IN THE SUPREME COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

Read 31.1.78

No. A.255/75

623

See C.A. Civ 439 28/9/77

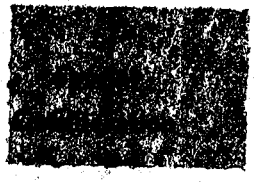
BETWEEN WILLIAM LYNN STOKES of Christchurch, Company Representative

Plaintiff

A N D WALKER PRODUCTS LIMITED a duly incorporated company having its registered offic at Christchurch and carrying on business there and elsewhere as a ladder manufacturer

First Defendant

A N D BARRY EDWARD FOXLEE of 59 Canning Street, Holland Park, Brisbane, Australia, Salesman



Second Defendant

A N D LORRAINE DOROTHY CARTER of Flat 1, 12 Cruickshank Crescent, Meadowbank, Auckland, Airline Supervisor

Third Defendant

Hearing: 14, 15, 16, 17, 18, 21, 22 November 1977

Counsel: B. McClelland, Q.C. and C.A. McVeigh for Plain
C.B. Atkinson and K.J. Jones for First Defenda
No appearance for Second Defendant
R.P. Thompson and A.K. Grant for Third Defenda

RULING OF SOMERS J.

In this action the plaintiff sued to recover damages for personal injuries suffered while travelling as a passenger in a car owned by the first defendant and driv by the second defendant. That car collided with one driv by the third defendant. The plaintiff claimed the second and third defendants were negligent in various ways and that the first defendant was vicariously liable for the negligence of the second defendant as its agent or employe

Following the accident on 19 July 1973 the second defendant was prosecuted on a number of charges relating to drinking and driving. At that hearing, over which Mr K.H. Mason, S.M. presided, the third defendant gave evidence for the prosecution. Her evidence, taken with other evidence and submissions was taken down by a shorthand writer and later transcribed. The complete typescript was signed by Mr Mason. It was proposed to call him for the plaintiff and to have him produce the transcript but so that only the evidence of the third defendant be given to the jury.

Mr Grant of junior counsel for the third defendant submitted that the note of evidence of the third defendant was not admissible. Mr Dovelgil, who argued the matter for the plaintiff, submitted that it was admissible under s.3 of the Evidence Amendment Act 1945 and in that he was supported by Mr Atkinson of counsel for the first defendant. The second defendant did not appear. After hearing argument I ruled that the note was admissible and now set out my reasons.

The relevant parts of s.3 of the Evidence Amendment Act 1945 provide as follows:

> "3.(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say -
>
> (a) If the maker of the statement either -
>
> (i) Had personal knowledge of the matters dealt with by the statement; or
>
> (ii) Where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and
>
> (b) If the maker of the statement is called as a witness in the proceedings: "

It was not suggested, and rightly I think, that what is

proposed to be produced is other than a statement in a document as defined in ss.2 and 3 of the Act.

The first question is whether Mr Mason is the maker of the document. Mr Grant submitted he was not. I do not think that s.60 of the Magistrate's Courts Act 1947 which casts an obligation upon a Magistrate to make or cause to be made a note of the facts in evidence is of assistance. The definitions of "proceedings", "action", "matter" and "prescribed" all suggest that provision relate to civil litigation. That is not to say that a note should not be taken in criminal proceedings. Clearly it ought to be and normally upon an appeal in such a matter that note is relied upon - see s.119 of the Summary Proceedings Act 1957.

Section 3(4) of the Evidence Amendment Act 1945 provides:

> " (4) For the purposes of this section a statement "in a document shall not be deemed to have been made "by a person unless the document or the material part "thereof was written, made, or produced by him with "his own hand, or was signed or initialled by him or "otherwise recognised by him in writing as one for the "accuracy of which he is responsible."

On the footing that Mr Mason's evidence would be to the effect I have indicated (as it proved in fact to be) I considered the note of evidence was a statement in a document signed by him as one for the accuracy of which he is responsible and accordingly was made by him. Section 3(4) is cast in a negative form but in my view embraces a converse positive.

Mr Grant suggested that the maker of the documer was the shorthand writer or the typist if more than one was involved. To the extent the matter rests upon s.3(1)(a)(i I do not think the information was relevantly "supplied" to the shorthand writer or typist. It was supplied to the Cou The point is referred to in Edmonds v Edmonds (1947) P.67. The statement there sought to be put in was one on oath by a witness given in proceedings in India which was taken dow by commissioner and signed by him. Lord Oaksey observed of the words "in the performance of a duty to record information" that in his opinion -

> "although those words are wide enough to cover "other forms of information which may be supplied, "they still are apt to cover the evidence given by "a witness either before a commissioner or before "a judge. Such evidence is simply a form of "information supplied to a commissinner or to a "judge, to whom it is given on oath and under the "solemnity of legal proceedings." (59)

In Barkway v South Wales Transport Co. Ltd (1949) 1 K.B. 54 one Jenkins, an employee of the defendant, gave evidence in proceedings brought against it by a passenger who claimed to have been injured by the negligence of one its servants. He died after giving evidence. It was proposed to adduce in the later action a document made by the shorthand writer containing the note of Jenkins' evidence. The appellant who desired the Court of Appeal to read the evidence relied on Edmonds v Edmonds (1947) P.67. Asquith L.J., who delivered the judgment of the Court of Appeal in Barkway v South Wales Transport Co. Ltd, said:

> "The Court of Appeal"(sc. in Edmonds v Edmonds) "held that the document so signed, recording Mrs. "Ingles' evidence, was admissible in theEnglish "suit for divorce by virtue of sub-s. I (i.) (b) "of s. I. The Court of Appeal undoubtedly took "the view that evidence given before the commissioner "in the Indian proceedings could answer the "description of 'information supplied' to such "commissioner within sub-s. I (i.) (b) for the "purpose of its admissibility inthe English "proceedings. But there are, it seems to us, two "important distinctions between the facts of that case "and those of the present. In that case the evidence "was held to be 'information supplied' to the maker "of the document, the maker of the document being the "commissioner, the court. To say that evidence "given in court is information 'supplied 'to' the "court seems to us an entirely different thing from "saying, as we are invited to say in this case, "that evidence given in court is information supplied "to the shorthand-writer. If a man dictates a "letter giving information to the person towhom he "is writing it, is an abuse of language to say he is "engaged in 'supplying information' to his shorthand "typist." (60)

Those cases related to makers of a statement of the type referred to in s.3(1)(a)(ii) and in my view indicate that if that be the basis of admission Mr Mason relevantly made the statement. The last point mentioned by

Asquith L.J. in Barkway's case was also referred to in Simpson v Lever (1962) 3 A.E.R. 870, 872 by Winn J.

I am of opinion Mr Mason was relevantly the maker of the statement.

The next point also arises out of Barkway v South Wales Transport Co. Ltd (1949) 1 K.B. 54. In that case the evidence was excluded as well by reason of the fact that Jenkins, the witness who had died and whose evidence was sought to be read, was held to be an interested party. Section 3(3) of the Evidence Amendment Act 1945 provides:

> "Nothing in this section shall render admissible
> "as evidence any statement made by a person
> "interested at a time when proceedings were pending
> "or anticipated involving a dispute as to any fact
> "which the statement might tend to establish."

In Barkway v South Wales Transport Co. Ltd it was submitted that the "person" referred to in ss(3)is not the person who evidence is transcribed - in that case Jenkins - but the person transcribing it - that is the shorthand writer who was not a person interested. That submission was rejected. Asquith L.J. said:

> "We think that in sub-s. 3 'a person' means any person
> "whatsoever provided he is interested. On the
> "narrower construction the mere accidental interpositi
> "of a shorthand-writer would let in statements of
> "interested parties whose evidence, because interested,
> "the Act intended to exclude, and sub-s. 3 would be
> "largely stultified." (61)

That was said to be a further ground distinguishing Edmonds v Edmonds (1947) P.67. That is to say, as Asquith L.J. put it in Barkway, Mrs Ingles, the witness in Edmonds v Edmonds, was not an interested person and that (inferentially) had she been the statement would not have been admissible. Although there has been adverse comment in the cases on Asquith L.J.'s interpretatinn of the circumstances in which a person may be said to be "interested" I was not referred to, and the researches I have been able to make since the point was raised have not disclosed any case in which any doubt has been cast upon the principle

I have set out. Indeed, in Brinkley v Brinkley (1963) 1 All E.R. 493, 497 it seems to have been accepted without question.

The materiality of the point is that Mrs Carter, who spoke that which is recorded in the note, was I think unquestionably an interested party.

That consideration operates to exclude the statement as evidence of the truth of its contents. A similar point was considered in Brinkley v Brinkley (1963) 1 All E.R. 493, 497. In that case a clerk to the justices provided a note of the parties' evidence in earlier proceedings before them. He was held following Barkway v South Wales Transport Co. Ltd (1949) 1 K.B. 54 not to be sufficiently identified with the Court to be a person to whom information was supplied. But the interest of the parties in any event excluded the note as evidence of the truth of the facts earlier given in evidence. But the note of evidence was admitted under the EvidenceAmendment Act on other grounds which may be summarised in this way. First, the statements of the wife made in previous proceed were in the nature of admissions, and secondly, the clerk of the Court could then produce the note of evidenceas a person who, having heard those admissions, was a person who in terms of theEvidence Amendment Act had personal knowledge of the facts contained, namely, the making of the admissions. He qualified as a maker under s.3(1)(a)(i).

Applying the principle in that case to the present, the Magistrate whom it is proposed to call is producing a document which forms part of a record and made the statement in performance of a duty to record information supplied to him by Mrs Carter who had personal knowledge of the matters. And the objection as to interes is surmounted and the statement admissible not as proof of the facts admitted but merely of the fact of the

admissions themselves. That is to say, both the objection referred to in Barkway's case and Brinkley's case are overc the first in that the learned Magistrate is for the purpose the Court and relevantly a person to whom the information was supplied and secondly, the matter of interest is overcome by the nature of the evidence, it being of the fact of an admission and not the truth of the facts recorded in the statement. Once the admission is proved, it is not the Evidence Amendment Act but the principles relating to the law generally which render that admission admissible as evidence of the facts admitted.

It of course follows that it would have been permissible to have produced the shorthand writer to have proved the statement as evidence of an admission having been made under s.3(1)(a)(i), and had that been done the case would have coincided wholly with Brinkley's case.

The final point made by Mr Grant was that the statement was inadmissible as being in the nature of a judge's note. On that point he referred to R. v Hira Te Akau (1907) 26 N.Z.L.R. 471, 472 and Taylor v Manu (1975) 1 N.Z.L.R. 285, 292. I do not think that a transcript of evidence such as that in the present case is to be treatdd as within the rubric of the principle referred to by Deniston J. in the first of those cases.

Mr Grant also observed that according to his instructions there was a considerable lapse of time between the taking of the evidence, its subsequent transmission and signature by the Magistrate. That was a matter which when I heard the point had still to be proved but if correct it went in my view to the weight of the evidence and not to its admissibility (cf: s.4 of the Evidence Amendment Act 1945). I have, as I think, no discretion in this matter. The evidence is either admissi or it is not and in my view it is admissible. The point as to delay in the making of the statement is of course

relevant to a different matter entirely. On the facts as submitted by Mr Grant the principles relating to the refreshing of the recollection of a witness and the possibility of the production of the statement where he has no independent recollection do not arise: cf. R. v Naidanovici (1962) N.Z.L.R. 334.

Subject, therefore, to the evidence supporting the hypothesis on which I proceeded (and in the event is did) the note at all events to the extent of admissions made and such matters as form a background to and explain those admissions was in my view admissible.