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DISCLOSURE AND ADDUCTION OF EXPERT EVIDENCE: A SURVEY OF DEVELOPMENTS

This article deals with the recent developments concerning the pre-trial disclosure of expert evidence. The positions in both the High Court and subordinate courts are considered.

I. INTRODUCTION

THE procedures concerning the disclosure and adduction of evidence in both the High Court and subordinate courts have undergone important changes of late. In 1986 the Subordinate Court Rules (S.C.R.) were revamped to bring them into line with the then current Rules of the Supreme Court. More recently, in 1991, the Rules of the Supreme Court (R.S.C.) (Amendment No. 2) Rules[1] brought about important changes to High Court proceedings. The Subordinate Courts (S.C.) (Amendment) Rules 1992 have introduced these developments to the subordinate courts so that now the same processes operate in both the High Court and subordinate courts. The procedures governing the disclosure and adduction of expert evidence feature prominently in these reforms. These include new provisions which apply at the summons for directions stage, the process of automatic directions and the use of the affidavit process to adduce the evidence in chief of witnesses. The purpose of this article is to consider these developments and the nature of the new procedures.

II. NATURE OF EXPERT TESTIMONY

As this article is concerned with the procedures governing expert evidence it is apt to commence with an account of the expert witness's role in litigation. The lay witness is ordinarily called to give evidence of facts which he has perceived. As a general rule, he is not entitled to express opinions or inferences based on those facts.[2] In contrast, the expert witness is generally called to state his opinion and inferences. This is justified on the basis that the court, in order to arrive at the appropriate decision, may need to rely

1 S. 281/91.

2 There are exceptions to this rule. For the prescribed circumstances in which the lay witness may give such evidence, see ss. 49-53 of the Evidence Act, Cap. 97, 1990 Rev. Ed., and s. 385(3) of the Criminal Procedure Code, Cap. 68, 1985 Rev. Ed.

on the evidence of a person possessed of a specific skill or special knowledge or experience. Section 47(1) of the Evidence Act provides the circumstances in which expert evidence may be given:

> When the Court has to form an opinion upon a point of foreign law or of science or art, or as to the identity or genuineness of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to the identity or genuineness of handwriting or finger impressions, are relevant facts.[3]

It may, for instance, in a case involving personal injuries be necessary for the court to hear medical evidence on how the injuries might have been caused as well as the doctor's diagnosis and prognosis on the issue of damages. Where the dispute concerns whether a cargo of goods was damaged by fresh or sea water the opinions of surveyors may be necessary. Where a case involves a claim for faulty construction of a machine or building, engineers may be expected to testify. When such evidence is appropriate it will be adduced by the parties. They will select and call their own expert witnesses who will be examined during the course of the trial.

III. THE RATIONALE OF PRE-TRIAL DISCLOSURE

It is usual for a party who intends to rely on expert evidence at a trial to arrange for his expert to prepare a report. Its form and content will depend on the nature of the case and on the matters on which the expert will testify. In a personal injury matter the doctor's report would include the facts as he perceived them (based on his examination of the patient and the results of medical tests), and his opinion (diagnosis and prognosis) based on those facts. As the expert report is usually made in contemplation of legal proceedings or after they are commenced it is a privileged document and, accordingly, the party at whose instance it was commissioned is not obliged to disclose it to the other party.[4] It is, of course, open to the parties to waive the privilege and to disclose their reports to each other. Several advantages may be gained

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3 S. 47(2) of the Evidence Act provides that the witness who shall give such evidence is to be referred to as an expert. S. 47(1) has been interpreted to encompass unspecified fields of knowledge on the basis that they come within the general meaning of "science or art." See *Chanderasekaran & Ors* v. *P.P.* [1971] 1 M.L.J. 153 at 159. For a consideration of the Singapore and Malaysian authorities regarding the circumstances in which the court will accept a witness as an expert, see J.D. Pinsler, *Evidence, Advocacy and the Litigation Process* (1992), at pp. 135-136; T.Y. Chin, *Evidence* (1988), at pp. 85-86.

4 *Worral* v. *Reich* [1955] 1 Q.B. 296; *Causton* v. *Mann Egerton (Johnsons)* [1974] 1 W.L.R. 162. For an a general discussion of the rule, see J.D. Pinsler, *Evidence, Advocacy and the Litigation Process* (1992), at pp. 188-197; T.Y. Chin, *Evidence* (1988), at pp. 182-185.

by such an approach. The parties may be able to agree to some or all of the issues in the report which will minimise the area in dispute at the trial. If, for instance, the injured plaintiff has been medically examined by his own medical expert and the defendant's medical expert,[5] and the reports of both medical experts are in agreement as to the nature and effect of the plaintiff's injuries, the issue of general damages would no longer be in contention and the medical experts would not need to testify. The parties have not only minimised the issues in the case so that they can concentrate on the remaining matters in dispute; they have also saved costs which would have been incurred had the witnesses been required to give evidence. Even if the parties are unable to reach an agreement on their reports, their disclosure before trial will highlight the issues in dispute and enable the parties to prepare themselves thoroughly, particularly for the cross-examination of each other's expert witnesses. In the absence of pre-trial disclosure the parties may well be 'surprised' by unforeseen matters at trial with the result that their cases will be presented less efficaciously.[6] If adjournments are sought because further preparation is necessary to tackle unanticipated matters raised for the first time at trial this can only lead to delay and additional costs. A party may also be enticed by the disclosure of his opponent's report to settle because he becomes aware of the strength of the case that he is up against.

IV. POSITION OF THE HIGH COURT PRIOR TO THE 1991 AMENDMENTS AND OF THE SUBORDINATE COURTS PRIOR TO THE SUBORDINATE COURT RULES, 1986

Prior to the introduction of the Subordinate Court Rules, 1986, the procedures for adducing expert evidence in both the subordinate courts and the High Court were substantially the same. O. 38, r. 4 of the R.S.C. and O. 25, r. 4 of the S.C.R. provided that the court could order either before or at the trial that "the number of medical or other expert witnesses who may be called at the trial shall be limited as specified by the order."[7] The order would usually be made on the hearing of the summons or application for directions and might be in the following terms: "A medical report be agreed, if possible, and that, if not, the medical evidence be limited to ... witnesses

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5 O. 25, r. 6 requires the parties to provide necessary information which includes the attendance for examinations by doctors nominated by both parties. See *Edmeades* v. *Thames Board Mills* [1969] 2 Q.B. 67 at p. 71.

6 See *Ollet* \. *Bristol Aerojet Ltd.* [1979] 1 W.L.R. 1197; *The Capitaine Le Gaff* [1981] 1 L.L.R. 322 at p. 324.

7 This rule continues to operate in both courts but must now be read together with other new provisions which have been introduced. See below.

for each party."[8] Or, "[a] report by engineers (surveyors) (expert ...)[9] be agreed if possible, and that, if not, the expert evidence be limited to ... witnesses for each party."[10]

These provisions did not entitle the court to compel disclosure of the reports and the parties could object to disclosure on the basis of privilege.[11] Furthermore, except in one specific situation provided for in O. 38, r. 6 (R.S.C.) and O. 25, r. 6 (S.C.R.), the right of the parties to call their respective expert witnesses at the trial was not dependent on disclosure of their reports beforehand. Rule 6, which has now been deleted from the R.S.C[12] and the S.C.R.[13] was in the following terms:

> In an action arising out of an accident on land due to a collision or apprehended collision, unless at or before the trial the Court otherwise orders, the oral expert evidence of an engineer sought to be called on account of his skill and knowledge as respects motor vehicles shall not be receivable in evidence at the trial unless a copy of a report from him containing the substance of his evidence has been made available to all parties for inspection before the hearing of the [summons/application for directions][14] *and an order made on the summons for directions*[15] or an application thereunder authorises the admission of the evidence.

The purport of this rule was clear. Unless the engineer's report was disclosed prior to the hearing of the summons or application for directions and the admission of the evidence was authorised at the hearing, he could not be called as a witness at the trial. This sanction was subject to the power of the court to order otherwise. Rule 6 was directed at eliminating the element of surprise in the evidence of experts who claimed to be able to draw from their examination of the damage sustained by motor vehicles such inferences as their respective speeds and the point and angle of impact.[16] As will be seen, the principle of making the adduction of expert testimony at trial

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8 Prayer 23 of Form 46 (R.S.C.) and prayer 21 of Form 45 (S.C.R.).

9 *I.e.*, an expert in another field.

10 Prayer 24 of Form 46 (R.S.C.) and prayer 22 of Form 45 (S.C.R).

11 See above. The rule of privilege was not affected by the reforms. For a discussion of this topic in relation to the new provisions, see below.

12 By the Rules of the Supreme Court (Amendment No. 2) Rules, 1991

13 By the Subordinate Court (Amendment) Rules, 1992.

14 "Summons for directions" in the R.S.C and "application for directions" in the S.C.R. (prior to 1986). In the S.C.R. 1986 the "summons for directions" replaced the "application for directions." See Part V, below.

15 The italicized part was removed by the S.C.R. 1986.

16 See the *Law Reform Committee's Seventeenth Report (Evidence of Opinion and Expert Evidence)*, 1970 (Cmnd. 4489), at p. 15.

dependent on pre-trial disclosure of the expert's report has wider application under the new rules.[17]

It is also significant that prior to the reform of the R.S.C. and the S.C.R there was no specific provision limiting the number of witnesses who could be called at trial. The judge would decide the matter according to the circumstances of the case. Usually the number would be limited to one or two expert witnesses for each side. Where experts were required to testify in two fields of knowledge (such as a personal injury case which involved engineering evidence), at least two or even three witnesses might be allowed for each side if this was appropriate.[18] As there was no reference in the rules to the periods in which the parties were to exchange reports, this was a matter left to the discretion of the court.[19] Other features of the unreformed rules included the absence of any specific reference in O. 25 (R.S.C.) and O. 19 (S.C.R.) (the provisions governing the hearing of the summons and application for directions) to expert evidence. Nor was there a process of automatic directions applicable to personal injury actions which was only introduced in the S.C.R., 1986.

V. SUBORDINATE COURT RULES, 1986

The Subordinate Court Rules were revised mainly for the purpose of standardising civil proceedings in the High Court and subordinate courts. The former O. 25 (governing the adduction of evidence at trial) became O. 38 as in the case of the Rules of the Supreme Court. Rules 4 and 6 of O. 25 (considered above) were retained as rules 4 and 6 of O. 38.[20] The developments in relation to the disclosure of expert evidence concern the former O. 19 which was entitled "Directions by the Court". Under the new rules, O. 19 became O. 25 and was re-titled, "Summons for Directions" as in the case of the Rules of the Supreme Court.[21] However, the changes were not merely cosmetic. O. 19 of the S.C.R. was very much in the same terms as O. 25 of the R.S.C. (prior to the coming into effect of the R.S.C. (Amendment No. 2) Rules, 1991). In the 1986 Rules, the Order was wholly reformulated so as to provide for three types of directions: automatic directions in the case of personal

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17 See below.

18 In special situations the court might allow a party to call additional expert witnesses. See *Taylor* v. *Greening* (1956) (unreported) (cited in the Supreme Court Practice, 1990, vol. 1, at para. 38/4/1).

19 See below for a discussion of the principles involving simultaneous and sequential exchange.

20 However, it was specifically provided that r. 6 did not apply to actions to which O. 25, r. 1 applied (*i.e.*, personal injury actions): O. 38, r. 6(3).

21 The difference being that under O. 19 the court would institute the process of directions by ordering the party to make the necessary application.

injury actions;[22] directions by consent;[23] and directions by the court.[24] The process for automatic directions is a standard set of directions which operates automatically in accordance with the rules of court, in contrast to the former procedure whereby the court would give directions on the party's application for directions. This development came about because of the recognition that in personal injury actions directions given on the summons would follow the same pattern in case after case. The summons for directions process in relation to personal injury actions came to be regarded as a needless expense and waste of time.[25] The automatic directions in relation to expert evidence may be summarised as follows:

- If a party intends to rely on expert evidence at the trial he must, within ten weeks of the time that the pleadings are deemed to be closed, disclose the substance of that evidence in the form of a written report which should be agreed if possible.[26]

- Unless the reports are agreed the parties will be at liberty to call expert witnesses if the substance of their evidence is disclosed in the report. Each party is limited to two medical experts and one other expert.[27]

- Where more than one party intends to rely on expert evidence at the trial the reports are to be disclosed by mutual exchange (medical for medical and non-medical for non-medical). The exchange is to take place within the time provided or "as soon thereafter as the reports on each side are available."[28]

The existence of these automatic directions did not prevent any party from applying to the court for additional or different directions or orders which were appropriate in the circumstances.[29] These provisions applied to any action for personal injuries except any action where the pleadings contain an allegation of a negligent act or omission in the course of medical treatment.[30]

Where the action did not involve personal injuries the automatic directions process provided for in rule 1 did not operate. In this situation one of two procedures could apply: O. 25, r. 2(1) provided that directions may take

22 O. 25, r. 1 (S.C.R.).
23 O. 25, r. 2 (S.C.R.).
24 O. 25, r. 3 (S.C.R.).
25 See Cmnd. 1476 (1979) s. III, and App. H.
26 O. 25, r. 1(1)(b) (S.C.R.).
27 O. 25, r. 1(1)(c) (S.C.R.).
28 O. 25, r. 1(2) (S.C.R.).
29 O. 25, r. 1(3) (R.S.C.).
30 O. 25, r. 1(5) (S.C.R.).

effect by consent where the parties agree within a month of the close of pleadings that the only directions required are as to the length of trial and the time for setting down. Any party may apply for further directions and the court may on its own initiative give further directions or orders.[31] In other cases, O. 25, r. 3 provided that the plaintiff must, within five weeks after the pleadings in the action are deemed to be closed, apply for directions by the court. The court "may give any direction or order as it deems necessary to secure the just, expeditious and economical disposal of the action." Accordingly, under rule 2(1) and rule 3, the court would consider the appropriate directions to give with regard to expert evidence. The most notable feature of the application form for the summons for directions (form 43) was the absence of the numerous prayers (including the former paragraphs 21 and 22, which concerned expert evidence)[32] found on its predecessor (form 45). Instead the party was to state in his own words what directions he was seeking.

VI. THE R.S.C. (AMENDMENT NO. 2) RULES, 1991 AND THE S.C. (AMENDMENT) RULES, 1992.[33]

The R.S.C. (Amendment No. 2) Rules and the S.C. (Amendment) Rules came into effect on 1 August 1991 and 1 March 1992 respectively. The reforms standardise the procedures for the disclosure and adduction of expert evidence in the High Court and subordinate courts. The amendments to O. 25 (the Order governing the summons for directions), O. 38 (the Order governing the evidence at trial) and the form for directions apply to High Court proceedings commenced on or after the 1 August 1991 and Subordinate Court proceedings commenced on or after 1 March 1992. Of the former specific provisions on expert evidence, only O. 38, r. 4 remains intact. Rule 6 of the Order has been deleted as have prayers 23 and 24 of the former Form 46 of the R.S.C. The new Form 43 of the S.C.R. contains substantially the same prayers as the newly amended Form 46 of the R.S.C. Automatic directions, which apply to personal injury actions, are governed by r. 8 of O. 25.[34] The directions in r. 8 which specifically concern expert evidence may be summarised as follows:

1. If a party intends to rely on expert evidence at the trial he must, within four months of the time that the pleadings are deemed

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31 O. 25, r. 2(2).

32 These are set out above.

33 Brought about by the R.S.C. (Amendment No. 2) Rules, 1991 and S.C. (Amendment) Rules, 1992.

34 O. 25, r. 8. This rule does not apply to admiralty actions or actions involving negligence in medical or dental treatment: O. 25, r. 8(6).

to be closed, disclose the substance of that evidence in the form of a written report which should be agreed if possible.[35]

2. Unless the reports are agreed the parties will be at liberty to call expert witnesses if the substance of their evidence is disclosed in those reports. The court still has a general discretion to allow any witness to give oral evidence if it thinks just.[36] Each party is limited to two medical experts and one other expert.[37]

3. Where more than one party intends to rely on expert evidence at the trial, the reports are to be disclosed by mutual exchange (medical for medical and non-medical for non-medical). The exchange is to take place within the time provided or "as soon thereafter as the reports on each side are available."[38]

The existence of these automatic directions does not prevent any party from applying to the court for additional or different directions or orders which are appropriate in the circumstances.[39] These provisions apply to any action for personal injuries except any admiralty action and any action where the pleadings contain an allegation of a negligent act or omission in the course of medical treatment.[40]

The new rules have also added a new feature to the pleading process involving the disclosure of expert medical evidence. In personal injury actions the plaintiff is required to serve a medical report and a statement of the special damages claimed with his statement of claim.[41] The same requirements apply to a defendant in respect of his counterclaim for personal injuries.[42] The medical report must substantiate all the personal injuries alleged in the statement of claim or counterclaim as the case may be, evidence of which the plaintiff or defendant respectively proposes to produce at the trial.[43] If these documents are not served with the statement of claim or counterclaim the court may "specify the period of the time within which they are to be provided, or make such other order as it thinks fit."[44] If a

35 O. 25, r. 8(1)(b).
36 See O. 38, r. 2(4) which is applied to this situation: O. 25, r. 8(1)(c).
37 O. 25, r. 8(1)(c).
38 O. 25, r. 8(3).
39 O. 25, r. 8(4).
40 O. 25, r. 8(6).
41 O. 18, r. 12(1A) (R.S.C.), r. 11(1A) (S.C.R.).
42 O. 18, r. 18 (a) (R.S.C.), r. 17(a) (S.C.R.).
43 O. 18, r. 12(1C) (R.S.C.), r. 11(1C) (S.C.R.).
44 Including an order dispensing with the requirements that the documents be served with the statement of claim or counterclaim, or staying the proceedings: O. 18, r. 12(1B) (R.S.C.), r. 11(1B) (S.C.R.).

party has already produced a medical report in accordance with this rule which he intends to rely on at the trial, he need not produce a further medical report. However, if the party who is claiming damages for personal injuries discloses a further report it is to be accompanied by a "statement of the special damages claimed."[45]

The most radical changes to O. 25 and O. 38 involve the institution of the process by which the evidence in chief of a witness (including an expert witness) is adduced by affidavit.[46] Under rule 8 the following automatic directions in relation to the evidence in chief of witnesses are to take effect from the time the pleadings are deemed to be closed:

1. The parties are to file and exchange their affidavits of the evidence in chief of all witnesses within four months.[47]

2. The evidence in chief of each witness is to be limited to a single affidavit.[48]

3. The number of witnesses is to be limited to those whose evidence in chief is contained in affidavits.[49]

In actions which do not involve personal injuries the automatic directions process does not apply. Under r. 3 of O. 25, the court is to consider the appropriate orders or directions that should be made to simplify and expedite the proceedings. With regard to expert evidence the court is specifically required to consider whether:

- an order should be made limiting the number of expert witnesses;[50]

- the mode in which the evidence in chief of an expert witness shall be given;[51]

- the manner in which the evidence in chief or the substance thereof of an expert witness shall be disclosed to the other parties;[52] and whether a "without prejudice" meeting should be held among

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45 O. 25, r. 8(2).
46 For a fuller account of the new affidavit procedure, see J.D. Pinsler, "Evidence in Chief by Affidavit: A Consideration of the New Rules" [1991] 3 M.L.J. xciii.
47 O. 25, r. 8(1)(e).
48 O. 25, r. 8(1)(f).
49 O. 25, r. 8(1)(g).
50 O. 25, r. 3(1)(d).
51 O. 25, r. 3(1)(e).
52 O. 25, r. 3(1)(f).

> experts prior to the trial with a view towards the preparation of a joint statement indicating the agreed evidence and the areas in issue.[53]

The former prayers 23 and 24 of Form 46 of the R.S.C., which concerned expert evidence,[54] are removed. Prayer 23 now gives effect to the direction that the evidence in chief of all expert witnesses shall be in the form of affidavits and are to be exchanged/disclosed within the period ordered by the court. Prayer 25 concerns the "without prejudice" meeting provided for in O. 25, r. 3(1)(g). This is followed by Form 43 in the new Subordinate Court Rules. The court can order the meeting to take place but the decision whether or not to prepare a joint statement rests with the parties and their respective experts. The provision contemplates the real possibility that the experts may not be able to agree on all matters, in which case the evidence upon which there is agreement is to be distinguished from the matters which remain in dispute.

The new provisions require the exchanging of documents such as the reports and affidavits of the evidence in chief of experts. The practice has been for the parties to exchange their expert reports simultaneously, and one assumes this approach is also to apply to the exchanging of witnesses' affidavits. Sequential service may lead to injustice as when one party delays the service of his own witnesses' documents so that he can modify them when he has received and considered the documents of the opposing witnesses. In *Mercer* v. *Chief Constable of Lancashire*[55] the English Court of Appeal indicated that simultaneous exchange of witness statements[56] should be the usual order of the judge. Lord Donaldson of Lymington M.R. expressed the following view:

> The normal rule should be that the exchange of witness statements shall be simultaneous. This is, I think, inherent in the concept of an "exchange" of witnesses' statements, but in any event flows from the fact that what is involved is a process of discovery and not of pleading, and the undesirability of either party being in a position to seek some tactical advantage by delaying service of its witnesses's statements until it has been served with witness statements by the other side.[57]

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53 O. 25, r. 3(1)(g).
54 See above.
55 [1991] 1 W.L.R. 367.
56 The English O. 38, r. 2A sets out the recently introduced procedure for the exchange of witness statements.
57 [1991] 1 W.L.R. 367 at p. 376.

In certain circumstances, however, sequential exchange may be more appropriate. In *Kirkup* v. *British Rail Engineering Ltd.*.[58] the plaintiff brought an action against defendants, his employers, claiming damages for the deafness which he alleged resulted from being exposed to excessive noise in the course of his employment in various railway workshops since 1952. The master had ordered on the summons for directions that the plaintiff disclose his engineer's report not later than 28 days after the setting down and that the defendants disclose their report within 42 days thereafter. The plaintiff appealed against the order contending that the master should have ordered simultaneous disclosure. The Court of Appeal pointed out the special circumstances of the case: it involved complicated facts which occurred over a long period of time (approximately twenty years); the defendants were not in a position to deal with the issues raised by the plaintiff until they saw the plaintiff's expert report; and only then would the defendants be able to consider such matters as the degree of the noise at any particular place and time, and the question of whether or not sufficient precautions were taken by them. Accordingly, the Court of Appeal held that the order for sequential exchange was correct on the facts. In *Mercer,* Lord Donaldson indicated that the process of sequential exchange might also be ordered when a party shows "any reluctance to come clean." In this situation the judge might order sequential service "thereby tying the party down to a particular case before the other party has to prepare his own witness statements."[59]

VII. CONCLUSION

The R.S.C. (Amendment No. 2) Rules, 1991 and S.C. (Amendment) Rules, 1992 have introduced reforms of considerable importance and consequence. With regard to the disclosure and adduction of expert evidence there is now a new regime of rules. The emphasis on pre-trial disclosure will ensure that the parties are well-prepared to meet each other's cases. In particular, the mutual disclosure of affidavits or written reports will enable the parties to more effectively prepare the cross-examination of each other's expert witnesses. The process of disclosure will encourage settlement by revealing to the parties the strengths and weaknesses of their respective cases. The parties, by reason of their knowledge of the facts intended to be proved at the trial, will be more prepared to limit the issues in dispute. This is also the objective of the process whereby a joint statement is prepared

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58 [1983] 1 W.L.R. 1165.

59 *Ibid.* Also see *Naylor* v. *Preston Health Authority* [1987] 1 W.L.R. 958 (expert reports); *Rahman* v. *Kirklees Area Health Authority* [1980] 1 W.L.R. 1244 at 1245 (expert reports); *Richard Saunders & Partners* v. *Eastglen Ltd.* [1990] 3 ALL.E.R. 946 (witness statements).

pursuant to a "without prejudice" meeting. The result will be shorter and less costly trials. The system of rules is sufficiently flexible to enable the court to order that the disclosure or adduction of evidence be effected by a particular mode. The parties are free to apply to the court for orders which are appropriate in the circumstances of the case. The balance of compulsion and flexibility will do much to promote the presentation of cases at trial.

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