IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

CP64/95

BETWEEN **MORGAN**

Plaintiff

AND **KEITH LAURENCE HUNTER**

First Defendant

AND **HUNTER**

Second Defendant

Hearing: 30 July 1997

Counsel: ACM Fisher (for plaintiff)
TR Ingram (for first defendant)
P Connell (for second defendant) (Given leave to withdraw on this application)

Judgment: 1/8/1997

RESERVED JUDGMENT OF HAMMOND J

Solicitors: Brookfields, Auckland (for plaintiff)
TR Ingram, Hamilton (for first defendant)
P Connell, Hamilton (for second defendant)

This is an application by the first defendant under Rule 441A(4) of the High Court Rules that the evidence to be presented at the trial of this proceeding be given viva voce.

The background is that the plaintiff is a forty year old woman. She has brought these proceedings against her stepfather (the first defendant) and her mother (the second defendant) for sexual abuse, which it is said was suffered by her between the ages of 8 and 12 years. The claim is grounded on allegations of breach of fiduciary duty; and assault and battery. The plaintiff claims both compensatory and exemplary damages.

The first defendant pleaded guilty to certain charges of indecency and, on 19 May 1994, he was sentenced by Penlington J to 3 years and 3 months imprisonment on each of those charges, all sentences being concurrent. On sentencing, Mr Hunter offered to pay $10,000 in reparation to the plaintiff; a reparation order in that sum was made by the Judge.

The claim has already given rise to some difficult issues. One was whether the plaintiff could sue at all, her stepfather having served a term of imprisonment, and paid some reparation in respect of his actions. The "double jeopardy" point was taken early. I directed that it be treated as a preliminary point; Heron J delivered a Reserved Judgment on 22 July 1996 in which he allowed the proceedings to continue.

A further issue was whether leave should be given to bring the proceedings out of time. On that point, Heron J recorded, "On the basis of *S v G*, [1995] 3 NZLR 681, it was accepted [by counsel] that the appropriate course was to leave that question until trial."

To revert to the present application, when counsel were before Penlington J on 26 March 1997 for a conference, the issue of the exchange, or otherwise, of briefs of evidence for trial was raised. Miss Fisher proposed a successive exchange of briefs; counsel for the defendants objected to any exchange of briefs at all. That issue was again before Penlington J on 30 April 1997. His Honour

directed that counsel be given the opportunity to argue this issue; this hearing was subsequently allocated.

It is convenient at this point to deal with the relevant law. Prior to 1 March 1996 there was a relatively widespread practice in this jurisdiction of the exchange of witness briefs, although, as Mr Ingram correctly observed, it was "by no means universal". That practice in itself attracted some controversy. Some practitioners and Judges were not at all that enamoured of the exchange of briefs. When the issue arose it was dealt with by way of an application for directions under Rule 438. That Rule gave this Court a very wide range of powers to give directions as to trial.

Whatever the position might have been prior to 1 March 1996, the position is now as laid down in Rule 441A to 441I of the Rules. Within 21 days of the filing of a praecipe, the plaintiff must serve the other parties with briefs of evidence; the other parties must respond thereto within 21 days. Each witness must sign their brief. Supplementary briefs can be prepared and served, but may only be adduced as evidence with leave. The briefs are to be read at

trial, unless the Judge otherwise directs, and oral testimony in chief is limited to evidence in response to evidence given by another party, unless leave is obtained under Rule 441G(2). There are consequential restrictions upon opening the case and upon cross-examination, while the rules as to privilege and admissibility of evidence remain untouched by the operation of the new Rules.

The purpose of these new Rules was to advance the just, expeditious and economical disposition of litigation. There are, essentially, two methodologies a given jurisdiction can adopt with respect to pre-trial exchanges of evidence in civil proceedings: either there has to be a pre-trial exchange of briefs, or there has to be a system of pre-trial depositions of the North American variety. (I leave aside the technique of affidavits as being appropriate to particular classes of proceedings, although in one sense affidavits bear some affinity to pre-trial depositions). In New Zealand the Rules, which of course have legislative force, have adopted the pre-trial briefs technique, building on the decade or so of experience with the use of pre-trial briefs which had evolved in this country, even before 1996.

The now Rules recognise, however, that an exchange of briefs may not be appropriate in every case. Rule 441A(4) provides:

> "The Court may in its discretion make an order directing that Rules 441B to 441I shall not apply to the evidence or any part of the evidence to be given at the trial of a proceeding and shall make such an order where in its opinion such is necessary to secure the just, speedy, and inexpensive determination of a proceeding."

As I read this Rule, in its context, briefs of evidence are to be exchanged in every case unless an order of the Court is obtained under Rule 441A(4). An exchange of briefs, in other words, is the norm.

There was some discussion before me as to the basis on which the Court should exercise its dispensing jurisdiction under sub section (4). Miss Fisher submitted that leave should be given only where there are "compelling reasons" to do so. Mr Ingram adopted a proposition which I tentatively floated in the course of

argument: that dispensation should be given where the overall justice of the case required it.

The words of the Rule itself refer to an order for dispensation being "*necessary* to secure the just, speedy and inexpensive determination of a proceeding". (Italics added). Mr Ingram suggested that those words should be construed disjunctively, and noted the mandatory "shall" in the Rule. Thus, his argument was that if any of those heads are met, dispensation might be given.

The sub-section clearly imports a broad discretion. I think it inappropriate and unwise to read down these expansive words in any way. The critical phrase that I have cited - the just speedy and inexpensive determination of the proceeding - strikes me as an empowering formula of a kind which is routinely found in rules of procedure, and which enables the Court to proceed as it thinks the justice of the case requires. Approaching the words in a narrow, semantic way does not seem to me to be appropriate. Nor do I think it helpful to identify particular categories of cases in which leave would be appropriate. Finally, the onus must be on the party

asserting the necessity to depart from the usual rule : that of pre-trial exchange of briefs.

To return to the instant case, Mr Ingram emphasised the particular nature of this proceeding. He said it is one where substantial issues of credibility of one or more witnesses are central to the determination of the case. He urged that the Court should be able to observe the changes in demeanour of the witness between evidence in chief and cross-examination. He noted that the relevant events occurred in the 1960s and that there is a huge lapse of time.

However, I think I do Mr Ingram's case no injustice if I say that the real issues in this case are not, with respect, to liability. The first defendant pleaded guilty to his criminal charges and the fact of that plea is clearly admissible evidence against him under Section 23 of the Evidence Amendment Act 1980. The real defences are that leave should not be given to proceed out of time; and, with respect to damages.

The heart of Mr Ingram's concerns on the leave issue are that, as he put it, "The plaintiff will obtain a substantial advantage in the presentation of her case if she is permitted to read from a brief. There can never be any practical safeguard against the brief being tailored to fit the legal demands of [the relevant law]". He made the same kind of argument with respect to the kind of damage suffered by the plaintiff. He said real caution should be exercised by the Court.

Miss Fisher submitted that in this case there is no reason to depart from the normal practice. She argued that the fact that this case is about historic sexual abuse is not a compelling reason to change the usual rules. And, she said, "an exchange [of briefs] will alert the parties at an early stage as to whether the tolling of the limitation period has caused difficulty". She suggested that liability can hardly be an issue and that any issues as to quantum should be "on the table" as soon as possible. She said that trial by ambush is no longer appropriate.

Both counsel were agreed that this would not be a long trial - possibly three or four days - the evidence necessarily being restricted to that of the plaintiff and the defendant; possibly some family members; and possibly some expert evidence. I should record that Mr Ingram conceded that if there was to be expert evidence there should at the very least be an exchange of the reports of the experts. But, generally speaking, the presentation of briefs in this case would not, by itself, have a significant impact on the length of this trial.

Notwithstanding that last observation, I am not disposed to dispense with a requirement for a pre-trial exchange of briefs in this case. I think a pre-trial exchange will assist in further clarifying the issues; it will have at least some effect on the expeditious disposal of the litigation; it will to that extent reduce the expense of the litigation; and further, I think a pre-trial exchange will to some extent assist in the reduction of trauma for this plaintiff. This last factor might well not apply in a case where liability is in issue, from the ground up, as it were. But this man has pleaded guilty and

served his prison sentence and Mr Ingram very responsibly said that liability is not the real issue before the Court.

Finally, notwithstanding Mr Ingram's able submissions - which really had much to do with the psychology of witnesses giving evidence - I am not persuaded that the essential issues before the Court will be prejudiced by proceeding in terms of the Rules. Indeed, as I said to Mr Ingram in argument, had the leave application been dealt with separately, it would have been dealt with on the affidavits and (possibly) cross-examination which, in functional effect, is not much different from the presentation of briefs.

In the result, I decline the application. I will give directions as to the actual time for the exchange of briefs, if the forthcoming settlement conference before me does not resolve this case, at the conclusion of that conference. The plaintiff will have costs of $1250.00 on this application, together with disbursements which, if necessary, will be fixed by the Registrar. Those disbursements are

to include the travel expenses of the plaintiff's counsel from Auckland.