# A Note on Methods of Giving Evidence in the Environment Court

*Judge J R Jackson, Environment Court*

## INTRODUCTION

The traditional practice in the Planning Tribunal and latterly the Environment Court is that the evidence is not given live or 'viva voce' through question and answer (as is usual in countries with common law traditions). Instead the practice has been for the evidence to be put into writing and exchanged 5 days before the hearing. Then at the hearing after swearing their oath or making the affirmation, the witness reads[1] his or her brief aloud and in full in Court before cross-examination.

The purpose of this paper is to ask everyone interested in the procedures of the Environment Court to consider the reasons for the Court's procedures in respect of the giving of evidence to the Court and to ask whether we can do better. I declare an obvious interest: I have uniformly followed a different practice (described below) from the traditional one of having all evidence read aloud to the Court. I should emphasise that what follows is my personal view and not that of the Environment Court or any other member of it.

An alternative procedure to that in the Practice Note is regularly, but not invariably, used by my division of the Court. It is:

(1) For the written evidence in chief[2] to be exchanged at least three weeks before the hearing;
(2) For rebuttal evidence to be exchanged in writing, at least one week before the hearing;
(3) For the evidence to be lodged with the Registrar of the Court one week before the hearing;
(4) For the members of the Court to read the evidence (for the first time) in the week before the hearing;
(5) At the hearing the witness is sworn then confirms their brief as a true and correct statement of their evidence so that it becomes part of the Court's record; and
(6) Cross-examination and questions by the Court ensue without the brief of evidence being read aloud to the Court by the witness.

In longer cases the Court reads much of the evidence twice before it is confirmed in Court by the witnesses - once as a reading of the evidence before the hearing, and then again during the hearing as a refresher within the 24 hours before the witness takes the stand.

In discussing the issue whether evidence should be read aloud to the Court, or in advance, it is important to bear in mind five points (three procedural and two general) about the Environment Court's jurisdiction. First, almost all evidence given to the Environment Court is in writing which is circulated to all parties in advance. Secondly, the Court has very wide powers:

- To regulate its procedure as it thinks fit[3];
- To conduct proceedings without formality[4];
- To receive anything in evidence it considers appropriate;

- so that, arguably, it has more wide-reaching powers than a Commission of Inquiry[5]. Thirdly, much of the evidence given to the Court consists of expert opinions - there are few disputes about primary facts. Fourthly, the Environment Court nearly uniquely[6] for a judicial body is not deciding cases about past events, but forecasting future events in the world of natural and physical resources and whether there need to be objectives, policies and methods to manage them[7]; or whether conditions should be imposed, or consent

1 Practice Notes (1998) para 28.
2 Perhaps the brief should be signed by the witness as a confirmation that it is their evidence.
3 Section 269(1) of the Resource management Act 1991 ("the RMA").
4 Section 269(2) RMA.
5 Under the Commission of Inquiry Act 1908.
6 Family Courts in deciding custody and/or guardianship cases also have to gaze into the crystal ball.

refused[8]; to events involving human agency. Fifthly the Environment Court, uniquely for a judicial branch of government, has a role of judicial oversight of (subordinate) legislation and indeed to rewrite such legislation (this is limited by the code in the First Schedule to the Act).

## Reading the evidence aloud in Court

The reasons given for the Court's traditional practice - inherited from the Planning Tribunal - have never clearly been articulated in any decision (to my knowledge) but appear to include these propositions: that hearings should be in public[9]; that it is useful to see the demeanour of the witness and listen to their emphases and/or mistakes; that at least if the evidence is read the parties know it has been seen (and heard) by the Court; and that accordingly justice is seen to be done.

No doubt some witnesses would prefer to read their evidence in public. Some of course (inadequately briefed) attempt to diverge from their briefs at every opportunity. Equally it is obvious that other witnesses would prefer not to have to read their statement of evidence aloud. For some expert witnesses it is a real chore to have to read extensive evidence aloud before cross-examination starts. But it should always be remembered that it is what is written that is important, not how it is said. This is a matter of substance over style.

It is difficult to understand why all the evidence (especially expert evidence) should be read in public to ensure that justice is seen to be done. First, copies can (and should) always be made available to journalists and usually to interested members of the public. In cases of great public interest that may not be possible (for reasons of expense and conservation of trees). But such cases are likely to have deeper and longer cross-examination on the key issues - which are the issues of most importance and relevance to the public as well as to the Court.

It seems to me that the reading aloud of the witness' views is not the most important part of the hearing - they are really present in person so they can be cross-examined and/or asked questions by the Court. It is in my view much easier to ask meaningful questions if the Court has been able to read the statement in advance.

Some counsel like to have the evidence read in Court because it assists with cross-examination. There is some advantage in that - counsel can hear the stumbling that suggests the words are not those used by a witness to their briefing solicitor, or they can hear the emphases which might make the meaning of the written words clearer (or more obscure). In my view they are small advantages for counsel compared to those they already have (under either system), that is, having the evidence in advance and being able to obtain one's own witnesses comment on it to assist prepare cross-examination. As for viewing the appearance of the witness there are three points about this. First this is quite a different exercise from watching viva voce evidence. Witnesses rarely look away or qualify their evidence when reading a written statement. Secondly because in resource management proceedings there are rarely disputes of primary fact, that direct lying to the Environment Court is (in my guess) rather unusual. Thirdly it has been suggested that emphases may be given by a witness which do not appear in writing. But why do they not? - underlining or italics add emphasis and save a great deal of time. Conversely, if a witness is permitted to add an oral explanation (often at some length) then their evidence has not been given in writing to the other sides in advance. In my experience such additions are often poorly expressed and unhelpful.

In the past[10] there was a less than perfect practice, especially in cases lasting 4 days or more, where the witnesses for the appellant would read their evidence in full, but later witnesses would be requested (they rarely refused) not to read theirs because the Planning Tribunal was running out of hearing time. That seemed unfair.

Under the Practice Note, the Court has experts giving up their valuable time (and costing their client) to come to the Environment Court to read prepared briefs of evidence. Is not the normal procedure both optimistic and perhaps even arrogant in its assumption that the Court's members can listen to the evidence and understand it completely as it is read? For myself I confess to not immediately understanding all expert evidence when it is read to me if I have not seen it before.

## Reading the evidence in advance

Is it not preferable, at least for an expert witness, for them to know that their evidence has been read previously and that the Court has had

7 In references under the First Schedule to the RMA.
8 In appeals under section 120 RMA.
9 Section 277 Resource Management Act 1991.
10 At least before 1996: I do not know whether it still occurs.

some opportunity to reflect on it before the witness becomes available for cross-examination by counsel and questions by the Court? Even if the evidence is well written, expert evidence on very complex issues may well be equally complex in itself. It may require backtracking, cross-references to other parts of the evidence, re-reading of some sentences or paragraphs, and time (different for each reader or listener) to study figures, tables and diagrams. Further there are particular problems in reading planning evidence which requires, in anything other than simple cases, constant checking of the evidence against the relevant provisions of the plan(s) read 'as a whole' (i.e. all the relevant parts) before the evidence can be assessed for its utility.

It is my division's view (unsupported by statistics, expert or otherwise) that the alternative method[11] we use saves one-third to one-half of the usual sitting[12] time. If correct, that is a really significant saving in lawyers' and experts' bills for the Court's customers. I gain the impression too that hearings over-run the allotted hearing time less frequently if the evidence-in-chief is not read to the Court. I note that in a (UK) ***Report to the Lord Chancellor by Sir Peter Middleton***[13] (on the Woolf report) the author stated:

> *The need for experts to give oral evidence is a major cause of delay. Its removal in all but exceptional fast track cases is a key change. This should also mean that more experts are prepared to act as witnesses, which may in turn help to reduce the cost of experts' reports.*

A criticism of the "taken as read in Court" procedure is that parties do not know whether evidence has been read (or not) or whether the Court has understood it. That is given as a reason for requiring evidence to be read to the Court, on the basis that if it is read out loud in Court, at least the parties know (or think they do) that it has been heard by the Court, if not necessarily understood. I am not sure of the validity of that criticism. Surely if the Judge states she or he has read the evidence there is no issue about that. Of course a losing party (and there is nearly always one) may often consider that the Court has not understood the evidence. However that bitterness may occur whether the evidence is read aloud or not. That is in the nature of the process - although the Court usually spends much of its decision giving reasons to the prospective loser. Questioning of the witness by the Court (if the evidence is sufficiently relevant) is one method of alleviating any reasonable concern on this issue.

Finally, the practice of reading evidence in advance has the advantage that it moves the emphasis of the Court hearing on to what is usually the most important aspect of a live hearing: the testing of evidence by cross-examination.

## Other Courts' practices

In New Zealand another Court which rarely requires evidence in chief to be read orally is the Family Court. That is, coincidentally, the other 'predictive' Court. However, its hearings are not held in public whereas there is a statutory obligation[14] for Environment Court hearings to be "in public".

The High Court may give a direction dispensing with reading evidence[15]. Rule 441F of the High Court Rules requires that the written statement(s) of the witness:

> *(a)...Shall, unless the trial Judge otherwise directs, be read by the witness at the trial as the witness's evidence in chief ...*

***McGechan on Procedure*** refers to the circumstance in which a Judge might direct otherwise as being[16]:

> *... It is in respect of lengthy and detailed expert evidence which has been exchanged well in advance of trial that a direction dispensing with reading by the witness may be appropriate.*

## Overseas' jurisdictions

In Australia[17]:

> *In the Federal Court, Family Court and AAT expert evidence is generally provided in writing. Expert examination in chief is not required, but experts are subject to cross-examination. The Law Society of South Australia has submitted that consideration should be given to requiring leave to cross-examine experts.* [My underlining].

In the UK[18] civil jurisdictions:

> *The new English Civil Procedure Rules provide that expert evidence is to be given in a written report and, if a claim is on the 'fast track', the court will not direct an expert to attend a hearing 'unless is necessary to do so in the interests of justice'.*

The suggestion that an expert need not even attend a hearing is remarkable.

11 Described above.
12 The Court's time is not saved: it still has to read the evidence.
13 Lord Chancellor's Department, London 1997.
14 Section 277 RMA.
15 McGechan on Procedure para 441E04.
16 McGechan on Procedure para 441F01.
17 The Australian Law Reform Commission Discussion Paper 62: Expert Evidence para 13.59.
18 As above para 13.58.

In the UK Planning Inspectorate - which has a nightmarish thicket of bureaucratic procedures which do not engender confidence - there is a procedure whereby:

> (1) all evidence is in writing;
> (2) it contains a summary not longer than 10% of the main evidence; and
> (3) the witness reads only the summary to the Court.[19]

This is a potential compromise that might be useful in New Zealand, although it does not seem to be particularly logical. Further one problem I have with summaries (especially of planning evidence) is that, not infrequently, they state something different to the 'main' evidence. Then what does one believe?

For all Federal Courts in the USA the ***Third Manual for Complex Litigation*** suggests that for non-jury trials the statements of direct testimony should be prepared. Then[20]:

> *Where credibility or recollection is not at issue, and particularly when the evidence is complicated or technical, the court may order that the direct testimony of witnesses under the parties' control be presented in substantial part through written statements prepared and submitted in advance of trial. At trial, the witness is sworn, adopts the statement, may supplement the written statement orally, and is then cross-examined and perhaps questioned by the judge. The statement is received as an exhibit and is not read into the record.*
>
> *This procedure, particularly appropriate for expert witnesses, witnesses called to supply factual background, or those needing an interpreter, has several advantages. The proponent can ensure that it has made a clear and complete record; the judge and opposing counsel, having read the statement, are better able to understand and evaluate the witness's testimony; opposing counsel can prepare for more effective cross-examination; and the reduction of the amount of live testimony saves time.*

This is, with respect, both a reasoned and authoritative statement of the advantages of reading the evidence in advance (and not in Court).

In <u>none</u> of the overseas papers which I have read is there any support for the idea of reading full reports (which is what experts' briefs are) aloud to the Court.

## Practicalities

Practical issues are:

> (1) The Court needs time to read the evidence - once as a whole before the hearing; and each brief again during the hearing so that each witness' evidence is fresh in the memory. That suggests sitting hours should not usually be too long. This also assists cross-examiners who need to prepare for the next day.
> (2) The written statements of evidence need to be filed in Court in accordance (preferably at least one week before the hearing) so that the members of the Court can read them.
> (3) As for ensuring evidence in chief becomes part of the record: my Court's practice is that I simply ask counsel to have the witness confirm their evidence on oath or affirmation and record it under a separate document number in sequence. In the Federal Courts in the USA the evidence (or report) may be produced as an exhibit (and I note that in any jurisdiction written exhibits are rarely read to the Court in full).
> (4) Should the practice only apply to experts, and not to lay people? In particular Maori lay witnesses - with their culture's emphasis on oral persuasion and 'speaking from the heart' - may feel more comfortable giving direct viva voce evidence which is not written down in advance.

## CONCLUSIONS

In my view there are three powerful positive reasons for changing the traditional practice[21]:

> (1) The changed procedure saves clients a considerable amount of money in lawyers' and experts' fees;
> (2) Justice to the parties and to the experts suggests the Court should read the evidence in advance so that the Court's members have had time to understand it as a whole;
> (3) The overseas authorities I have read all favour the reading in advance of expert evidence, and most of them are not in favour of statements being read aloud in Court.

I look forward to hearing other reasoned views on this issue.

19 Para 36 of Annexure 3 to Circular DETR 05/2000 [search: www.planning_inspec].
20 Para 22.51 (footnotes omitted) [p.160].
21 Whilst always recognising that there will be (exceptional) cases where evidence should be given orally.