Just prove it

Lay witness statements and admissibility in civil cases

Gillian Coumbe QC
Auckland, New Zealand

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Contents

"It is of essence that material presented to a court as evidence must have a tendency to prove or disprove a fact in issue….If it does not, it is a mere distraction and has no place being in the courtroom"[1]

Introduction

1. Pity the poor lay witness. As well as providing relevant testimony about what the witness saw or did at the time, their written brief is often overloaded with other, inadmissible content.

2. This typically includes an exhausting 'walk-through' commentary on the common bundle. The brief may be punctuated with expressions of disbelief, even outrage, at the opposing party's staggeringly bad conduct. A mass of irrelevant material is always popular, as well as generous offerings of hearsay (preferably double or triple), argument, and quasi-expert opinion. And this is all presented in the stilted, charmless voice of the lawyer who crafted the brief. We have all seen the way it is done…

3. This desire to present the entire case – evidence, opening and closing submissions, chronology -- through a witness of fact, who is then cross-examined on their 70 page epic, is not a new problem. It emerged with the introduction of written briefs in the early 1990s. The response to these excesses was, for a long time, rather laissez-faire. Objections were seldom taken, or upheld. Judges were content to give "appropriate weight" to offending material. This contrasted sharply with the Australian courts' brutally strict approach to admissibility.

4. However, in recent years, the New Zealand courts have increasingly clamped down. The days of lawyers playing "fast and loose"[2] with the rules of evidence may be drawing to a close.

5. The Supreme Court's landmark judgment in *Bathurst Resources Ltd v L&M Coal Holdings Ltd*,[3] is a reminder that the Evidence Act 2006 does underpin civil cases. The Court affirmed that the admissibility of all evidence in court proceedings, including cases involving the interpretation of written contracts, is determined by the Act.[4] Furthermore, evidence will be rigorously scrutinised under ss 7 and 8 – the "engine room" of the Act -- for relevance and probative value.

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1 *Commerce Commission v Bunnings Ltd* [2020] NZCA 310, at [29] (***Bunnings***), per Kõs P (giving the Court's reasons).
2 To use the words of the Deputy Judge in *Prime London Holdings Ltd v Thurloe Lodge Ltd* [2022] EWHC 79 (***Prime London Holdings***), at [45].
3 *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2021] NZSC 85 (***Bathurst***).
4 At [54]-[58] per Winkelmann CJ and Ellen France J (with whom Glazebrook, O'Regan and Williams JJ agreed, at [232]).

6. The Rules Committee is currently pondering the fate of written witness briefs. The Committee's latest preference is for evidence in chief to be given by affidavit, rather than written brief. This proposal is still under consideration.

7. In my earlier paper, "Show me the evidence",[5] I highlighted the misuse of factual briefs. This paper is the sequel (but hopefully more of a smash hit). It covers the following three topics:

   (a) ***The proper content of written witness statements***. I discuss how to ensure compliance with the key requirements of the Evidence Act and the High Court Rules 2016 (**Rules**), and refer to recent case examples. My comments apply equally to briefs and to affidavits containing evidence in chief at trial.[6]

   (b) ***How judges are approaching pre-trial rulings***. Challenges to admissibility are more frequent, and where there are significant and obvious transgressions judges are now more willing to intervene before the trial.

   (c) ***A look at the Rules Committee's proposals***. It is difficult to see the point of dumping written briefs at a time when the courts' enforcement of the rules of evidence is on the rise, and lawyers are becoming more mindful of their obligations. The present direction of travel should be encouraged, not diverted by mere changes of form. Simply replacing briefs with affidavits will not prevent misuse.[7] A preferable course might be to tighten up the requirements about how witness briefs are prepared, as has recently happened in the United Kingdom.

The proper content of lay witness statements

8. What is a lay witness brief? It is a written statement setting out the evidence proposed to be given by a witness of fact, as opposed to an expert witness. Its proper purpose is to provide in writing the evidence which the witness would be allowed to give as *oral* evidence in chief at trial.

A check list – what's in and what's out?

9. The brief is a vehicle for evidence that is relevant, admissible, and complies with the Rules. The following is an essential checklist of what should *not* appear in a lay witness brief:

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5 Gillian Coumbe QC. "Witness statements in civil cases – show me the evidence", paper presented at a Litigation Skills Masterclass seminar, Auckland, 25 November 2015, https://www.gilliancoumbe.co.nz/publications/

6 Although briefs are the default mode for written evidence in chief at trial, the Rules also allow the use of affidavits where both parties agree and/or the Court so directs: rr 9.55 and 9.56. Similar obligations as to content apply: r 9.76.

7 The Committee itself has acknowledged that it may "exacerbate" the situation, as discussed in paragraph [110] below.

(a) testimony that is not relevant: s 7 of the Evidence Act, r 9.7(4)(g) of the Rules;

(b) the dreaded 'legal-speak'. The brief must be in the words of the witness, not of the lawyer involved in drafting it: r 9.7(4)(b);

(c) unnecessary commentary on the trial bundle, or lengthy quotes from those documents: r 9.7(4)(f);

(d) information about which the witness does not have personal knowledge, unless it is admissible as a hearsay exception: ss 17 and 18 of the Act.

(e) expressions of opinion, other than to the limited extent permitted by s 24 of the Act;

(f) material in the nature of submission or argument: r 9.7(4)(d);

(g) material that may be viewed as unduly prejudicial or likely to prolong the trial: s 8 of the Act;

10. When preparing a brief your first question must always be: is this material relevant? If not, stop there. If it is, your next question must be whether it is inadmissible, or excluded, because it belongs to one of the categories listed in paragraph 9 above. If you adhere to this approach, your brief should at least clear the admissibility and compliance thresholds. The further inquiry as to what *weight* should be given to the evidence will be for the trial judge.

Relevance

11. The United Kingdom Supreme Court recently observed that "In the modern law of evidence relevance is the paramount consideration".[8] This approach is also reflected in s 7 of the Evidence Act, which provides that:

> (1) All relevant evidence is admissible in a proceeding except evidence that is –
> (a) inadmissible under this Act or any other Act; or
> (b) excluded under this Act or any other Act.
> (2) Evidence that is not relevant is not admissible in a proceeding.
> (3) Evidence is relevant to a proceeding if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.

12. In *Bathurst* our Supreme Court stated that s 7 provides the Act's "fundamental principle"[9] that all relevant evidence is admissible, unless excluded under an Act, and that all irrelevant evidence is inadmissible. Thus, relevance is a *prerequisite,* to the admissibility of all evidence.[10] "

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8 *Shagang Shipping Company Ltd v HNA Group Company Ltd* [2020] 2 Lloyds Rep 527, [2020] UKSC 34, [2021] 1 All ER 905, [2020] 1 WLR 3549, at [104] per Lord Hamblen and Lord Leggatt (with whom Lord Hodge and Lord Burrows agreed).

9 *Bathurst*, above n 3, at [33].

10 For good measure, r 9.7(4)(g) also states that every witness brief "must be confined to the matters in issue".

13. But relevance, although necessary, is not always enough. Relevant evidence will be *prima facie* admissible, but may still be knocked out under the Evidence Act or another Act.

What does "relevant" mean?

14. The definition of relevance in s 7(3) — a "tendency to prove or disprove anything that is of consequence to the determination of the proceeding" — is a not a high threshold.[11] As Kõs P stated in *Bunnings*, for evidence to be "relevant" as defined, it must meet twin requirements:[12]

    (a) First, the evidence must be *probative* (that is, have "a tendency to prove or disprove"). Importantly, the question is not whether the evidence has sufficient probative tendency. The question is whether it has "some, that is any" probative tendency. It must have some tendency "in logic and common sense" to advance the proposition in issue. If it does not, "it is a mere distraction and has no place being in the courtroom".[13]

    (b) Secondly, the evidence must be probative of something *material* (that is, "of consequence"). The offered proof must relate to a fact in issue in the case. In a civil case, the facts in issue are determined by the pleadings,[14] which in turn should reflect the substantive law which defines the particular cause of action or ground of defence. To give a simple example, if the cause of action is breach of contract, the plaintiff must prove these material facts: that there was a contract between the parties, that the defendant breached the contract, and that the plaintiff suffered loss as a result of the breach.

15. Thus, it is not enough that evidence appears relevant on its face. There must be some rational basis for the court to infer that the evidence is probative on a material issue in the case.

16. Lay clients will not always have a good understanding of what is or is not relevant. They may also want to use their evidence as an opportunity to unburden themselves about the endless issues and grievances that have preoccupied them since the dispute arose. It the lawyer's role to provide structure and guidance (without hijacking the brief). This often includes restraining the client's enthusiasm to tell the whole, unedited story. This point was made very colourfully by Pembroke J in *Thomas v SMP (International) VP Nominees Ltd*, a judgment of the New South Wales Supreme Court, when describing a trial affidavit full of "unfiltered outpourings":[15]

> I have to say that, to use the most neutral language, [the] affidavit is inappropriate, confusing and unhelpful. It is a prolix examination carried out without any lawyerly discrimination. The majority of it is irrelevant to the resolution of the particular factual and legal issues that I must decide.

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11 *Wi v R* [2009] NZSC 121, [2010] 2 NZLR 11, at [8] per Tipping J
12 *Bunnings*, above n 1, at [32].
13 At [29] per Kõs P.
14 *GRP Management Ltd v VP Nominees Ltd* [2022] NZHC 71 (***GRP Management***), at [6] per Fitzgerald J.
15 *Thomas v SMP (International) Pty Ltd* [2010] NSWSC 822, at [10].

> It can fairly be described as a gallimaufry – difficult to understand and impossible to disentangle. It is a jumble that masks rather than illuminates the facts…The sheer length of the affidavit is oppressive. It consists of 6,657 paragraphs spread over nearly 500 pages. There are 63 pages of detailed objections by the defendants. Page after page explains in agonizing detail the life and times of Mr Sullivan, Mr Thomas and Mr Willet. Dozens and dozens of persons who have no serious involvement in the issues for determination are introduced in cameo roles in the narrative. Minor celebrities and rugby league identities feature frequently. Little attempt has been made to meaningfully correlate the narrative recounted in the affidavit with the particular facts that have been pleaded.

17. Lack of relevance is a huge issue in practice, even though most offending witness statements are not as extreme as in *Thomas*. Some recent examples are discussed below.

The Bunnings case

18. The *Bunnings*[16] case highlights that evidence that appears relevant on its face will not meet the s 7 threshold, if, on closer scrutiny, it has no probative value. The case is an interesting illustration of the dividing line between "*logical probative connection*" (required under s 7), and "*probative weight*" (which is for the trial judge).

19. The Commerce Commission laid charges against Bunnings of misleading advertising, for claiming that it offered the "lowest prices". The Commission sought to rely on the affidavit of Mr Murray Snowden, a senior manager at Mitre 10 (New Zealand) Ltd, Bunnings' main competitor. Mr Snowdon's affidavit contained a summary of the results of an automated price comparison survey undertaken by Mitre 10. He offered the evidence as a general witness of fact.

20. Bunnings promptly challenged the affidavit, claiming it was not relevant because the results evidence, *of itself*, had no logical tendency to prove or disprove the price comparison. The Commission maintained that the evidence was relevant, and that its reliability was for the trial judge to determine.

21. Kõs P began by identifying the fact in issue to which Mr Snowdon's evidence was directed. It was "whether a substantial proportion of identical products were priced more cheaply at Mitre 10 than at Bunnings". The affidavit made two assertions of fact: (i) a direct assertion that the price comparison outputs were reliable; and (ii) an implied assertion that the automated process reliably matched and compared products and prices offered by Bunnings and Mitre 10.

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[16] *Bunnings*, above, n 1. Although the case involved a summary prosecution, and the pre-trial admissibility hearing was under s 78 of the Criminal Procedure Act 2011, the judgment's findings are also relevant to civil cases.

22. Each assertion "required a foundation to have a tendency to prove the fact in issue concerning comparative pricing". That foundation had to come from observation or (where permissible) a combination of fact and expert opinion. Neither assertion had such a foundation because:[17]

    (a) Mr. Snowden was not presented as an expert, and was not qualified to verify the accuracy of the programme;

    (b) Nor did his affidavit offer any evidence of his own personal observations of checking or auditing the outputs of the automated process. The Court inferred that he had not undertaken such an exercise;

    (c) The actual comparative database of electronic matches underlying the output results had not been provided.

23. In the absence of a proper foundation, the results presented were "simply conjecture based on an unproved automated process". They had no tendency to prove the fact in issue. The affidavit therefore lacked relevance and was inadmissible.[18]

The Bathurst case

24. In *Bathurst*[19] the Supreme Court unanimously agreed on the approach to admissibility of extrinsic evidence in the interpretation of contracts, a matter that had long been the subject of controversy and debate. The Court articulated a single test of *relevance*. It applies equally to evidence of (i) the factual matrix (which the Court labels "commercial context and purpose"), (ii) prior negotiations, and (iii) subsequent conduct.

Sections 7 and 8 are the "touchstones"

25. The Supreme Court emphasised that the question of relevance must be assessed under s 7 of the Evidence Act, in light of the substantive law of contract.[20] The Court blended the wording of s 7 with its articulation of the objective approach to interpretation, and restated the test of admissibility as: follows:[21]

> …evidence is prima facie admissible if it has a tendency to prove or disprove anything of consequence to determining the meaning the contractual document would convey to a reasonable

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17 *Bunnings*, above n 1, at [37]-[42] per Kõs P.

18 These apparent deficiencies appear to be because of Mitre 10's understandable reticence in placing confidential and commercially sensitive information before the Court. Kõs P did uphold the Commission's power to issue a summons, giving Mitre 10 the standing to apply for confidentiality orders.

19 *Bathurst*, above n 3.

20 At [56].

21 At [62].

> person having all the background knowledge reasonably available to the parties in the situation they were in at the time of the contract.

26. Put more shortly, the evidence must prove something relevant to the contract's objective meaning.[22] Again, the term "prima facie" is used because even relevant evidence may still be inadmissible under s 8 or another exclusionary provision. The Court stressed that s 8 "will often be relevant to a court's task in determining admissibility".[23] Under s 8(1)(b), for example, evidence may be excluded if its probative value is outweighed by the risk that it will "needlessly prolong the proceeding". This provides a means of keeping out material that is only marginally relevant, and discouraging excessive amounts of material.

27. The framing of the approach in terms of a single test of relevance is not really surprising. That was already the standard for the factual matrix. Extending it to prior negotiations and subsequent conduct endorses Tipping J's approach in *Vector*[24] and continues the liberalising path taken in that case. It is quite a bold forward step, and, at least at present, a specifically New Zealand one. In the United Kingdom and Australia, for example, long-standing substantive principles of contract law (the "exclusionary rules") continue to exclude prior negotiations and subsequent conduct from consideration in aid of interpretation.[25]

28. However, the Supreme Court is clear that ss 7 and 8 are now the "touchstones" for all admissibility issues, using the "objective standard for contract interpretation as the standard against which relevance and probative value must be measured".

Supreme Court's guidance on the application of ss 7 and 8

29. The Supreme Court has provided some guidance as to how its reformulated approach can be applied to the various categories of extrinsic evidence. These are described as "indications" only of the likelihood of admission under ss and 7 and 8, not "hard and fast rules". In relation to *prior negotiations*, for example:

    (a) Evidence will continue to be irrelevant and inadmissible, to the extent that it proves only one party's subjective intention or belief as to the meaning of the words, or what their undeclared negotiating stance was at the time.[26]

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22 *Biscuit Creek Forest Ltd v Vallance* [2021] NZCA 577, at [31] per Miller J (giving the reasons of the Court).
23 *Bathurst*, above n 3 at [64].
24 *Vector Gas Ltd v Bay of Plenty Ltd* [2010] NZSC 5, [2010] 2 NZLR 444.
25 In my paper "The Supreme Court's *Bathurst* judgment", presented at an ADLS webinar on 13 September 202, I discuss this issue further at [3.23]-[3.25], https://www.gilliancoumbe.co.nz/publications/
26 *Bathurst*, above n 3, at [75].

(b) If, however, there is objective evidence of a prior common consensus or mutual understanding, that will be relevant and, subject to s 8, admissible. The intention needs to be communicated, but need not be express on both sides:[27]

> Logically, the party who claims to have communicated their intention would have to be able to point to something – even if just silence (in circumstances where a reply might be expected) – on the part of the other party to bring that intention into the realm of mutual understanding.

(c) The admissibility of evidence to show that the parties understood a word to carry a particular meaning within a profession, trade or industry "is now also to be determined by applying the Evidence Act". Objectively ascertainable evidence, which could include words or conduct showing that the parties understood words to carry that meaning at the time of the contract, will be relevant, subject to s 8.[28]

30. In relation to subsequent conduct:

(a) Again, subsequent conduct that evidences one party's subjective intention or belief is irrelevant and inadmissible.

(b) Subsequent conduct need not necessarily be mutual. However, non-mutual conduct is more likely to be relevant to a claim for estoppel.[29]

(c) In assessing the relevance of subsequent conduct, it must not be forgotten that the court is interpreting the contract at the time it was made.[30]

(d) Where the subsequent conduct does cross the s 7 relevance threshold, s 8 will be especially important.[31] Care will be needed to assess the probative value of the evidence. The Supreme Court gave two examples of "problematic evidence" that may be barred under s 8:

(i) The first is conduct that occurs after the actual dispute has arisen. This is very unlikely to be admissible as "by then the parties will have retreated into their respective corners, and their conduct may well be self-serving". Its admission is likely to add to time and cost, especially in light of the inevitable calling of rebuttal evidence.[32]

(ii) The second is conduct of executives of corporate parties who had no prior involvement in negotiating the contract and no knowledge of its background. "This evidence will not

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27 At [76].
28 At [83].
29 At [89].
30 At [89].
31 At [90].
32 At [90].

be probative if their actions do not represent the views of the relevant corporate party at the time the contract was formed."[33]

Treatment of the factual evidence in Bathurst

31. One of the key issues was the proper interpretation of cl 3.4 of the parties' mining exploration contract, which provided that the first performance payment of US$40m was triggered when 25,000 tonnes of coal had been "shipped from the Permit Areas". L&M argued that "shipped" simply meant transported in a generic sense. This included trucking coal from the site, which had occurred. Bathurst argued that it meant exported by ship, which had not occurred. The Supreme Court unanimously agreed with the courts below that "shipped" just meant transported. The text "strongly supported" this interpretation. The Court then considered the extrinsic evidence, including this factual evidence:

(a) ***Factual matrix--genesis and purpose***. The Court had regard to objective evidence of the commercial genesis and purpose of the contract, including a feasibility study, to conclude that while the focus of the project was export coking coal, it was not the project's sole focus. The commercial purpose did not exclude the extraction of thermal coal (which could only be sold locally).[34]

(b) ***Prior negotiations-testimony of negotiators***. L&M relied on evidence given by a Mr Geoff Loudon, former managing director of L&M, and a Mr Hamish Bohannon, former chief executive and director of Bathurst. They had been the chief negotiators of the agreement on behalf of L&M and Bathurst respectively. Unusually, both witnesses gave evidence for L&M. Their testimony was "*ad idem* as to what they had intended the [agreement] to record". This included a "common view" that "shipped" simply meant "transported". In the High Court Dobson J thought that to the extent the evidence established mutual intentions, it was admissible.[35] Alternatively, he considered that such evidence of shared intention was within the concept of "background".[36]

However, the views of Mr Loudon and of Mr Bohannan were not actually communicated to the other at the time. The evidence was no more than the individual subjective intent of two different witnesses. As counsel for Bathurst submitted, "repetition by a number of witnesses of the same subjective recollections did not change their character."[37] The Court of Appeal

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33 At [90].
34 At [145].
35 *L&M Coal Holdings Ltd v Bathurst Resources Ltd* [2018] NZHC 2127, at [40] and [58]-[61].
36 Above n 35, at [40], "Ruling 1-admissibility of evidence" (annexed to the judgment) at [13], [14].
37 Above n 35, Ruling 1, at [12]. It is also difficult to see how this subjective evidence could have been part of the factual matrix or "background".

accepted that submission, and the Supreme Court also agreed that "without some outward manifestation" of the mutual understanding the evidence was of individual subjective belief or intent and so "of no relevance to the objective exercise of contractual interpretation".[38] It was therefore inadmissible under s 7. It was also evidence that could have been excluded under s 8 as it was likely to have needlessly prolonged the proceeding.

(c) ***Subsequent*** conduct. Each party tried to rely on the subsequent conduct of the other as being inconsistent with the interpretation that the other was now advancing:

(i) ***Letters sent by L&M***. Bathurst relied on letters sent by L&M's solicitor to obtain regulatory consents on which the Agreement was conditional. L&M asserted that this was "mutual" conduct because L&M was plainly helping Bathurst with efforts to obtain the consents. In the letters the description of Escarpment focused on the export of coking coal. The Supreme Court accepted that the evidence was "marginally relevant", but thought it should have been excluded under s 8. It was unhelpful, and, because it invited the admission of "further low value evidence" to rebut it, it would have unnecessarily prolonged the proceeding.

(ii) ***Bathurst's financial statements***. L&M relied on Bathurst's 2014 to 2016 financial statements, annual reports and presentations, which acknowledged that the amount of thermal coal sold locally had (or would) trigger the first performance payment. The Court of Appeal disregarded this evidence, on the grounds that it was unilateral, and equally consistent with a mistaken understanding as with a common understanding. However, the Supreme Court disagreed. It was "marginally relevant" because Bathurst had consistently, throughout the series of documents, expressed a view contrary to the one it was now advancing.[39] The Court did not attach much weight to the evidence, but said it was "properly regarded as corroborative of the interpretation we favour".

(iii) ***Letter sent by Bathurst***. Finally, L&M relied on a letter of June 2016 sent to L&M by Bathurst's chief executive, in which he did not deny that the performance payment had been triggered but said the non-payment was not a breach. The Supreme Court said this was admissible on the same basis as the financial statements.[40]

32. What is striking is that in the end, and despite the vast amount of evidence adduced, the Supreme Court took into account very little extrinsic material. The Court's interpretation was firmly based

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38 *Bathurst*, above n 3, at [154]
39 At [151].
40 At fn 157.

in the text. The admissible extrinsic evidence provided "little assistance as to the interpretation of the term."[41]

The IAG case

33. A subsequent Court of Appeal judgment, hot off the press, *IAG New Zealand Ltd v OBE Insurance (Australia) Ltd*,[42] further illustrates the use of extrinsic evidence in contract interpretation cases. The case concerned defective repairs to an earthquake damaged home in Christchurch. The appeal turned on the proper construction of an indemnity clause in the Rebuild Solution Master Agreement ("RSMA") between IAG and the project manager, Hawkins. A lot of extrinsic evidence had been adduced in aid of interpretation.

34. The Court of Appeal held that the High Court Judge was entitled to have regard to the prior negotiations between IAG and Hawkins because that evidence "illuminat[ed] joint intention, and thereby the objective terms of the RSMA".[43] Further, a comparison of the concluded RSMA with the 2020 version was also relevant because it "enhanced the probative value of the negotiation evidence".[44] However, the subsequent operational documents (created after the signing of the RSMA) could not be relied on by AIG as evidence of subsequent conduct. There was no evidence that the personnel who had drafted them had had any involvement in negotiating the RSMA and knew its background:[45]

> How then can it be said, as required by the Supreme Court in *Bathurst*, that they represent the views of the relevant corporate party at the time the contract was formed.

Evidence of admitted facts is irrelevant

35. If a pleaded fact is admitted, then it is no longer an issue in the case, and evidence of that fact should not be led. It is irrelevant under s 7, or, if having some residual probative value, may be excluded under s 8(1)(b) of the Evidence Act. [46]

36. In *Lewis v JP Morgan Bank NA,*[47] Muir J made a pre-trial ruling that the extensive evidence relating to admitted facts was inadmissible. The plaintiff, Mr Lewis, was a very disgruntled former New Zealand CEO of the defendant JP Morgan. He sued JP Morgan, alleging breach of a settlement agreement, and injurious falsehood. He claimed that JP Morgan had damaged his prospects of employment with another bank, Westpac, by failing to confirm, when asked by Westpac, that he

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41 At [158].
42 *IAG New Zealand Ltd v OBE Insurance (Australia) Ltd* [2022] NZCA 208 (***IAG***).
43 At [63] per French J (giving the reasons of the Court).
44 At [66]-[67] per French J.
45 At [83] per French J.
46 *Parihoa Farms Ltd v Rodney District Council* (2010) PRNZ 8 (***Parihoa Farms***), at [11]-[13] per Duffy J.
47 *Lewis v JP Morgan Chase Bank NA* [2019] NZHC 832 (***Lewis***), Muir J.

had been its CEO. JP Morgan had therefore "discredited" him to Westpac. Mr Lewis' witness brief contained a vast amount of evidence relating to his appointment as CEO, the scope of that role, and the minutiae of related disputes.

37. Muir J ruled that because Mr Lewis' CEO role had been admitted by JP Morgan, this was all irrelevant, saying:[48]

> The admission of evidence to prove admitted facts is no more than a doubling up of proof, which in turn can only needlessly prolong a trial. It is hard to see how there could ever be a reason for proving something twice."

Not all disputed allegations in the pleadings are necessarily relevant

38. Although the pleadings govern relevance, that assumes of course that the pleading has been well drafted. The allegations in the pleading must be relevant to the particular cause of action or ground of defence. This point is also well illustrated by the *Lewis* case. Mr Lewis' statement of claim contained a number of "extraneous and peripheral allegations" that were denied by JP Morgan. Mr Lewis argued that because of the denials, evidence was necessarily admissible to establish the allegations. Muir J rejected that. JP Morgan was obliged under the Rules to admit or deny all factual allegations, and therefore had no option but to deny them. But it did not follow that the allegations were relevant. That assessment had to be made with primary reference to the causes of action.[49]

> Otherwise allegations about extraneous matters could be used as a Trojan Horse for the introduction of evidence which is inconsequential to the determination but which is being vented exclusively for "reputational" reasons

In the witness's own words

39. Rule 9.7(4)(b) states that every brief " must be in the words of the witness and not in the words of the lawyer involved in drafting the brief."

40. This is vital, for reasons of authenticity, reliability, and credibility. The courts are also increasingly concerned about the fragility of memory, and the very real risk that over-worked witness briefs will reflect the lawyer's reconstruction rather than the witness's genuine recollection.

41. The stodgy prose of the lawyer can usually be spotted at 100 paces. It has that instantly recognisable, deadening quality. Few witnesses will actually say: "I was mildly intoxicated, and became somewhat querulous". They will say: "I was drunk, and got into an argument".

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48 At [28] per Muir J, quoting Duffy J in *Parihoa Farms*, above n 46, at [11].
49 *Lewis*, above n 47, at [38] per Muir J.

Australians will say: "I grabbed a slab of frothies, got bloody hammered, and did me block". Let the witness speak in their own voice, however jarring. It will have a ring of truth about it.

42. During the trial, when the witness is questioned in cross-examination, it may become even more obvious that their brief contains "professional embellishment". In *Samsung Electronic* the witness's statement had been polished to perfection, but it was clear from contemporaneous emails written by the witness, and from cross-examination, that the witness actually spoke English as a second language. Jagose J was moved to state:[50]

> Mr Yoon's 308-paragraph initial written statement and 555-paragraph written statement "in reply", in particular, complied only with HCR 9.7(4)'s requirements (a) and (f). Compared to the evidence of his own writing and speaking, set out elsewhere in this judgment, his statements bore all the hallmarks of intensive legal authorship, including substantial submission.

43. In a recent case, *Queensland v Masson*,[51] that ended up in the High Court of Australia, it was only the plaintiff's oral evidence at trial that clarified a "seemingly erroneous" statement in his written witness brief. The case involved allegations of negligence against a paramedic. A young woman had suffered a severe asthma attack. Ambulance officers treated her at the scene, and immediately gave her the drug salbutamol. Later, en route to the hospital, they administered adrenaline. Sadly, she suffered irreversible brain damage from oxygen deprivation. She lived in a vegetative state, cared for by her parents, for over 13 years until her death. A damages claim was brought against the State of Queensland, alleging vicarious liability for the ambulance officer's failure to administer adrenaline at the outset.

44. A factual issue was whether or not the officer, Mr Peters, had initially considered the use of adrenaline. Mr Peters' written witness brief contained a statement that adrenaline was "not permitted" by the asthma guideline. However, it was clear from questioning during his oral evidence that he had in fact considered both drugs as an option, but decided that the young woman's initial clinical presentation militated against using adrenaline. The oral evidence proved critical. Nettle and Gordon JJ stated:[52]

> The oft unspoken reality that lay witness statements are liable to be workshopped, amended and settled by lawyers, the risk that lay, and therefore understandably deferential witnesses, do not quibble with many of the changes made by lawyers in the process – because the changes do not appear to many lay witnesses necessarily to alter the meaning of what they intended to convey – and the danger that, when such changes are later subjected to a curial analysis of the kind undertaken in this matter, they are found to be productive of a different meaning from that which the witness intended, means that the approach of basing decisions on the ipsissma verba[53] of civil litigation lay witness statements is highly problematic.

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50 *SCC (NZ) Ltd* v *Samsung Electronic New Zealand Ltd* [2018] NZHC 2780 (***Samsung Electronic***), at [202] ("Postscript").
51 *Queensland v Massan* [2020] HCA 28.
52 At [112] per Nettle and Gordon JJ.
53 I have no idea what this means.

45. A similar issue arose in *Lloyd v Belcomen Lakeview Pty Ltd*.[54] The affidavit of a key witness, Mr Ryan, had omitted a critical statement and so "presented a less than candid and fully truthful account". However, when giving evidence orally, his evidence had a "crystal clear ring of truth about it". Lee J blamed this on the way his affidavit had been prepared. It was less a reflection of the witness's unassisted recollection and more of a "closely drafted position paper put together by solicitors after pouring over contemporaneous documents with the assistance of the witness".

Identical or similar statements in multiple briefs

46. Another dead give-away is when multiple briefs contain identical, or eerily similar, statements on important issues. It is difficult to see how this could ever occur if the witness' own words are being faithfully reproduced. In *Blue Manchester*, a judgment of the England and Wales High Court, Stephen Davies J referred to two identical statements that had been made by two different witnesses. The statements were also drafted in a similar style. The Judge observed:[55]

> It cannot be coincidence that precisely the same words were used. In my judgment the fact that a legal representative is permitted to take primary responsibility for drafting a witness statement does not justify departing from the clear requirement that the witness statement should, where practicable, be in the witness's own words.

47. There is also a risk that such a chorus of evidence will be suggestive of collusion on the part of the witnesses, unless shown to be just the lawyer's shoddy work. A notable example is the judgment of the New South Wales Supreme Court in *Macquarie Developments Pty v Forrestier*, where it emerged that the defendants' solicitor had 'cut and pasted' large chunks of testimony, relating to critical discussions, from one witness's brief into his brother's brief.[56] That was said by the Judge to be "totally destructive" of the utility of that evidence.

48. In the *Samsung Electronic* case, Jagose J pointed out that the lawyer who had evidently drafted the brief had repeated exactly the same error (about the date of SCC's relocation) in Mr Yoon's brief and in the brief of another witness, Mr McDonald. This precise repetition 'exacerbate[d] the sense of legal authorship".[57]

Statements that are not in the first person

49. If the witness does not primarily speak in the first person that will also be a 'red flag'. I have yet to meet anyone who speaks continuously in the passive tense or the third person, even among my

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54 *Lloyd v Belcomen Lakeview Ltd* [2019] FCA 2177, at [109]-[110] per Lee J.

55 *Blue Manchester Ltd v Bug-Alu Technic GMBH* [2021] EWHC 3095 (TCC) (***Blue Manchester***), at [25] per Stephen Davies J.

56 *Macquarie Developments Pty Ltd v Forrestier* [2005] NSWSC 674, at [89] and at [61]-[65] per Palmer J. Discussed in "Show me the evidence", above n 5, at [51]-[53] and [56].

57 *Samsung Electronic*, above n 50, at [203] per Jagose J.

legal colleagues. In *Blue Manchester*, Stephen Davies J stated that "…it is difficult to see any justification for any part of the witness statement not being expressed in the first person".[58] This is a matter of substance, not merely form. As *Blue Manchester* illustrates, it will be unclear whether the evidence is the genuine, personal recollection of the witness, rather than pure comment or a retrospective narrative of documents.

Statements that merely confirm what is in another brief

50. A statement by a witness that they agree with what another witness says in their brief is also objectionable. Although expressed in the first person, it does not do what r 9.7(4)(b) requires, namely set out, in the witness's own words, what he or she personally recollects. In *Mansion Place*, for example, the claimant objected to evidence of this kind. O'Farrell J upheld the objection, stating:[59]

> In paragraph 5 Mr Higginbotthom purports to confirm the contents of Mr Kite's statements as true and accurate to the best of his knowledge and belief. This is of no probative value because much of Mr Kite's evidence is clearly not within Mr Higginbottom's knowledge. It is contrary to the requirement that the witness should give the evidence that he would be permitted to give if called to give oral evidence in chief. It should be redacted.

The need to brief witnesses early

51. In order to meet the requirement that the evidence be in the witness's own words, it is essential to brief the witness early, and at least prepare a draft statement as a 'work in progress', especially on key issues. Too often, the witness statement is prepared years after the relevant events, after efforts to settle have failed, and after a lot of time has been devoted to interlocutories. The is nothing like hearing a witness telling you their story.

52. If the witness is left at large for too long, their recollection will fade. It may also be contaminated by subsequent events, and become more susceptible to the influence of the briefing lawyers who have, by then, spent years honing their theory of the case. The witness's narrative should fashion the case, not the other way around.

Commentary on documents

53. Rule 9.7(4)(f) states that every brief "must avoid the recital of the contents or a summary of documents that are to be produced in any event". Briefs that infringe this requirement are also

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[58] *Blue Manchester*, above n 55, at [25]. The Judge identified in an Appendix the many paragraphs that needed to be converted into the first person.

[59] *Mansion Place Ltd v Fox Industrial Services Ltd* [2021] EWHC 2747 (TCC) (***Mansion Place***), at [56] per O'Farrell J.

likely to contain submission and opinion. Yet it is a practice that lawyers cling to. As Stephen Davies J put it, in *Blue Manchester:*[60]

> This in my view is a very good example of lawyers needing to be prised away from the comfort blanket of feeling the necessity of having a witness confirm a thread of correspondence, otherwise it might in some way disappear into the either or be ruled inadmissible at trial.

54. This is endemic. Although it most often occurs in the heavy cases – complex, high value, commercial cases where the events occurred over many years – it is also a problem in more modest cases. An extreme example was *JD Wetherspoon Plc v Harris*,[61] a decision of the English High Court of Justice. The "vast majority" of the brief of a Mr Goldberger, a director of the second to fourth defendants, was commentary on documents, as well as argument and opinion. The claimant applied (largely successfully) to strike out all but seven of the 231 paragraphs. Little of substance was left. The Judge stressed that this was an abuse:[62]

> Mr Goldberger would not be allowed at trial to give oral evidence which merely recites the relevant events, of which he does not have direct knowledge, by reference to documents he has read.

55. The *JD Wetherspoon* case seems to have instigated the growing call for lay briefs to focus on testimony, rather than describing documents that are already in evidence, and which the witness may not have created, or even seen at the time. As mentioned, there is also a growing view that documentary evidence is inherently more reliable that witness testimony.

56. In *GRP Management*[63] Fitzgerald J was highly critical of the practice of factual witnesses to providing what is "ultimately a subjective and one-sided commentary" on contemporaneous documents. This, her Honour said, is unhelpful and should be avoided. The documents "inevitably speak for themselves". This case involved a contract dispute about the purchase of a property. A house on the site was alleged to have been damaged by methamphetamine contamination. Both parties made pre-trial objections to the witness statements. For example, the plaintiffs challenged parts of the brief of Mr Zang, the defendant's witness. Mr Zang had expressed his views about what he meant by certain statements in his email correspondence with Mr Chang, and/or gave evidence about what the emails meant. The defendant submitted that Mr Zang's evidence was a necessary response to similar commentary given by the plaintiff's own witness, Ms Liu.

57. Fitzgerald J ruled that this part of Mr Zang's evidence was (with only limited exceptions) inadmissible, for several reasons:[64]

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60 *Blue Manchester*, above n 55, at [38].
61 *JD Wetherspoon Plc v Harris* [2013] 1 WLR 3296, [2013] EWHC 1088 (Ch);, Sir Terence Etherton C.
62 At [39].
63 *GRP Management*, above n 14, at [5] per Fitzgerald J.
64 At [84]-[86].

(a) The written communications should be left to speak for themselves. An "overriding commentary" on them by Mr Zang (or for that matter Ms Liu or Mr Chang) was not relevant or of assistance to the Court;

(b) Any such commentary will inevitably involve "a degree of spin or advocacy" as to how the party says the correspondence ought to be interpreted;

(c) It would create difficulties if a witness's (subjective) commentary on written correspondence was ordinarily admissible, and led to the need for other witnesses to be called to provide a "counter-commentary". The difficulty is compounded if the witnesses were not personally involved in the correspondence.

58. It is for counsel, not the witness, to provide the narrative derived from the documents, in the pre-trial chronology required by r 9.9, and in opening submissions. Argument about the meaning, effect, relevance, or significance of the documents is also for counsel.

59. However, a witness may still refer to documents where the evidence is relevant, and the reference is *necessary*. It may, for example, be necessary to:

(a) prove or disprove the date, content, or authenticity of the document;

(b) confirm whether the witness created the document, or saw the document at the relevant time;

(c) explain that the witness understood the document, or particular words or phrases, in a certain way at the time;

(d) provide any additional relevant evidence about what the witness said or did at the time, in response to the document;

(e) provide necessary 'linking' or background narrative;

(f) explain other evidence.

60. In *GRP Management*, where Fitzgerald J ruled Mr Zhang's commentary on his email correspondence with Mr Chang to be inadmissible, her Honour did make an exception for one statement which "reflected evidence of a factual matter." Mr Zhang had explained in his brief that at the time he received the email he assumed that Mr Chang's reference to a "right of pre-settlement inspection" was a reference to the inspection rights contained in a particular clause of the sale and

purchase agreement. The Judge declined to rule that evidence inadmissible; leaving its relevance for the trial judge to determine.[65]

Hearsay

61. In the internecine war that was the recent *Depp v Heard* defamation trial, Amber Heard's unfortunate lawyer was so flustered that, after putting a question to his own witness, he himself objected to the answer as "hearsay". This gaffe, together with the constant barrage of rapid-fire objections by Johnny Depp's lawyer, spawned a catchy 'trial theme song' called "Objection! Hearsay!". This has gone viral on social media.

62. Whilst hearsay objections may not be quite so 'all-out' in New Zealand courtrooms, hearsay is a common ground of challenge. A witness of fact normally describes his or her own actions and observations, rather than the observations of others. A hearsay statement, however, is a statement made by another person who is not a witness, that is offered in evidence to prove the truth of its contents.[66] Subject to specific exceptions, hearsay evidence is inadmissible.[67]

63. A significant exception, often relied on in the civil context, is s 18 of the Act, which provides:

> **18. General admissibility of hearsay**
> (1) A hearsay statement is admissible in any proceeding if –
> (a) the circumstances relating to the statement provide reasonable assurance that the statement is reliable; and
> (b) either:
> (i) the maker of the statement is unavailable as a witness; or
> (ii) the Judge considers that undue expense or delay would be caused if the maker of the statement were required to be a witness

64. The decision whether to use hearsay evidence, rather than call the person as a witness, must be made carefully, especially if the evidence is important. In order to rely on s 18, additional evidence will usually need to be adduced to satisfy the requirements of (i) reliability and (ii) unavailability[68] or undue expense or delay. This can easily derail, as the following cases illustrate.

The Zespri case

65. The briefs in *Zespri Group Ltd v Gao*.[69] were replete with hearsay. The intellectual property equivalent of a spy thriller, it is a story of a global superpower, smuggling, conspiracy, and two

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65 At [88](a). In *Vardy v News Group Newpapers Ltd* [2022] EWHC 946 (QB), Steyn J allowed some commentary to remain in the witness statement, on various grounds, at [108].
66 Section 4, Evidence Act 2006.
67 Section 17, Evidence Act 2006. In the case of affidavits in interlocutory applications and discovery affidavits, s 20 allows for the admissibility of hearsay statements.
68 As defined in s 16(2) of the Act.
69 *Zespri Group Ltd v Gao* [2020] NZHC 109 (***Zespri***), Katz J.

varieties of golden kiwifruit called G3 and G9. Zespri had exclusive rights to commercialise G3 and G9 under the Plant Variety Rights Act 1987 (**PVR Act**). Zespri had granted a G3 licence agreement to Mr Gao and his wife in relation to their own kiwifruit orchard in Opotiki. Rumours reached Zespri that the G3 and G9 varieties were being grown in China.

66. As a result of some sleuthing by private investigators, Zespri believed that Mr Gao had smuggled "budstock" into China for supply to a co-conspirator, Mr Shu, and had purported to licence Mr Shu to sell G3 and G9 throughout the whole of China. Zespri brought a proceeding against Mr Gao, his wife, and their company, aptly named Smiling Face Ltd, alleging breach of Zespri's exclusive rights under the PVR Act, and breach of the G3 licence agreement.

67. In granting Zespri a permanent injunction and damages of over NZD14m, Katz J described Mr Gao as a very unimpressive witness, lacking a "moral compass", who did not "place a high value on honesty."[70] However, despite Zespri's success, Katz J was critical of the "extensive" hearsay evidence contained in Zespri's evidence briefs. Her Honour observed that most of the hearsay was "obvious in nature, and some of it was double or triple hearsay. It should not have been included in the first place."[71]

68. The hearsay evidence in *Zespri* fell into three main categories, and each was considered separately:

    (a) Statements allegedly made by Zespri's investigators to Zespri's witnesses. The witness briefs of two of Zespri's senior managers, Mr Shane Max and Ms Sheila McCann Morrison, contained passages based on information provided by the private investigators. This evidence was held to be hearsay. Zespri argued that it should be admitted under s 18. Katz J was not satisfied as to the first limb of s 18, reliability. There was multiple hearsay. Although some of the challenged evidence was based on direct observations by the investigators, other evidence was based on what they were told by unnamed third parties, who in turn sourced their information from others. The Court could not therefore be satisfied that each statement in the "hearsay chain" was reliable. Katz J also expressed concern that Zespri had withheld the investigators' full reports from the defendants, on the grounds of litigation privilege. Zespri had disclosed only selected portions of the reports in evidence. This meant that neither the defendants, nor the Court, could review or test that evidence in the context of the full reports.

    As to the second limb of s 18, unavailability, Zespri asserted that this was met because the investigators feared for their personal safety and that of their families if they were to appear

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70 At [43].
71 At [15].

as witnesses. Katz J accepted that those fears were genuine. However, Zespri could have made more effort to allay those concerns by seeking comprehensive confidentiality orders to protect their identity, including that they give their testimony from behind a screen. [72] The evidence was therefore inadmissible as to the truth of its content.

(b) DNA testing of samples. Mr Max, who was a factual witness, gave evidence for Zespri that samples from China had been tested in a laboratory in France, followed by an analysis of the results in New Zealand, and that the results had tested positive for G3 and G9. His brief included a table of the results. However, Zespri did not call any evidence from either the French or New Zealand laboratories to prove the DNA results. Katz J ruled that that this was hearsay, something Zespri's counsel eventually acknowledged at trial. The DNA results could not be relied on for the truth of their contents, and so the Judge did not consider it further.[73]

(c) ***Statements made by Mr Shu to Zespri's witnesses.*** In their witness briefs, Mr Max and Ms McCann Morrison also gave evidence of assertions made to them by Mr Shu that he was growing G3 and G9. The Judge held that these were hearsay statements, but that they were admissible under s 18. The circumstances provided reasonable assurance that they were reliable. Mr Shu had a capacity for dishonesty, but he clearly had no motive to lie about growing the G3 and G9 varieties. If he had wished to lie about this, it is highly unlikely that he would have taken Mr Max and Ms McCann Morrison to visit his orchards to see his illicit operation. The hearsay statements were also wholly consistent with other evidence, including photographs and videos taken by Mr Max and Ms McCann.

The Judge also accepted that Mr Shu was unavailable as a witness, for two reasons. First, Mr Shu was in China and so could not be compelled by subpoena to give evidence in New Zealand. Secondly, there was persuasive evidence that he not would not voluntarily give evidence. Despite having been a co-conspirator with Mr Gao, he wanted to be "Zespri's man in China", and had said he would not give evidence without a commercial settlement or "partner" agreement with Zespri. Zespri was unwilling to entertain this. Mr Shu's hearsay statements were therefore admissible under s 18.[74]

69. On appeal the defendants challenged the third ruling above, but it was upheld by the Court of Appeal, on largely the same grounds.[75]

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72 At [17]-[29].
73 At [45]-[47].
74 At [30]-[44].
75 *Gao v Zespri Group Ltd* [2021] NZCA 442, at [47]-[53] per Kõs P (giving the reasons of the Court). The Supreme Court declined leave to appeal: *Gao v Zespri Group Ltd* [2022] NZSC 13. There is a good example of double hearsay in *Lewis*, above n 47, at [42] per Muir J. His Honour left the hearsay issues for the trial Judge. The claimant, Mr Lewis had said he

Other recent examples of inadmissible hearsay

70. In the *Bunnings* case discussed above, the results of the Mitre 10 automated price comparison survey in Mr Snowden's brief were also ruled inadmissible hearsay. This was because the automated system was "novel and bespoke". No statutory or common law assumption of accuracy therefore applied.[76] Mr Snowden was not an expert, and nor did he confirm the results by his own observation. The assertions as to reliability were therefore the implied statements of other persons, namely the programmers of the automated system, who had not given evidence.[77]

71. In *GRP Management,* the case involving the alleged 'meth house', large amounts of evidence were ruled admissible, including on the grounds of hearsay. In the brief of evidence of Ms Liu (a witness for the plaintiffs), for example, Mrs Liu recounted a discussion with a tenant of the house at the time, a Ms McPherson, who told Ms Liu that she was "concerned about methamphetamine as she had been unwell, her dog was unwell, and her other dog had died". This evidence was being advanced for the truth of its contents. There was no suggestion that Ms McPherson was unavailable, or that calling her would cause undue expense and delay. Fitzgerald J ruled the evidence inadmissible, and said that Ms McPherson would need to be called at trial and be cross-examined.[78]

72. Ms Liu's brief also recounted a conversation she had with a friend, Ms Ning, who was a real estate agent. Ms Liu claimed that Ms Ning told her that: [79]

> …from her experience methamphetamine contamination was a very problematic issue. She said that if the contamination was not serious, then it could be cleaned. But if the contamination was serious, then even if you clean and paint over it, the contamination will still slowly seep out. Then the beam and walls need to be replaced, or [the] whole house needs to be rebuilt.

73. This was plainly hearsay evidence if relied on for the truth of its contents. If it was not so relied on, then it was irrelevant. There was, however, an additional, more fundamental, problem. The evidence expressed matters of opinion, and it was by no means clear that Ms Ning was a suitably qualified expert to give evidence on remediation of methamphetamine contamination. The evidence was ruled inadmissible.

74. *Grace v Orion New Zealand Ltd*[80] involved claims by property owners for damage caused by two major fires in the Port Hills area of Christchurch in 2017. One of the issues was whether the fire

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intended to subpoena the makers of the alleged statements, but no draft briefs of evidence or will say statements from such persons had been provided. Nor was there any evidence on which to base an analysis under s 18.

76 *Bunnings*, above n 1, at [50] per Kõs P.

77 At [51] and [52].

78 *GRP Management*, above n 14, at [102].

79 At [106].

80 *Grace v Orion New Zealand Ltd* [2020] NZHC 2176, Gendall J.

had been started deliberately. Orion's counsel raised a number of admissibility objections during the trial. The following statements in the briefs of the expert investigator, Mr Donnellan, were ruled by Gendall J to be inadmissible:[81]

> I am aware that the Police could not locate any evidence that the Early Valley Road fire was arson
>
> Mr McKenzie knew that Ms Levey was working for the first defendant and that Orion were taking the view that the fire had been deliberately ignited rather than because of the expulsion fuse. The interview demonstrates that Ms Levey held the view that Mr McKenzie had an interest in the fire.

75. The first statement was offered in evidence to prove the truth of its contents, and a representative of the Police could easily have been called as a witness. The second statement was also inadmissible hearsay, as well as being submission in breach of r 9.7(4)(d).

76. Similarly, the following statement by Mr McKenzie to the Police was ruled inadmissible hearsay:[82]

> I understand that the Police found no basis for the allegations made by Mr Legat and Ms Levey to them that I should be investigated as an arson suspect

Opinion

77. The briefs of evidence of lay witnesses often stray into opinion. An "opinion" is defined in s 4(1) of the Evidence Act as a "statement of opinion that tends to prove or disprove a fact". It may, for example, be a statement of belief, or judgment, a viewpoint or an inference or conclusion. Sometimes there is a fine line between opinion and fact. Section 23 of the Act states that a statement of opinion is inadmissible, except as provided in ss 24 or 25. Section 25 applies to expert witnesses. Only s 24 applies to a factual witness. It provides:

> **24. General admissibility of opinions**
> A witness may state an opinion in evidence in a proceeding if that opinion is necessary to enable the witness to communicate, or the fact-finder to understand, what the witness saw, heard, or otherwise perceived.

78. To give some basic examples, lay witnesses are routinely permitted under s 24 to give evidence of such things as apparent age, identity, speed, and a person's physical and emotional state. In *Green v Green*[83] Winkelman J stated that for evidence to be admissible under s 24 two basic requirements must be met:

    (a) First, the opinion must be the only way to communicate effectively the information to the judge. The information must be something the judge cannot otherwise infer; and

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81 At [2], [5] and [31]-[33].
82 At [4].
83 *Green v Green* [2014] NZHC 1991, at [7] per Winkelmann J.

(b) Secondly, the opinion must be about something the witness has personally perceived, and so the factual basis for the opinion must be described by the witness as far as possible.

79. The *Green* judgment contains many good examples of statements in affidavit evidence that were ruled as inadmissible, or as permissible opinion under s 24.[84] A more "grass roots" illustration is provided by *Roberts v Northland Regional Council*.[85] This case involved the prosecution of the owner of a dairy farm near Waipu, for discharging cow effluent from his two "herd homes" over six days. A Council employee had estimated the depth of the effluent, based on his "knowledge and experience how long his gumboots were", and where the effluent came to on his gumboots. His estimate that the discharge had continued over six days was based on his observations of what was on the floor of the herd homes, and his "knowledge of things effluent".

80. Andrews J ruled the opinion admissible under s 24. The witness's use of his gumboots as a ready at hand measure was sufficiently reliable. He "knew the dimensions of his gumboots" and was "drawing an inference from observed facts, in light of his experience".[86]

81. Moving from the bovine world into the equine world, the case of *Cato v Manaia Media Ltd*[87] aired some of the intrigues of the New Zealand equestrian community. It involved pre-trial evidence objections by each party, on multiple grounds, including inadmissible opinion.

82. The plaintiff Ms Cato (a barrister) had acted for a group of complainants in a mediation. Complaints had been made to Equestrian Sports New Zealand (**ESNZ**) about the conduct of two members of the New Zealand show jumping team that toured Australia in 2017. The mediation achieved a settlement, which included an agreed statement for publication. (Unfortunately, most of the details remain confidential.) Ms Cato released the agreed statement to an equestrian website and magazine, but not to *New Zealand Horse and Pony*. In an apparent 'sour grapes' response, *New Zealand Horse and Pony* posted an article entitled; "What goes on tour doesn't stay on tour."

83. Ms Cato brought an action for defamation. She claimed that the article defamed her by suggesting she had acted unethically in releasing the agreed statement. The defendants were the publisher, editor and co-authors of the article. The evidence challenged by Ms Cato included these examples, in the brief of Ms Dixon (the editor), which were ruled to be opinion and inadmissible:[88]

> …the subject dispute was "particularly topical news".

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84 "Show me the evidence", above n 5, at [33]-[34].
85 *Roberts v Northland Regional Council* [2014] NZHC 284, Andrews J.
86 At [61]-[62] per Andrews J. Discussed in "Show me the evidence", above n 5, at [31]-[32].
87 *Cato v Manaia Media Ltd* [2021] NZHC 2299 (***Cato***), Campbell J.
88 At [55]-[57] per Campbell J.

> …there was "considerable public interest in the story".
>
> …the incident was "yet another example of ESNZ having mismanaged a situation".

84. Similarly, a number of statements in the brief of Ms Thompson (a co-author) were opinion, or a mix of opinion and submission, including:[89]

> That most of the criticisms of Ms Laurie were "tall poppy syndrome"
>
> That "if one good thing has come of this incident it is that ESNZ now has a more robust and fair system", and that the ESNZ judicial process was "obviously flawed".
>
> That before the subject article ESNZ had issues with Andrew Nicholson that received widespread media coverage. This "resulted in" Mr Nicholson declaring he would not ride for New Zealand again.
>
> There was "considerable interest from the equestrian community in the ESNZ investigation into the Australian tour".

85. Ms Cato's husband, Mr Manson, explained in his brief that he and his business regularly engage lawyers, and then stated: "But I would not retain a lawyer if I believed there were reason to doubt their integrity and loyalty".

86. The defendants argued that this was non-expert opinion and therefore also inadmissible. Campbell J disagreed. It was not a mere opinion. It was a statement of fact as to Mr Manson's state of mind, made with reference to the article, and was relevant to the gravity of damage.[90]

Submission

87. Rule 9.7(4)(a)(d) states that every brief "must not contain any material in the nature of a submission." This rule recognises the importance of a proper separation between evidence, which is the domain of the witness, and submission, which is the domain of counsel. However, for some reason, lawyers often cannot resist the temptation to argue their case through the witness. Submission material may take the form of:

    (a) commentary on documents, and the conclusions to be drawn;

    (b) argumentative statements; and

    (c) propositions about the law.

88. I have already discussed commentary on documents. As to the second category, argumentative statements, this is a very common sin. Lawyers often embellish written evidence with expressions

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89 At [66]-[69], [71].
90 At [94]-[96].

of surprise, disagreement, and indignation. Sometimes it is the witness who wants to paint a full and self-justifying picture. In *Lewis*, Muir J observed that Mr Lewis clearly regarded the brief as a vehicle to exonerate him and "restore his reputation". There were a number of instances of argumentative statements mixed with opinion, including the following examples:[91]

> This was a clear breach of the 2009 JP Morgan code of conduct
>
> I felt that JP Morgan Australian executives had entered into a settlement agreement knowing that they had no intention of keeping it. I believe they had knowingly and deliberately damaged my reputation

89. In relation to the third category, legal propositions, this tends to include assertions about the legal effect or consequences of something, statements of legal principle, commentary on legislative provisions, and even references to cases. The English case of *Alex Lawrie Factors Ltd v Morgan*[92] provides an especially vivid example of what can go wrong. There, the defendant, Mrs Morgan, nearly lost her home. She claimed she had been fraudulently induced to sign a deed of indemnity by her former husband. In her affidavit she made some sophisticated points about a relevant House of Lords judgment, which she said she had studied "in detail".

90. This completely backfired. The trial judge could not accept that someone with such an impressive understanding of the case law could have been misled. The deed of indemnity was upheld. On appeal, new evidence revealed that Mrs Morgan's affidavit was the work of her former lawyer, and that she had limited literacy and intelligence. She had been at the bottom of her class at school, had never read a book, and could not spell.

91. This case is an extreme example, but it does highlight the dangers of lawyers putting words into a witness's mouth. Interestingly, some of the most blatant recent examples of legal submission in a witness brief have involved expert witnesses rather than lay witnesses.

92. In *Provident Insurance Corporation Ltd v Commissioner of Inland Revenue*,[93] for example, the issue was one of statutory interpretation, namely whether the premiums paid for two insurance policies were subject to GST, or were within the exemption in s 3 of the Goods and Services Tax Act 1985. The Commissioner challenged the admissibility of a brief of evidence from Mr Robin Oliver, an acknowledged expert in tax policy, on the grounds that most of his evidence was legal submission. Mr Oliver had purported to give his opinion on the policy underpinning the 1985 Act.

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91 At [47].

92 *Alex Lawrie Factors Ltd v Morgan* [2001] CP Rep 2, Court of Appeal.

93 *Provident Insurance Corporation Ltd v Commissioner of Inland Revenue* [2019] NZHC 995. In *Cullen Group v Commissioner of Inland Revenue* [2019] NZLR 404, Palmer J ruled at the beginning of the trial that part of the evidence of one of Cullen Group's experts was inadmissible because it contained legal submission (at [25]). In *Ng v ACC* [2020] NZCA 274 the affidavit evidence of a medical practitioner was ruled inadmissible to the extent it contained a critique of the High Court decision.

He also introduced into evidence, to advance his theories, a number of legislative history documents such as a GST commentary/guide prepared for the insurance industry, and three government discussion documents on GST.

93. There is more. Instead of refraining from responding to the legal content of Mr Oliver's affidavit, the Commissioner had 'a bob each way'. The Commissioner called counter-evidence from a Ms Marie Pallot (also an expert in tax policy), just in case the Court held that Mr Oliver's evidence was admissible. Her expert 'evidence' was also just her opinion about the policies underlying s 3. Because there was no time for an admissibility ruling before trial, the parties agreed that all the evidence could be admitted *de bene esse*. Churchman J ultimately held that to the extent that the evidence was, in reality, legal submission, the two witness statements were both inadmissible. The narrative on s 3, and the legislative history documents, should have been presented by counsel.[94]

Advance admissibility rulings: the courts' recent approach

94. Rule 9.11 specifies time limits for notifying challenges to briefs of evidence before trial:

> **9.11 Compliance with the Evidence Act 2006**
> (1) Any challenge to the admissibility of a brief, in whole or in part, must be notified to the party or parties concerned within 20 working days after receipt of the brief by the challenging party
> (2) If the issue is not resolved between counsel in a further 10 working days, notice that there is an admissibility issue must be given to the court by the challenging party.

95. Having given notice, should parties apply for a *pre-trial ruling* on admissibility challenges? Ultimately that will depend on the circumstances of the particular case, but the courts have provided some guidance on the approach they prefer.

Some guidelines

96. The courts have urged counsel to try and resolve admissibility issues by agreement before trial. As Fitzgerald J said in *GRP Management*, "many admissibility issues are relatively straightforward, and ought to be able to be resolved by counsel without the need for any formal court involvement (and the use of scarce court hearing time)." In *Prime London Holdings*,[95] the Deputy Judge castigated counsel not only for taking up valuable court time but, even worse, for requiring him to spend a large part of his weekend putting together a decision.

97. If a resolution cannot be agreed, and a ruling is sought before trial, this should be done in good time so that it does not disrupt trial preparation, or imperil the trial fixture. An advance ruling will

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94 At [31]-[33].
95 *Prime London Holdings*, above n 2, at [39].

not be appropriate for transgressions of a minor, trifling or random nature, which can be readily dealt with by the trial judge as the evidence is given.

98. Nor is it appropriate to seek an advance ruling, where it is plain that a proper assessment can only be made at the trial, where the judge will have the full array of issues, evidence and submissions. In such cases the judge is more likely to admit the evidence provisionally pending a final ruling on admissibility.

99. Judges have also cautioned against pre-trial "satellite litigation that is disproportionate to the size and complexity of the main dispute".[96] The *Bunnings* case, discussed above, illustrates this. Bunnings notified a challenge to Mr Snowdon's affidavit, on which the Commission wished to rely. The Commission sought a pre-trial ruling in the District Court. This was followed by an appeal (and judicial review) by the Commission in the High Court, and then appeals by both parties to the Court of Appeal. An application for leave to appeal to the Supreme Court was refused.

100. Kõs P, in the Court of Appeal, observed that it may have been better all round if the admissibility application had awaited trial:[97]

> The pre-trial admissibility application was made in November 2017 on the basis that it was more convenient the matter be dealt with prior to trial. It may well be thought, no doubt with the benefit of hindsight, that that was not the case after all. And that it might have been much better for all concerned, in this category 1 summary prosecution, launched in 2016, and still unheard, if the admissibility of Mr Snowden's evidence had simply been dealt with at trial.

101. In the *Zespri* case, by contrast, where the defendants left their objections until after the trial had begun, Katz J said that it was "unfortunate" that, given the large amount of hearsay evidence, they had not raised their complaints prior to the trial.[98] Her Honour noted that this was likely to have been a tactical decision; if so, that was "a matter of concern". The need to deal with "extensive evidential issues" during the trial had complicated and disrupted the trial process, and both counsel had had to address the hearsay issues at length during closing submissions.

102. If the non-compliance is significant and obvious, then a ruling should be sought in advance of trial. That will more often be the case in relation to hearsay, opinion, argument, submission, and witness statements that contain a long commentary on the documents in the trial bundle. But the courts have also upheld pre-trial objections on the grounds of relevance in clear-cut cases, as in *Lewis.*

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96 See, for example, *Mansion Place Ltd*, above n 59, at [49] per O'Farrell J.

97 *Bunnings*, above n 1, at [5]. The trial was eventually heard in the District Court and all of the charges against Bunnings were dismissed.

98 *Zespri*, above n 69, (Schedule – Hearsay Rulings), at [13]-[14] per Katz J.

103. If serious transgressions are not ruled on in advance, this will hamper trial preparation and the conduct of the trial. For example:

(a) Parties will have to make difficult decisions about whether or not to serve a witness statement responding to a non-compliant one. The *Provident Insurance Corporation* case[99] discussed above illustrates this, as does *GRP Management.*[100]

(b) Counsel may have to decide whether to risk cross-examining on parts of an offending witness statement that also contains assertions on important contested issues; and

(c) Counsel may have to waste time in cross-examination trying to establish whether the witness's testimony on an important issue is based on their own independent recollection, or on documents (and if so which ones).

The kinds of orders made

104. The court has power to exclude inadmissible evidence, and also, under r 9.7(6), to direct that non-complying briefs not be read, in whole or in part. Under r 9.10 the court also has power to make oral evidence orders.[101]

105. A proportionate approach to sanctions is adopted. At the lower end, the court may be willing to do some "surgery" to the witness statement, by simply excising the offending paragraphs or sentences. In *Prime London Holdings*, this was the option chosen. The first 17 paragraphs could stay in, but many of those that followed had to be deleted.

106. Simply making some deletions may not be appropriate if that leaves parts of the rest of the statement incoherent. In such a case, the court may order the witness statement to be replaced with a compliant one. In *GRP Management,* Fitzgerald J directed the defendant to serve a revised brief for Mr Zhang, as some paragraphs required "top and tailing" in light of the content that had to be removed. Her Honour also warned that this was not an opportunity for additional or changed evidence to be put in the brief.[102]

107. Another brief in *GRP Management,* that of Mr Jones, suffered almost fatal surgery. As a result of Fitzgerald J's rulings very little of Mr Jones' brief was left. Her Honour suggested that the parties

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99 *Provident Insurance,* above n 93.

100 *GRP Management*, above n 14, at [86] ("counter-commentary").

101 Discussed in "Show me the evidence", above n 5, at [67] to [72].

102 *GRP Management*, above n 14, at [98]. A similar approach was taken in *Greencastle MM LLP v Payne* [2022] EWHC 438 (IPEC).

should reduce this small remnant to an agreed statement "or, more likely, an "agreed paragraph". This would avoid the need to call Mr Jones at all, or any witness in response

108. In egregious cases, the entire witness statement may be excluded. In *Bunnings*, counsel for the Commission asked the Court of Appeal not to make a ruling excluding Mr Snowden's brief, on the basis that "repair work" could be done before trial. Kõs P concluded that a ruling should be made. The Commission itself had applied for the pre-trial hearing, and the defects in Mr Snowden's statement were "patent". Kõs P ruled the statement inadmissible both under s 7 (relevance), and as infringing the rule against hearsay. His Honour stated that the receipt and admissibility of any substitute statement by Mr Snowden would be a matter for the trial judge.

The Rules Committee's current proposal

109. Written witness briefs have some clear advantages. When used properly, they are important in informing the parties and the court of the evidence to be relied on, putting parties on an equal footing, saving time at trial, and promoting settlement. But how to ensure the proper use of written briefs?

110. The Rules Committee, in its current access to justice review, initially proposed that briefs of evidence be replaced with "will say" statements,[103] but that has now changed. The latest proposal is that evidence at trial be given by affidavit, with additional oral evidence in chief only on areas of significant factual contest.[104] The Committee has also suggested that new measures could, for example, include imposing costs sanctions on counsel personally, or "more clearly" empowering the court to refuse to read offending affidavits.

111. It is not apparent what would be achieved by replacing briefs of evidence with affidavits. While the formalities may differ, there is no significant difference of substance between a witness brief and an affidavit.[105] The Committee itself has acknowledged that the use of affidavits "might, absent appropriate caution", exacerbate the current problems.[106] And why get rid of briefs of evidence when the cases I have discussed above, such as *GRP Management*, *Zespri*, *Lewis*, and *Cato*, demonstrate the increased readiness of the courts to enforce the rules of evidence. This in turn will encourage greater discipline on the part of lawyers in preparing briefs.

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[103] The Rules Committee, "Improving Access to Civil Justice", consultation paper issued 16 December 2019, at [43].
[104] The Rules Committee, "Improving Access to Civil Justice", further consultation paper, issued 14 May 2021, at [75](c).
[105] Alan Sullivan QC "Written evidence: witness statements as an alternative to oral evidence", NSW Bar Association Bar Practice Course, August 2015, at [2.12]-[2.14].
[106] Further consultation paper, above n 104, at [75](c)(iv).

112. Any expansion of the courts' power to impose costs on counsel personally would in my view be undesirable. A more effective way forward would be to retain written briefs, and to strengthen the current requirements relating to their form, content, and process of preparation.

The United Kingdom reforms

113. This has recently been done in the United Kingdom. In March 2018 the Witness Evidence Working Group was formed to address judges' concerns that factual witness statements in civil trials were not performing their core function. Instead they were being used as a vehicle for partisan narrative, commentary and argument. Sounds familiar. The review was initially limited to the Commercial Court, but was extended to cover all trials in the Business and Property Courts.[107] In January 2021, Practice Direction 57AC (**PD 57AC**) was published, applicable to all trial witness statements signed on or after 6 April 2021. Some additional significant measures were introduced. These include the following requirements:

(a) Trial witness statements must be prepared in accordance with the new Statement of Best Practice contained in the Appendix to PD 57AC. This sets out in detail the process that must be followed in briefing witnesses, such as not putting any kind of pressure on a witness to give anything other than their own account; not using leading questions; only showing a witness documents which they created or saw at the time; and ensuring that briefs are as concise as possible without omitting anything of significance; and using as few drafts as possible.

(b) The witness is required to verify the witness statement by a statement of truth as to the contents, and to sign a certificate of compliance. The witness must also list all the documents that he or she has been referred to for the purpose of providing evidence.

(c) The lawyer must, in turn, certify that the requirements have been explained to the witness, and that the lawyer believes that the witness statement is compliant.

114. Similar measures could be introduced in New Zealand. Some of the above reforms just restate existing obligations, but not all do, and they empower both the courts and the parties to take a harder line in relation to non-compliance. A clear and detailed statement of best practice is overdue here. It would provide a valuable guide on preparing witness statements, especially for younger lawyers who missed the "dinosaur" era of leading witnesses through oral evidence in chief.[108]

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[107] In December 2019 the BPC Board accepted the recommendations in the Working Group's final report, and on 22 October 2020 the Working Group's implementation report was accepted.

[108] The Western Australian Bar Association, for example, has published a detailed "Best Practice Guide 01/2009-2011, "Preparing Witness statements for use in Civil Trials".

115. Imposing further requirements may initially result in a spate of pre-trial admissibility hearings. But, in the longer term, it could have a positive impact on how witness briefs are used. The introduction of PD57 led to an increase in pre-trial reviews in the United Kingdom, but that is expected to fall back after a settling-in period:[109]

> …it is to be hoped that as PD57AC becomes more familiar to practitioners, and as the principles become clearer, such heavily contested, time-consuming and expensive applications become the exception rather than the norm. Parties in the Business and Property Court cases who indulge in unnecessary trench warfare in such cases can expect to be criticised and penalised in costs.

Conclusion

116. Lucky the lay witness whose brief is concise, written in their own speaking style, and confined to what is relevant and otherwise admissible – what the witness saw, did, heard and the like. Not only will the brief survive any objections, the witness is less likely to have a difficult time in cross-examination. Furthermore, as Fitzgerald J said in *GPR Management*, such a brief will be "far more persuasive to the Court" than a broad-ranging one that tries to tell the whole story.[110] Enough said.

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[109] *Blue Manchester*, above n 55, at [10] per Stephen Davies J.

[110] *GRP Management*, above n 14, at [5](c).