time as the pre-trial deposition hearing was being rejected in the civil law, English lawyers were fighting to preserve its counterpart in the criminal law. The cause for their concern was the intention of Parliament to reform the preliminary inquiry (similar to our preliminary hearing) held in respect of indictable offences. This was subsequently done by sections 1-7 of the Criminal Justice Act 1967. That Act was the English forerunner of New Zealand's Summary Proceedings Amendment Act 1976 which introduced section 173A to our preliminary hearing procedure. The use of written statements instead of oral evidence at the preliminary hearing, committal by consent and other procedures[46] was designed to make the system more efficient.

However, in the lead up to the introduction of the English provisions (and due to uncertainty as to the precise reform it would make) there was considerable analysis of the merits of the preliminary hearing system. Reference to some of the points made in that debate seems to demonstrate a certain lack of consistency in the position taken by the English in relation to pre-trial oral examinations.

42 *Project for Effective Justice, Columbia University, Field Survey of Federal Pretrial Discovery*, V-1-10 (1965) (Unpublished Report to the American Federal Advisory Committee on Rules of Civil Procedure).

43 Above n41, 63.

44 July 1968.

45 Above n41, 63 citing Tauro *"The State of the Judiciary"* 208-9.

46 Described more fully in Carlisle "The Criminal Justice Act 1967 - Its Procedure and Practice" [1967] Crim L R 613.

David Napley referred[47] to keen support from English solicitors to preserve the preliminary hearing. Some of the relevant arguments were:

(a) The vast majority of practising solicitors with daily experience of the preliminary hearing were convinced that it should remain as a valuable part of the administration of justice.

(b) The Council of the Law Society supported the preservation of the committal procedure. In a memorandum of February 1964 the Council summarised the advantages of taking depositions as:

(i) Clarification of the issues to be determined at trial;

(ii) The testimony of witnesses was recorded at an early date.

(iii) The proceedings were materially shortened by clarification and arrangement of evidence presented at the preliminary hearing.

(iv) Witnesses whose evidence was of a formal nature were relieved of attendance at trial.

Napley saw the value of the deposition hearing as follows:[48]

> In experienced hands the preliminary inquiry can be conducted so that the deposition provides a signpost to the advocate at the trial as to which questions should and which should not be put to the witnesses; it can lay the foundation for the tactical conduct of the proceedings and it may relieve the accused, and sometimes does, of the hardship of going for trial.

His comments echo similar remarks made by American lawyers[49] in relation to their civil deposition process. It is not unusual to find such similar views; whatever the jurisdiction, whatever the forum, litigators come back to the same point - "knowledge is power."

Most of the arguments put forward by Napley were accepted[50] by the proposers of the reform, who really did not seek to challenge the value of the deposition process. However they suggested that the defence would not wish to use the full scale former version of the preliminary hearing in every case - ie that although it would be

47 Napley "The Case for Preliminary Inquiries" [1966] Crim L R 490; (1966) 63 Law Society's Gazette 91.

48 Ibid 493.

49 Eg "Depositions as Evidence" (1983) 9 Litigation 25; Hamilton "Taking and Defending Depositions" (1985) 11 Litigation 20; Jerome P Facher "Taking Depositions" *The Litigation Manual - a Primer for Trial Lawyers* (published by the Section of Litigation American Bar Association, 1983) 3.

50 See "The Case for Reform" [1966] Crim LR 498.

appropriate in some cases, the majority of criminal matters would proceed more quickly under the alternative system.

That last point is relevant to the introduction of a deposition system to our discovery process. It would be too rigid to suggest that it should be a mandatory procedure - for not every case, nor perhaps the majority of cases would merit the use of depositions. However there can be little doubt that in some cases it would be a valuable option to have - and why should litigants be deprived of such an attractive alternative in such cases?

B. *The Australian Position*

In the main Australian jurisdictions a notice for discovery of documents and one set of interrogatories can be served as of right. Further interrogatories can be administered if the court grants leave. An important exception to this is in New South Wales where discovery and interrogatories are not available in tort cases for death and personal injury unless the court orders otherwise. This limitation is to reduce expense and delay.

It is interesting to note from statistics[51] that in a survey of 562 New South Wales cases only 65 involved formal discovery. It was not possible from the information provided to ascertain the date of the sample and the period over which it was taken. However it was apparent from the figures that the restriction on discovery in personal injury cases had a major effect - in that class there were only 7 out of some 379 cases in which discovery was obtained. Interrogatories were only administered in about 5% of the cases. The Australian Institute of Judicial Administration Incorporated ("AIJA") report also referred[52] to Victorian statistics. Although those figures are now well out of date they showed that there were lengthy delays in answering interrogatories and providing affidavits of documents. In many cases there were significant delays before parties even filed applications for discovery or interrogatories. The delays involved were partly due to the cumbersome enforcement procedure necessary if the opposite party defaulted in its discovery obligations.[53]

In a discussion[54] on delays caused by the unnecessary use of discovery, an interesting dichotomy appeared in New South Wales and Victoria practice. Because of the limitation on discovery in the former jurisdiction, New South Wales practitioners thought it unnecessary to discover and interrogate in most cases. On the other hand Victorian practitioners thought it almost essential to do so. The divergence of views of practitioners in the same country who have become used to their own systems illustrates how difficult it may be to effect changes to entrenched views.

51 These statistics were published in *Delays and Efficiency in Civil Litigation* Australian Institute of Judicial Administration Incorporated ("AIJA", 1985) 78-79.

52 Ibid 80-81. The figures are taken from a 1976 Victoria Law Reform Commissioner Report "Delays in Supreme Court Actions."

53 Ibid 83 note 7.

54 Ibid 84 para 9.19.

The AIJA report compared Australian discovery procedures with those in the United States. Although the report referred to a number of different surveys on the American system,[55] it made no recommendations nor even discussed whether or not it would be advantageous to have oral deposition discovery in any Australian jurisdiction.

The AIJA suggestions for reform were[56] that:

(a) Narrative pleadings may obviate the need for interrogatories;

(b) There ought to be automatic discovery with set time limits for compliance;

(c) Discovery should be restricted (except with leave of the court) to certain types of litigation.

Points (a) and (c) may have relevance in the later discussion in this paper of possible alternatives to the pre-trial deposition hearing.

C. *An Example of the Canadian Position - the Saskatchewan Rules of Court*

The Rules of Court of the Province of Saskatchewan discovery provisions are set out in rules 212-240. Rule 212 requires automatic discovery of documents. Those documents may be inspected by the other party (rule 213). In the absence of co-operation the court may order compliance. Questions of privilege are determined by the court, which has the power to inspect documents (rule 215(2)). There are the usual sanctions for non-compliance (rule 217) and a restriction on the use of documents not disclosed (rule 218). The examination for discovery provisions (pre-trial oral examination of witnesses at which depositions of their evidence are taken) are contained in rules 222-240.

There is an important limitation on such examinations: they are confined to any party to an action. There is a limitation to one such examination (rule 223(4)) unless the court orders otherwise (the exception only applies in the case of officers and servants in the employ of a corporation which is a party to the proceeding). The formal examination may take place at any time after the statement of defence has been delivered (rule 226). The formal procedure (rule 227) is to obtain an appointment from the registrar of the local court nearest the place where the person to be examined resides. The person to be examined may be subpoenaed (rule 228) and is liable to the sanction of contempt (rule 231) for failing to attend or for refusing to properly answer any question. Objections to questions may be taken by the witness (rule 232). The offending questions are then taken down by the examiner and sent to the local registrar whereupon the validity of the objection shall be decided by the court (costs shall be in the discretion of the court).

55 Ibid 85-86 notes 10-15.
56 Ibid 87-89.

The person to be examined may be required to bring documents and records and may be examined accordingly. The examination (rule 237) is taken by an official court reporter, otherwise by a person approved by both parties and sworn by the examiner. The deposition is then normally transcribed and certified as accurate (rule 237). The deposition is returned to the court in which the proceedings are being conducted. The deposition may be used in whole or in part (rule 239), provided that where the answer does not reflect the true position the party affected may request the judge to put in such other part or parts by way of explanation of the passage complained of.

The costs (rule 240) of the examination for discovery are in the discretion of the court. The court has the sanction of being able to order the party at fault to pay for the costs of the deposition where the examination has been "... held unreasonably, vexatiously or at unnecessary length ...". Comments from the bar indicate that significant information (for both plaintiff and defendant) can be elicited by an oral deposition examination:[57]

> ... it appears that effective use of discovery will usually result in complete disclosure of an opponent's case as it is known to the opponent at the time of the discovery ... if properly used, a lengthy and thorough discovery should reduce the time required at trial or remove the necessity of trial altogether in a great many cases.

D. *Practical Aspects of the Examination for Discovery*

Discussion with a practising Canadian attorney[58] in late July 1988 confirmed that the examination for discovery is still regarded by litigators as an essential tool. In recent years the use of legal service companies has meant that most deposition recording is now done by private court reporting companies instead of through the court system. This has meant a quicker but more expensive service for the parties.

The examinations are recorded by an operator using a shorthand machine. Tapes from the machine can be read directly by the court reporter's computer thereby avoiding any need to manually type up a transcript. The reporter double-checks the computer prepared transcript with the original shorthand tape. The effect of this technology is that transcripts are generally available within a two week period of the examination. If necessary the report can be rushed so it is available the day after examination.

In Canada most examinations are held at one of the lawyer's offices, avoiding any need for the court to schedule the examination. The cost of the reporters is (at July 1988) a basic charge of 85 cents a page (which covers the operator's attendance as well as a transcript of the tape). In addition there may be a mileage charge and a charge of $25 per hour for any overtime - generally after 4.30 pm. The oral examination ensured the opposite party's account was fully elicited and understood. The transcript was useful for cross-examination at the subsequent trial. Because of the popularity and success of

57 R B Drewry "Discoveries made easy", Canadian Bar Association 1982 mid-winter meeting, at pp 8 and 10.

58 Mr G Heinrichs, of Messrs Robertson, Baynton, Drawer (Alberta, Canada).

the examination for discovery (with both plaintiffs and defendants) it appears unlikely that it will be restricted in any significant way in the foreseeable future.

E. *The Scheme of the Federal Rules of Civil Procedure in the United States*

The purpose of discovery in American courts is fundamentally the same as in other common law systems. In *Hickman* v *Taylor*[59] the Supreme Court stated that "... mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation."[60]

Rules 26, 28-30 and 32 are the primary provisions dealing with depositions upon oral examination. Rule 26(a) provides a wide variety of methods for discovery. Rule 26(b) also permits a wide range of material to be traversed in the discovery process, including specific areas such as the contents of insurance agreements, the disclosure of material obtained for trial preparation and the discovery of the parties expert evidence. Rule 26(c) permits a litigant to obtain a protective order to control the extent and process of discovery. Rule 26(d) permits a party to use the permitted methods of discovery in any sequence. Rule 26(e) provides that a party has no duty to supplement the response to a request for discovery except as to the identity and location of persons having knowledge of discoverable matters and the identity and substance of expert testimony. Rule 26(f) is a 1980 amendment giving the court more control of pre-trial discovery proceedings. In the same spirit rule 26(g) was added in 1983, requiring the attorney requesting discovery to certify that discovery was sought for proper purposes. If subsequent events show the certification is incorrect the court has a power to award costs (or impose and appropriate sanction) for the breach. This provision is specifically aimed at curbing discovery abuse.

The combined effect of rules 28 and 29 means that the parties may in writing arrange that depositions may be taken before any person at any time or place on any notice etc. If such stipulations are not agreed rule 28 takes effect. It provides that within the United States the deposition shall be taken before and officer authorised to administer oaths or before a person appointed by the court in which the action is pending. Rule 30 provides that any party, generally without leave of the court except in special circumstances, may take the testimony of any person, including a party, by deposition upon oral examination. Attendance may be compelled by subpoena. Rule 30(b) provides the means for the taking of the deposition (which may be done by telephone). The 1980 amendment to rule 30 (b)(4) permitted the parties to have a deposition recorded other than by stenographic means. This enables the videotaping of the deposition process - now a common feature.[61] The American provisions differ from the Canadian provision in that rule 30(c) provides that evidence objected to shall be taken subject to the objections. However, it should also be noted that rule 30(d) permits the party being

59 *Hickman* v *Taylor* 329 US 495 (1947).

60 Ibid 507.

61 Figari and Loewinsohn "Videotaped Depositions Come to Court" (1988) 14 Litigation 35; David M Balabanian "Medium v Tedium: Video Depositions Come of Age" in *The Litigation Manual - a Primer for Trial Lawyers* (1983) 11.

examined to apply to the court for termination or limitation of the examination. Consequently it would permit curtailment of a vexatious examination. Rule 32 regulates the use of depositions in court proceedings. All or any part of a deposition may be used. The same provisions as in Canada apply where only part of a deposition is used unfairly. Rule 32(a)(3) permits the use of the deposition in a number of circumstances including death, witness at a distance, inability to testify or inability to subpoena the witness. Rule 32(b) permits objections to admissibility of the content of the deposition to be heard at trial.

1. *History of the FRCP*

The Federal Rules of Civil Procedure were adopted in 1938. One of the drafters of the discovery section of the 1938 rules wrote that the new procedural rules:[62]

> ... mark the highest points so far reached in the English speaking world in the elimination of secrecy in the preparation for trial. Each party may in effect be called upon by his adversary or by the Judge to lay all his cards upon the table the important consideration being who has the stronger hand, not who can play the cleverer game.

In an earlier article the same author had stated:[63]

> Lawyers who constantly employ [discovery] in their practice find that an exceedingly valuable aid in promoting justice. Discovery procedure serves much the same function in the field of law as the x-ray in the field of medicine and surgery; and if its use can be sufficiently extended and its methods simplified, litigation will largely cease to be a game of chance.

The benefits anticipated from the Rules were:

(a) Greater assistance in ascertaining the truth;

(b) Safeguards against surprise at the trial;

(c) Detection of false fraudulent and sham defences in claims.

62 Sunderland "Discovery Before Trial Under the New Federal Rules" (1939) 15 Tenn LR 739.

63 Sunderland "Improving the Administration of Justice" 167 Annals 60, 76.

However, to some American commentators[64] *Hickman* v *Taylor*[65] opened a Pandora's Box of discovery abuse by declaring that the Federal Rules were to be "accorded a broad and liberal treatment". In *Hickman* the Supreme Court stated:[66]

> No longer can the time-honoured cry of "fishing expedition" serve to preclude a party from enquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession.

The American Bar was not slow to respond to the opportunity provided by the new rules. It is plain from statistical analysis[67] that the use of oral depositions became the largest single interlocutory proceeding in cases in the federal courts after the rules were adopted. For example, of a survey of some 700 cases in 1938 and again in 1941 the use of the deposition process jumped from 105 to 507. It is believed that that trend has continued.

2. *Alleged abuse of the FRCP*

In the ensuing years many people believed that the philosophy behind the Rules was being undermined. For a graphic description of the problem one can refer to the comments of Judge Goettel:[68]

> Discovery was intended to be a domesticated bird-dog to help flush out evidence. It has become, instead, a voracious wolf roaming the countryside, eating everything in sight.

One distinguished writer said:[69]

> ... that the adversary character of civil discovery, with substantial reinforcement from the economic structure of our legal system, promotes practices that systematically impede the attainment of the principal purposes for which discovery was designed. The adversary structure of the discovery machinery creates significant functional difficulties for, and imposes costly economic burdens on, our system of dispute resolution ....

64 M L Weissbrod "Sanctions under Amended Rule 26 - Scalpel or Meataxe? - The 1983 Amendments to the Federal Rules of Civil Procedure" (1985) 46 Ohio St LJ 183.

65 *Hickman* v *Taylor* 329 US 495 (1947).

66 Ibid 507.

67 "Tactical Use and Abuse of Depositions under the Federal Rules" (1959) 59 Yale LJ 1.

68 Referred to by Sherman "The Judge's Role in Discovery" 3 Rev Litigation 89, 96-97. In *Herbert* v *Lando* 441 US 153, 179 (1979) the Supreme Court expressed the view that discovery had been "... not infrequently exploited to the disadvantage of justice."

69 Brazil "The Adversary Character of Civil Discovery: a Critique and Proposals for Change" (1978) 31 Vand LR 1295, 1296.

And later:[70]

> The theory was that if opposing parties and counsel knew before trial what the evidence would be with respect to all important issues, they would feel capable of predicting reasonably the outcome of the litigation. Therefore, the parties would decide to settle their dispute in order to avoid the expense, inconvenience and risk of the trial itself. The crucial premise on which this theory rests is that discovery would result in full disclosure of the relevant evidence. If disclosure was only partial, or if there was reason to fear it was only partial, opposing parties and counsel would either miscalculate the strength of their positions or feel incapable of predicting reasonably what the outcome at trial would be.

By making all the potential unprivileged evidence available to both sides well in advance of trial, discovery was supposed to shorten and streamline the trial process by narrowing issues and organising the "mass of indigested and undifferentiated data" into an orderly package for efficient and meaningful presentation.

Brazil criticised this presumption. His view was that the contrary position had resulted:[71]

> Instead of reducing the sway of adversary forces in litigation and confining them to the trial stage, discovery has greatly expanded the areas in which those forces can operate. It has also provided attorneys with new weapons, devices, and incentives for the adversary gamesmanship that discovery was designed to curtail. Rather than discourage "the sporting or gain theory of justice", discovery has expanded both the scope and complexity of the sport. Modern discovery has also removed most of the decisive plays from the scrutiny of the Court. Because so many civil cases are settled before trial and because the conduct of attorneys is subject only to fitful and superficial judicial review during the discovery stage, much of the decisive gamesmanship of modern litigation takes place in private settings.

Brazil was not alone in his criticisms of post *Hickman* developments. Among some of the other complaints were:[72]

(1) Delays responding to interrogatories and document requests;

(2) Improperly narrow answers to the questions for information in (1);

(3) The location and timing of a deposition as a tactical weapon designed to harass or annoy an opponent;

(4) Large numbers of depositions being scheduled;

70 Ibid 1302.
71 Ibid 1303-1304.
72 Above n64, 186.

(5) Litigators would often try and conceal the existence of those who were capable of giving evidence damaging to the case.

In other cases abuse occurred for purely mercenary reasons - for example, some lawyers have sold discovery materials to other attorneys prosecuting similar courses of action. This practice is more likely to flourish in an environment where class actions involving similar issues in personal injury and product liability cases are frequent, eg aircraft crashes and car manufacturing cases. In addition the behaviour referred to would probably amount to professional misconduct and a possible contempt of court because of our common law rule that a party who obtains documents on discovery is not entitled to use those documents except for the purpose of the proceedings.[73] The prospect of abuse of process for the kind of mercenary purpose referred to is not high in New Zealand.

3. *Positive features*

It should not be assumed from the above criticisms that the bad features of the American system come close to outweighing the good. Not all commentators agreed that discovery abuse was prevalent in the American system.[74]

Setear points out the advantages[75] which may accrue to the litigant by the use of the deposition process:

(a) It is a less expensive and far more reliable method of acquiring information than using private investigators or other forms of professional information gatherers.

(b) The information acquired can increase the strength of a litigant's position in settlement negotiations or chances of his victory if the case goes to trial.

(c) The process reduces the litigant's uncertainty about the likely outcome of the litigation.

(d) The process may also provide information useful to the litigation outside the context of the immediate litigation.

(e) It preserves the testimony of witnesses who might be unavailable to testify the time of trial.

73 See *McGechan on Procedure*, above n2, 3-372 (5) for a full discussion of the relevant authorities and principles.

74 For example see Professor Levine "Abuse of Discovery: or Hard Work makes Good Law" (1981) 67 ABA J 565; *Judicial Controls under Civil Litigation Process: Discovery* (Federal Judicial Centre, Washington, 1978) - an analysis of 3000 cases which failed to disclose any significant evidence of discovery abuse; see also the articles cited by Weissbrod, above n64, 194.

75 Setear "Discovery Abuse under the Federal Rules: Causes and Cures" (1982) 92 Yale LJ 352.

(f) It provides a check on adverse witnesses who might try to change their testimony in the courtroom.

(g) It enables judges to simplify issues and matters of proof in pre-trial conferences.

4. *Reasons for possible shortcomings in the FRCP deposition system*

Prior to the 1980s the FRCP discovery process may have been capable of abuse for some of the following reasons:

(a) Depositions were not properly regulated by sanctions for abuse nor were conducted under the close supervision of the court;

(b) There were no real criteria for assessing whether the examination was necessary in terms of evidence required, expense, or the nature of the case generally.

(c) A deponent had to answer the questions put during a deposition even though the evidence might have been inadmissible. Although counsel could object those points were not determined immediately but were noted by the stenographer and became effective only if the deposition was to be offered at trial. This encouraged the practice of persisting in a line of enquiry which might have been offensive or objectionable, but which the questioner knew would probably be answered because of the difficulty associated with getting a court order to terminate it (see next clause).

(d) While rule 30(b) limits the scope of the proposed examination if it can be shown that it will lead to "annoyance embarrassment or oppression" and although the deponent can seek a protective order during a taking of the deposition under rule 30(d) if the questioning is being conducted in bad faith or in such a manner as unreasonably to annoy, embarrass or oppress, the options are seldom used. The reasons for this reluctance are:

(i) American courts had a history of being reluctant to muzzle the deposition process unless a clear case was made out. This was partly due to the reluctance of judges to become immersed in the merits of proceedings which were still at an interlocutory stage.

(ii) There will necessarily be a delay while the deposition is interrupted and the point argued in court.

(iii) The costs of the argument in (ii).

(iv) The further costs of reinstating the deposition (especially if the witness is at a distance).

5. *Reform in the American system*

Many of the drawbacks (real or imagined) of the American system may have been resolved by recent amendments to the FRCP. In the early 1980s reformers were anxious to see the rules tightened because of allegations of discovery abuse. The Supreme Court approved changes to the FRCP which were then passed by Congress to become effective on 1 August 1983.

The main object of the new Rules was to encourage greater judicial control over the management of civil cases. Weissbrod[76] refers to the significant parts of the amendments:

(a) A new rule 16 requires a discovery schedule within 120 days of a complaint (statement of claim) being filed.

(b) Rule 26(b)(1) directs the court to limit any discovery that is found to be "unreasonably cumulative or duplicative" or that can be obtained from a more convenient, less burdensome, or less expensive source.

(c) Under rule 26(b)(1)(ii) the court must limit discovery when the discoverer "has had ample opportunity" through previous discovery efforts "to obtain the information sought".

(d) Rule 26(b)(1)(iii) permits a judge to limit "unduly burdensome or expensive" discovery requests after considering "the needs of the case, the amount and controversy, ... the parties resources, and the importance of the issues at stake".

(e) Rule 26(g) requires the lawyer to certify that discovery has been carried out to certain standards. The rule permits the court to impose sanctions on either the attorney, the client or both if any of its requirements are not met.

A survey of judges in the northern and southern districts of Ohio conducted six months after the new rules went into effect disclosed that the sanctioning authority of the new rule 26(g) had not been used. Weissbrod concludes:[77]

> Despite the avalanche of commentary triggered by the 1983 adoption of the amendments to the Federal Rules of Civil Procedure, the new rules appear to have produced a few changes in the way discovery is sought and sanctioned. The residual reluctance of Judges to impose sanctions has been helped along in its gradual decline by Rule 26(g) and the Advisory Committee Notes, but no great rush to the Courthouse door by lawyers seeking sanctions has begun.

Most United States litigators appear to support the proper use of the deposition process. One would expect the best guide to the merits to be given by practitioners

76 Above n64.
77 Above n64, 201.

rather than by academics. Most experienced counsel speak favourably of the process. Some examples:

(a) In most cases depositions are the most important discovery tool, both in the preparation for trial and as a prelude to settlement.[78]

(b) In preparing for trial, depositions play an important and often crucial role. Tactics and strategy planning, taking, and using depositions frequently determine the outcome of litigation and the trial lawyer cannot neglect or indiscriminately delegate this vital phase of the case. If he does so, he may discover to his regret that he has lost or wasted a valuable tactical opportunity which may never be regained. Preparation of a case rarely fails to benefit from a deposition, and in general the decision to depose at least the adverse party should be the rule.[79]

(c) In jurisdictions in the United States where both such a scheme of oral examination and interrogatories have been available, lawyers, judges, and legal scholars have had the distinct impression that practitioners on the whole prefer the oral mode.[80]

(d) Perhaps the most striking example of all is a California experiment[81] in which depositions were eliminated for claims up to $25,000. Many lawyers (especially those representing defendants in personal injury claims) strongly opposed the change on the basis that the restriction detrimentally affected their ability to prepare and present their cases.

The true test of the merits of the oral deposition system is whether it is supported by those who have to work with it. If the deposition procedure unfairly favoured either a plaintiff or a defendant one would expect to find a strong opposition to its continued use. The position seems to be that among American and Canadian lawyers there is considerable support for the system provided it is used properly.

F. *A Continental View - Germany*

German courts work on an inquisitorial basis. The proceeding commences with a complaint which sets out the key facts in a cause of action and seeks a remedy. However, the German pleading also refers to sources of evidence for its main factual

78 Hamilton "Taking and Defending "Depositions" (1985) 11 Litigation 20.

79 Facher "Taking Depositions", above n49.

80 J B Levine, above n41.

81 See "American Experiments for Reading Civil Trial Costs and Delays" (1982) 1 Civil Justice Q 151 referred to in *Delays and Efficiency in Civil Litigation* (Australian Institute of Judicial Administration Inc, 1985) 78-79. The Australian Report referred to a number of different Americans surveys which examined so-called discovery abuse. There did not seem to be sufficient evidence in that material to pass over the deposition process because of its possible drawbacks.

contentions, ie witnesses names, relevant documents, etc. However, in most cases neither side will have conducted any significant search for witnesses, as digging for the facts is primarily the work of the judge.

After reading the file the judge schedules a hearing and notifies the lawyers. He invites the parties to attend and then commences his investigation into the facts. The lawyers do not lead witnesses - the judge questions them but does not take a verbatim record of the testimony. He dictates a summary of the testimony into the dossier he compiles.

Langbein describes counsel's involvement with the process of examining the evidence as follows:[82]

> After the Court takes witness testimony or receives some other infusion of evidence, counsel have the opportunity to comment orally or in writing. Counsel use these submissions in order to suggest further proofs or to advance legal theories. Thus, non-adversary proof taking alternates with adversary dialogue across as many hearings as are necessary. The process merges the investigatory function of our pre-trial discovery and the evidence-presenting function of our trial. Another manifestation of the comparative efficiency of German procedure is that a witness is ordinarily examined only once. Contrast the American practice of partisan interview and preparation, pre-trial deposition, preparation for trial and examination and cross-examination at trial. These many steps take their toll in expense and irritation.

The possibility of the German approach being adopted in New Zealand is slight at this stage. However as stated in the introduction to this paper, it is possible that greater judicial intervention in litigation may lead to judges not only being involved in the control of procedure, but may also lead to them becoming involved in the marshalling and assessment of evidence in the pre-trial stage. Such developments will no doubt occur slowly - but in the finish we may develop a hybrid of the English and European systems. Whether or not that proves to be the ultimate way of achieving the objects in rule 4 is at this stage something that is too difficult to judge.

V. INTERMEDIATE STEPS OR ALTERNATIVES TO THE ORAL DEPOSITION SYSTEM

In examining options or alternatives to the oral pre-trial deposition system it is logical that one should first assess the object of having a deposition process. One can then examine what alternatives might take the litigator to the same point. The main benefits of the deposition system are:

(a) The removal of the element of surprise by the full disclosure of the opposite party's case;

82 Langbein, above n6, 825.

(b) The testing of the credibility of the opposite party's witnesses.

There are a number of options which might substantially remove the element of surprise and provide disclosure of an opposite party's case. For example:

(a) Narrative pleadings which set out material parts of the evidence and annexe exhibits to the statement of claim;

(b) Pleadings which are accompanied by statements of evidence and exhibits;

(c) The exchange of briefs of evidence at an appropriate pretrial stage.

A. Narrative Pleadings

In recent years courts have become used to seeing more than the bare bones of a case supplied in the statement of claim. It is not unusual to set out full particulars of negligence (or of some other cause of action). Although there is authority[83] which discourages the pleading of evidence it is not often that such challenges are seen now.[84]

In view of the authorities referred to there would probably have to be some formal relaxation of the prohibition on pleading evidence before full narrative pleadings could safely be used. This would enable a party to make his pleading as explicit as desired. In many cases plaintiffs might wish to establish the strength of their claim by setting it out in a detailed narrative accompanied by material exhibits.

Notwithstanding the help this might give the court and opposite parties to understand the claim, it might still fall far short of providing the opposite party with the full evidential basis of the claim. It would also be open to plaintiffs to keep their pleadings to a minimum if they so desired. However, despite the shortcomings it would probably be a useful option for a party to exercise because it would generally help satisfy the objects of rule 4.

B. A Claim Accompanied by Evidence

This practice is one which is relatively common in New Zealand. In almost all interim injunction applications, summary judgment applications, applications for review under the Judicature Amendment Act 1972 and formerly in claims under the Family Protection Act 1955, affidavits disclosing each party's evidence are filed before the substantive hearing.

83 *Meikle* v *NZ Times Company (No 2)* (1904) 23 NZLR 894; *Public Trustee* v *McArley* [1942] NZLR 12.

84 But see *Thomson* v *Westpac Banking Corporation* (unreported 17 April 1986, Wellington High Court, A 303/85, Eichelbaum J) although in that case the pleading of evidence (reproduction of text from documents) was a small part of more significant complaints about the form of the statement of claim.

There seems to be no reason in principle why litigators in those areas should have the exclusive advantage of ascertaining the evidence to be adduced by the opposite party. Other trial lawyers would no doubt be pleased to have a similar option. The only possible disadvantage is that in the long term the leading of oral evidence may be avoided altogether - that process being substituted by the provision of the written brief as evidence-in-chief. In some cases that would concern litigators who were anxious that a witness gave all his evidence orally because his credibility was in issue. Again, notwithstanding any shortfalls in such a system, the objects of rule 4 would be assisted.

C. *The Exchange of Witness Briefs*

Recently[85] the executive judges at Auckland and Hamilton issued a practice note relating to the pre-trial exchange of briefs of evidence. It is clear that such exchanges are presently on a trial basis - but if successful the judges indicate that appropriate amendments will be made to the High Court Rules.

In suitable cases the courts intend to encourage the practice. This will be subject to the settlement of issues such as the time of the exchange of briefs, whether the exchange is contemporaneous or consecutive, whether the briefs should be filed in court, whether the statements should be sworn or signed and/or countersigned by the respective party's solicitors, etc.

This last option is merely an extension of the other alternatives mentioned in this section of the paper. If adopted in its full form, ie the exchange before trial of the duly sworn briefs of evidence of all parties' witnesses, it would certainly go a long way to meeting the first main object (full disclosure/removal of surprise) of the oral deposition system.

In those circumstances there would certainly be a strong argument that an oral deposition system would then be unnecessary. But that argument should take into account two points. The first is that the other principal object of the deposition system is to allow a litigator to assess the credibility of the opposite party's witness or witnesses. A written brief cannot be a proper substitute for that. For example, the brief may be the lawyer's words, not his client's; the witness may not come up to brief at trial; the witness's demeanour and presentation of narrative may be unsatisfactory.

Secondly, a good code of civil practice should in principle provide the option of pre-trial depositions. It is doubtful if anyone could contest the fact that there would be value in certain circumstances of having discovery by way of a deposition hearing - subject to appropriate controls to see that the objects of rule 4 were met.

For example, in a serious fraud case if there are some hundreds of thousands of dollars at stake and the case turns on issues of credibility, why should the plaintiff and the defendant not only be entitled to documentary discovery, and/or narrative pleadings

85 See (20 July 1988) 287 "Lawtalk".

and/or an exchange of witness briefs, but also an opportunity to depose each other's material witnesses before the substantive hearing?

VI. CONCLUSION

Those are certainly options which would satisfy some of the advantages of the oral deposition system. However, it may be unnecessarily inflexible to say there must be a restriction on this type of pre-trial discovery. Provided rule 4 is kept in mind, there seems to be no harm in the High Court Rules offering the litigant the ultimate form of pre-trial discovery - the opportunity to cross-examine the principal witness or witnesses of an opposite party. The absence of such an option infers that the lawyers and judiciary of this country are not responsible enough to decide when such an option could be most appropriately used to satisfy the spirit and objectives in rule 4. Such a contention is untenable.

The hardest part of the introduction of a deposition system would be in overcoming the prejudice associated with using a different legal process. However, overseas experience indicates that if the process was available it could be used extensively as litigators quickly became acquainted with the advantages it could confer.

The merits of some form of a deposition discovery system seem to be beyond question, having regard to the favourable comments of experienced Canadian and American attorneys. The deposition process deserves at least a limited trial in New Zealand.

The risk is that any experimentation will be shunned because lawyers here are not used to the process. To resist innovation in this important area of litigation for that reason is to perpetuate the view Colton satirised when he wrote: "We hate some persons because we do not know them; and we will not know them because we hate them".[86] The proposal deserves a more rational response.

86 Charles Caleb Colton *Lacon* (1825).