EVIDENCE

Definition for this Part

11.1 In this Part:

"document" includes an object.

[11.1.1] Confusion arising from different definitions See further r.20.1 for the general definition of a "document". The definition in this rule creates much confusion: See for example its effect on r.11.5(3).

How to give evidence – Magistrates Court

11.2 (1) Evidence in the Magistrates Court is to be given orally.

(2) However, a magistrate may order that evidence in a particular case, or particular evidence, be given by sworn statement.

[11.2.1] Applicable criteria Such an order may not be appropriate where motive or credibility is in issue: *Bonhote v Henderson* [1895] 1 Ch 742 at 749; *Constantinidi v Ralli* [1935] Ch 427 at 436-8; *Re Smith & Fawcett* [1942] 1 Ch 304 at 308; [1942] 1 All ER 542 at 545.

How to give evidence – Supreme Court

11.3 (1) Evidence in chief in the Supreme Court is to be given by sworn statement.

[11.3.1] Purpose This modern practice is designed to promote efficiency and reduce surprise: *Wang v Consortium Land* [2000] WASC 265 at [14], [15]. The consequence that the public does not hear the evidence may be overcome by appropriate order: *Hammond v Scheinberg* [2001] NSWSC 568 at [2], [6]; 52 NSWLR 49 at 50, 52 as to which see further r.12.2.

(2) However, a judge may order that evidence in a particular case, or particular evidence, be given orally.

[11.3.2] Applicable criteria Such an order may be appropriate where motive or credibility is in issue (*Bonhote v Henderson* [1895] 1 Ch 742 at 749; *Constantinidi v Ralli* [1935] Ch 427 at 436-8; *Re Smith & Fawcett* [1942] 1 Ch 304 at 308; [1942] 1 All ER 542 at 545) or where a witness declines to provide a sworn statement.

[11.3.3] Supplementation of sworn statement It is not uncommon for a party to request to supplement a sworn statement with some brief examination-in-chief. It is suggested that the overriding objective is consistent with the application of a liberal approach so long as incurable prejudice is not occasioned.

Content of sworn statement

11.4 (1) A sworn statement may contain only:

(a) material that is required to prove a party's case, and references to documents in support of that material; and

(b) material that is required to rebut the other party's case, and references to documents in support of that material.

[11.4.1] Facts not argument With very few exceptions, the function of the sworn statement is to give evidence of fact. Legal arguments and conclusions ought to be raised in submissions, not in sworn statements: *Gleeson v J Wippell* [1977] 3 All ER 54 at 63; [1977] 1 WLR 510 at 519.

(2) In particular, a sworn statement must not contain material, or refer to documents, that would not be admitted in evidence.

[11.4.2] Law of evidence applies equally to sworn statements The same rules applying to oral evidence at trial apply to written evidence contained in a sworn statement. Accordingly, it is very important to ensure that sworn statements are drawn carefully and by someone who understands the issues between the parties. Correspondingly, it is very dangerous to fail to take a proper and timely objection to a sworn statement.

[11.4.3] Time and mode of objection Although it is possible to make objection to inadmissible material in a sworn statement without a formal application to strike it out, a formal application brought on well before the hearing is the better course where a large quantity of material is to be attacked: *Savings & Investment Bank v Gasco Investments* [1984] 1 WLR 271 at 278; [1984] 1 All ER 296 at 302. This also has the advantage of affording relief against the necessity to prepare answering material which might subsequently become unnecessary. Consideration should be given to removing the whole document from the court file so that the party can first put their evidence in order: *Rossage v Rossage* [1960] 1 All ER 600 at 601; [1960] 1 WLR 249 at 251**;** *Re J* [1960] 1 All ER 603 at 605-6; [1960] 1 WLR 253 at 257.

[11.4.4] Scandalous material Sworn statements containing inadmissible material which is also scandalous may be removed from the court file or sealed, as occurred in *Spaulding v Kakula Island Resorts* [2008] VUSC 72; CC 29 of 2008).

[11.4.5] Costs against lawyer A lawyer who files sworn statements contrary to the rules may be ordered to pay the costs associated with them personally: *Re J L Young Manufacturing* [1900] 2 Ch 753 at 755. Where a lawyer discovers that a sworn statement he has filed is in fact false, he must remedy the matter at the earliest opportunity if he continues to act: *Myers v Elman* [1940] AC 282; [1939] 4 All ER 484.

[11.4.6] Statements of information or belief in interlocutory matters There is no provision in the rules which permits the court to accept statements of information or belief in interlocutory matters, as is common elsewhere. The court might, however, receive such statements in its inherent jurisdiction: *Vinall v De Pass* [1892] AC 90 at 92, 97-8.

Attachments and exhibits to sworn statements

11.5 (1) A document may only be attached to a sworn statement after disclosure if the document has been disclosed.

(2) Documents referred to in a sworn statement must be:

(a) attached to the statement; and

[11.5.1] Originals to be attached The original sworn statement should attach the original attachments. Photocopies of attachments should be used only when the original document is unavailable and, of course, in service copies of the sworn statement.

(b) identified by the initials of the person making the statement and numbered sequentially.

(3) A sworn statement may refer to a thing other than a document (an "exhibit").

[11.5.2] Exhibits part of sworn statement An exhibit is considered part of the sworn statement: *Re Hinchcliffe* [1895] 1 Ch 117 at 120.

(4) The sworn statement must state where the exhibit may be inspected.

(5) The party making the sworn statement must ensure that the exhibit is available at reasonable times for inspection by other parties.

(6) If a person makes more than one sworn statement, the numbering of the attachments and exhibits must follow on from the previous statement.

Service of sworn statement

11.6 A sworn statement must be filed and served on all other parties to the proceeding:

(a) if the court has fixed a time, within that time; or

(b) for a sworn statement to be used during a trial, at least 21 days before the trial; or

(c) for a sworn statement that relates to an application, at least 3 days before the court deals with the application.

[11.6.1] Late evidence not automatically excluded The failure to file and/or serve a sworn statement within the applicable time may have serious consequences but may not lead automatically to the exclusion of such evidence according to the principle in *Dinh v Polar Holdings* [2006] VUCA 24; CAC 16 of 2006. It remains to be seen precisely to what extent case management principles may affect late sworn statements. See further r.18.10.

Use of sworn statement in proceedings

11.7 (1) A sworn statement that is filed and served becomes evidence in the proceeding unless the court has ruled inadmissible.

[11.7.1] Filed evidence admitted subject to ruling otherwise The rule is expressed in the present tense so that immediately upon filing and service the sworn statement "becomes" evidence, regardless of subsequent events, such as the deponent's failure to attend to be cross examined: *Dinh v Polar Holdings* [2006] VUCA 24; CAC 16 of 2006. See further [11.7.7].

[11.7.2] Time for making objection A party who objects to any material in a sworn statement should make clear their objection before the sworn statement is relied upon: *Gilbert v Endean* (1878) 9 Ch D 259 at 268-9. It is courteous (and may avoid delays) to notify the other side of proposed objections to sworn statements in advance.

[11.7.3] Statements made in attachments It does not necessarily follow that a statement contained in an attachment is deemed to be included in the sworn statement (and therefore evidence for all purposes): *Re Koscot Interplanetary* [1972] 3 All ER 829 at 835.

(2) The sworn statement need not be read aloud during the trial unless the court orders.

[11.7.4] Not necessary to read sworn statements Though not strictly necessary, a deponent (especially if present to be cross-examined) is sometimes called upon to identify their sworn statement by way of evidence-in-chief.

(3) A witness may be cross-examined and re-examined on the contents of the witness's sworn statement.

[11.7.5] Nature and scope of rule It is unlikely that this subrule is intended to displace the traditional rules as to cross-examination or re-examination by confining both to the content of the sworn statement. Cross-examination is not limited to the content of the sworn statement and may extend to any relevant matter, including the credibility of the deponent: *Muir v Harper* (1900) 25 VLR 534 at 535-6. The usual rule as to re-examination is that it is confined to the scope of cross-examination. The rule in *Browne v Dunn* will continue to operate: *West v Mead* [2003] NSWSC 161 at [93]-[100].

[11.7.6] Cross-examination of deponents in interlocutory proceedings The subrule appears to confer an absolute right, subject to the formal requirements in subr.(4). See however *Iririki v Ascension* [2007] VUSC 57; CC 70 of 2007 at [5] (cross-examination on interlocutory sworn statements refused - requires "exceptional circumstances"); cf *Kontos v Laumae Kabini* [2008] VUSC 23; CC 110 of 2005 at [4] (cross-examination on interlocutory sworn statements allowed - "in line with the overriding objective"); *Kalmet v Lango* [1997] VUSC 39; CC 161 of 1996 (cross-examination in judicial review refused - requires "exceptional circumstances").

[11.7.7] Failure to attend to be cross-examined goes to weight The failure of a witness to attend to be cross-examined is a matter going to weight, not to admissibility: *Dinh v Polar Holdings* [2006] VUCA 24; CAC 16 of 2006; *Kelep v Sound Centre* [2008] VUSC 13; CC 37 of 2007 at [8], [9]. Accordingly, the court is not entitled to simply ignore a sworn statement in these circumstances. In deciding how much weight to attach to a sworn statement untested by cross-examination the court may have regard to the nature of the evidence in question and the particular circumstances: See for example *Kelep v Sound Centre* [2008] VUSC 13; CC 37 of 2007 at [9]; *Re Smith & Fawcett* [1942] 1 Ch 304 at 308; [1942] 1 All ER 542 at 545 (questions of motive/good faith); *Re O'Neil (deceased)* [1972] VR 327 at 333 (death of deponent). See further r.12.6(2).

[11.7.8] Cross-examination in judicial review See generally *Kalmet v Lango* [1997] VUSC39; CC 161 of 1996, especially as to cross-examination in judicial review proceedings.

(4) A party who wishes to cross-examine a witness must give the other party notice of this:

(a) at least 14 days before the trial; or

(b) within another period ordered by the court.

[11.7.9] Consequences of failure to give notice The failure of a party to give such notice within time or at all does not automatically disentitle a party from cross-examining a witness. In these situations, the court will have regard to principles of fairness and case management. See further r.12.3 as to adjournment.

Giving evidence by telephone, video or in other ways

[11.8.1] Origin of rule Much of the scheme and content of this rule appears to derive from the detailed consideration given by Coventry J to these issues in *Tari v Minister of Health* [2002] VUSC 42; CC 36 of 2001.

E *CPR* r32.3

11.8 (1) The court may allow a witness to give evidence by telephone, by video or by another form of communication (called "evidence by link") if the court is satisfied that it is not practicable for the witness to come to court to give oral evidence or to be cross-examined.

(2) The court may do this whether the witness is in or outside Vanuatu.

(3) The application for evidence to be given by link must:

(a) be in writing; and

(b) have with it a sworn statement setting out:

(i) the name and address of the witness and the place where he or she will be giving evidence; and

(ii) the matters the witness will be giving evidence about; and

(iii) why the witness cannot or should not be required to come to court, and any other reason why the evidence needs to be given by link; and

(iv) the type of link to be used and the specific facility to be used; and

(v) any other matter that will help the court to make a decision.

[11.8.2] Onus on applicant In practical terms, the party making the application bears the onus of satisfying the court of the appropriateness of the order sought: *Australian Medical Imaging Pty Ltd v Marconi Medical Systems Australia Pty Ltd* (2001) 53 NSWLR 1; [2001] NSWSC 651 at [25].

(4) The court must take the following into account in deciding whether to allow the evidence to be given by link:

(a) the public interest in the proper conduct of the trial and in establishing the truth of a matter by clear and open means; and

(b) the question of fairness to the parties and balancing their competing interests; and

(c) any compelling or overriding reason why the witness should come to court; and

(d) the importance of the evidence to the proceeding; and

(e) whether or not the reason for seeking the evidence to be given by link is genuine and reasonable, having regard to:

(i) how inconvenient it is for the witness to come to court; and

(ii) the cost of the witness coming to court, particularly in relation to the amount claimed in the proceeding; and

(iii) any other relevant matter; and

(f) whether the link will be reliable and of good quality; and

(g) whether or not an essential element in the proceeding can be decided before the evidence is given; and

(h) whether the kind of link will make examination of the witness difficult; and

(i) for evidence to be given by telephone, that it is not practicable for the witness to give evidence in a way that allows for the witness to be identified visually; and

(j) any other relevant matter.

[11.8.3] Contraindications Specific factors militating against evidence by link may include where there may arise important issues of credit (*Edge Technology v Wang* [2000] FCA 1459 at [11]; *Australian Medical Imaging v Marconi Medical Systems* (2001) 53 NSWLR 1 at 5; [2001] NSWSC 651 at [27]; *Xia v Santah* [2003] NSWSC 807 at [6] *cf Tetra Pak v Musashi* [2000] FCA 1261 at [21] – [22]), where a large volume or complex documents will be deployed in court (*Australian Medical Imaging v Marconi Medical Systems* (2001) 53 NSWLR 1 at 5; [2005] NSWSC 651 at [27]) or generally long/complex matters: *Commissioner of Police v Luankon* [2003] VUCA 9; CAC 7 of 2003. See further r.1.4(2)(k).

(5) For evidence given by telephone:

(a) if practicable, a fax machine should be available at each end of the link; and

(b) the court must be satisfied, when the evidence is being given:

(i) of the identity of the witness; and

(ii) that the witness is giving evidence freely.

(6) The court may take into account a certificate by a magistrate, police officer or chief who was present when the witness gave telephone evidence that:

(a) the person was present when the witness gave the evidence; and

(b) the person knows the witness; and

(c) the witness seemed to give the evidence freely.

(8) The certificate must be in Form 19.

(9) For evidence given by video or another link showing the witness:

(a) the witness should sit at a plain table or desk, with only the required documents and exhibits in front of him or her; and

(b) the link should show a reasonable part of the room but still be close enough to enable the court to see the witness clearly and assess him or her; and

(c) no-one else should be in the room with the witness except a technical person to help with the link.

(10) The court may end the giving of evidence by link if the court considers:

(a) the quality of the link is unacceptable; or

(b) to continue would cause unfairness to a party.

(11) The court may give directions about giving evidence by link, including about:

(a) which party is to arrange and pay for the link; and

(b) when and where the evidence will be given by the witness and heard by the court; and

(c) the stage of the hearing when the evidence will be given.

(12) Evidence taken by link for the purpose of a proceeding is taken to be evidence given in court during the proceeding.

Giving evidence before trial

11.9 (1) A party may apply to the court for an order that a witness give evidence before trial.

[11.9.1] Early commencement of trial Nothing in this rule should be read as permitting the trial judge to commence the trial early by hearing a witness, unless all parties are present and agree: *Palaud v Commissioner of Police* [2009] VUCA 10; CAC 6 of 2009.

(2) The court may order that the witness give evidence if the court is satisfied that:

(a) the witness can give evidence that will be relevant to the person's case; and

[11.9.2] What sworn statement should contain The sworn statement in support of the application should state that the deponent is aware of the evidence proposed to be given by the witness and, if qualified, state the opinion that the evidence is relevant: *Smith v Smith* [1975] 1 NSWLR 725 at 731; 25 FLR 38 at 44; 5 ALR 444 at 451.

(b) the witness's evidence is admissible; and

(c) the witness will not be available to give evidence at the trial because:

(i) of the witness's state of health; or

(ii) the witness is leaving Vanuatu either permanently or for an extended period of time.

(3) The witness:

(a) must give the evidence to the court, in the presence of the lawyers for each party, if any; and

(b) may be cross-examined and re-examined.

(4) Evidence given under this rule has the same value as evidence given during a trial.

Evidence by children

11.10 (1) If a child is required to give evidence, the court must take whatever steps are necessary to enable the child to give evidence without intimidation, restraint or influence.

[11.10.1] Time considerations This rule confers a power and an obligation upon the court, which may act upon its own initiative. The parties should identify any issues likely to arise under this rule well before the hearing and should bring them to the attention of the court to obtain appropriate directions. The power will usually be exercised before the witness gives evidence though it may also be exercised during the course of evidence if appropriate circumstances present themselves: See generally *Question of Law Reserved (No 2 of 1997)* [1998] SASC 6563.

[11.10.2] Meaning of "child" See r.20.1 for the definition of "child". As to competency of child witnesses at common law see *R v Brazier* (1779) 1 Leach 199 at 200; 168 ER 202 at 202-3.

(2) In particular the court may:

(a) allow the child to give evidence screened from the rest of the court (but not from the judge); and

[11.10.3] Purpose of rule Child witnesses may be especially fearful of confronting certain people in court, even in civil proceedings. Experience in other jurisdictions suggests that children who give evidence in this way were less anxious and more effective. Indeed, in some jurisdictions this is the usual way for children to give evidence.

(b) sit in a place other than the court-room; and

[11.10.4] Purpose of rule The design of court building may intimidate child witnesses. Long periods waiting in the building, inappropriate waiting facilities and the crowding together of hostile parties and strangely costumed lawyers, sometimes even the media, can elevate a child's anxiety. Children may therefore be more effective witnesses if their evidence is heard elsewhere, in less formal surroundings.

(c) allow only the parties' lawyers to be present while the child gives evidence; and

[11.10.5] Purpose of rule The presence of members of the public in the courtroom may cause distress to child witnesses, particularly where personal or embarrassing evidence is to be given.

(d) appoint a person to be with the child while the child gives evidence; and

[11.10.6] Identity and role of companion So-called court companions may provide emotional support to the child. The court companion is often a parent, family member or trusted friend. In other jurisdictions there are also a range of specialist counsellors who may perform this task. It is suggested that it is not appropriate for a person who is also involved or a witness in the proceedings act as court companion. The court companion usually sits next to the child so as to confer support by their physical presence, but the companion may sometimes be required to sit elsewhere in the courtroom. All aspects of the function of this provision are within the discretion of the judge. It is not the function of the court companion to prepare the witness to give evidence, coach them or generally discuss their evidence prior to giving it. This activity runs the risk of contaminating the evidence and it is suggested that judges should specifically warn against such practices in advance.

(e) do anything else that may assist the child to give evidence.

[11.10.7] Cross-examination The language and formalities of the courtroom are highly confusing for children and this problem is especially acute in cross-examination. It is suggested that the court should be alert to this possibility and ensure that child understand the questions asked of them and are not harassed or intimidated by tone of voice, aggression, difficult language or other unfair or abusive treatment. Children may require frequent breaks during cross-examination.

Evidence by other vulnerable persons

11.11 If the court is satisfied that a witness may be unable to give evidence without intimidation, restraint or influence, the court may take any of the steps set out in rule 11.10 to ensure the witness is able to give evidence without intimidation, restraint or influence.

[11.11.1] Time considerations This rule confers a power and an obligation upon the court, which may act upon its own initiative. The parties should identify any issues likely to arise under this rule well before the hearing and should bring them to the attention of the court to obtain appropriate directions. The power will usually be exercised before the witness gives evidence though it may also be exercised during the course of evidence if appropriate circumstances present themselves: See generally *Question of Law Reserved (No 2 of 1997)* [1998] SASC 6563.

[11.11.2] Meaning of "vulnerable persons" There is no definition of "vulnerable persons". Presumably this includes anyone who is a competent witness for whom the giving of evidence is likely to be particularly traumatic, such as a victim of violence or sexual abuse. Other classes of potential "vulnerability" are more problematical. Perhaps the protection of this rule could extend to the elderly or the intellectually disabled, however the influence of cultural differences or other peculiar susceptibilities is uncertain.

Expert witnesses

11.12 (1) A party who intends to call a witness to give evidence as an expert must:

(a) tell every other party; and

(b) give them a copy of the witness's report.

[11.12.1] Purpose of rule The purpose of this rule is, clearly, to avoid surprise and to give each party the opportunity to consider the expert evidence and, if necessary, to answer with additional expert evidence.

[11.12.2] Uncertainty Paragraph (b) generates uncertainty. First, there is no underlying obligation for an expert witness to bring any particular "report" into existence other than by sworn statement under r.11.3. Second, if an expert witness did bring such a report into existence it is almost certainly protected by legal professional privilege until tendered – is this rule intended to be a derogation of that privilege? Third, what must be contained in such a "report"?

[11.12.3] Validity of rule To the extent that the rule purports to require that a privileged document be produced to other parties, its validity should not be assumed: See *Worrall v Reich* [1955] 1 QB 296 at 300; [1955] 2 WLR 338 at 341; [1955] 1 All ER 363 at 366; *Circosta & Ors v Lilly* (1967) 61 DLR 2d 12 at 15; *Causton v Mann Egerton (Johnsons) Ltd* [1974] 1 WLR 162 at 169; [1974] All ER 453 at 459.

(2) In the Magistrates Court, this must be done at least 21 days before the trial date, or if the report is a response to an existing report, within 14 days of the trial date or such other date approved by the court.

(3) In the Supreme Court, this must be done at Conference 1.

[11.12.4] Timing issues The timing of this requirement is likely to be difficult or impossible in most cases. For example, if a claimant gives notice to a defendant at Conference 1 of his intention to call an expert witness and then provides a copy of the same, how is a defendant to be expected simultaneously to provide answering expert evidence? There are also situations in which a claimant will be unable to comply with this time frame; such as when an expert's report depends upon the examination of some document or thing in the possession of the defendant and not yet available to be examined. It is suggested that the court should deal with issues of expert evidence whenever they arise in a manner that is fair to all parties and without regard to artificial and unrealistic schedules. Obviously, parties should draw the court's attention to the likelihood that expert evidence will be required at the earliest time.

(4) A party may only call one expert witness in a field unless the court orders otherwise.

Court-appointed experts

11.13 (1) The court may appoint a person as an expert witness if a question arises that needs an expert to decide it.

[11.13.1] Inherent jurisdiction There is also an inherent jurisdiction to appoint a court expert: *Badische Anilin v Levinstein* (1883) 24 Ch D 156 at 166-7; *Colls v Home & Colonial Stores* [1904] AC 179 at 192; [1904-7] All ER 5 at 14.

[11.13.2] Applicable criteria Appointment of a court expert is an encroachment on the adversarial system and it is suggested that it may not be appropriate in all cases, despite the admonitions in Part 1. Most lawyers have strong reservations about the use of court experts, usually because the parties themselves are better placed to know what kind of expert evidence is required and from which kind of expert. A court expert may be appropriate where this would involve a significant saving of costs: See further r.1.2(2)(c)(iii); *Newark v Civil & Civic* (1987) 75 ALR 350 at 351. There is, however, no good reason to suppose that a cost saving will always result from the appointment of a court expert as such an expert is likely to expend greater time in attendances. It would not be appropriate to appoint a court expert merely to assist one side obtain expert evidence (at the partial expense of another): *Gale v NSW Minister for Conservation* [2001] FCA 1652.

[11.13.3] Whether contemporary test differs from earlier There may be a wider role for court-appointed experts under the new *Rules* than in the past. In *Daniels v Walker* [2000] 1 WLR 1382 at 1387 Lord Woolf suggested that a joint expert should be a first step and then if a party required additional expert evidence, that could be permitted in the court's discretion. It is suggested that such an approach involves high costs to the parties and should be adopted with caution. Lord Woolf also acknowledged, in his final report (at 141), the difficulty where there are a number of "schools" of thought within a discipline. In such cases the court is deprived of the opportunity of hearing fully representative expert evidence and of seeing it tested in the adversarial method.

(2) The court may:

(a) direct the expert to inquire into the question and report back to the court within the time the court specifies; and

(b) give the expert instructions about the terms of reference and the report.

[11.13.4] Use of report Upon receipt of the report, the court is bound to consider it and may allow cross-examination of the author. The court is not obliged to accept the report and may accord it such weight as is it considers appropriate: *Non-Drip Measure v Strangers* [1942] RPC 1 at 24-5; *Trade Practices Commission v Arnotts (No 4)* (1989) 21 FCR 318; (1989) 89 ALR 131 at 135.

(3) The expert's costs are payable by the parties equally unless the court orders otherwise.

(4) If the court appoints an expert, a party may not call another person as an expert witness in that field unless the court orders otherwise.

Medical evidence

11.14 (1) In a claim for damages for personal injury, the defendant can request that the claimant be examined by a medical practitioner chosen by the defendant.

[11.14.1] No power to require submission There is no power at common law nor under statute law to require a person to submit to a medical examination against their will in these circumstances. Accordingly, the rule refers to a "request" which, if declined, leads to the consequences described in subr.(2).

[11.14.2] Meaning of "examination" There is no definition of "examination" which leads to doubt as to the extent of the same, especially as to whether an examination might involve penetration of the skin, etc. The authorities illustrate attempts to balance the rights of the parties against personal liberty, risk, etc. For a "narrow" approach see for example *W v W (No 4)* [1964] P 67 at 78; [1963] 2 All ER 841 at 845; [1963] 3 WLR 540 at 548 (blood test); *Pucci v Humes* (1970) 92 WN (NSW) 378 at 382 (injection of liquid into spinal column under general anaesthetic); *Aspinall v Sterling Mansell* [1981] 3 All ER 866 at 868 (patch testing). For a "wide" approach see for example *Prescott v Bulldog Tools* [1981] 3 All ER 869 at 875 (audiological tests); *Grant McKinnon v Commonwealth* [1998] FCA 1456 (risk of inhaling pollution to attend medical appointment in city) *Perpetual Trustees v Naso* (1999) 21 WAR 191 at 193, 196; [1999] WASCA 80 at [15] (tests, injections, psychiatric examinations); *Crofts v Queensland* [2001] QSC 220 (MRI scan under general anaesthetic).

(2) If the claimant does not attend and allow the examination without reasonable excuse, the court may:

(a) order the proceedings be stayed until the claimant does so; or

[11.14.3] Inherent jurisdiction Such a rule probably falls within the inherent jurisdiction to stay proceedings whenever just and reasonable: *Edmeades v Thames Board Mills* [1969] 2 QB 67 at 71-2; [1969] 2 All ER 127 at 129-30; [1969] 1 Lloyd's Rep 221 at 223**;** *Starr v National Coal Board* [1977] 1 All ER 243 at 248, 254, 256; [1977] 1 WLR 63 at 69, 75, 77.

(b) take the circumstances of the claimant's refusal into account when considering the claimant's evidence.

[11.14.4] Interests to be balanced In deciding which course to take, the court must balance the claimant's right to personal liberty against the defendant's right to defend against the claim: *Starr v National Coal Board* [1977] 1 All ER 243 at 249; [1977] 1 WLR 63 at 70; *Stace v Commonwealth* (1988) 49 SASR 492 at 495.

Summons to give evidence and produce documents

11.15 (1) The court may order that a summons be issued requiring a person to attend court to give evidence, or to produce documents.

[11.15.1] History Such a summons was formerly called a subpoena (literally "under penalty") and was either a subpoena *ad testificandum* (to give evidence) or a subpoena *duces tecum* (to produce documents). The power to issue subpoenas originally derived from the inherent jurisdiction. It is likely that a summons under this rule is equivalent in substance to the former subpoena: *BNP Paribas v Deloitte* [2003] EWHC 2874 at [6] (Comm); [2004] 1 Lloyd's Rep 233 at 234-5; *Tajik Aluminium v Hydro Aluminium* [2005] EWCA Civ 1218 at [19] – [25].

[11.15.2] Applicable criteria The authorities are not overly prescriptive about the criteria in which a summons will be issued, provided that a legitimate forensic purpose is served. The extent of assistance which the party seeking the summons is likely to derive is obviously relevant, as are case management considerations. An indiscriminately wide summons, seeking documents or evidence of doubtful relevance at great inconvenience or risk to a third party, may not readily attract the grant of leave: *Australian Gas Light Co v ACCC* [2003] ATPR 41-956 at [8].

[11.15.3] Inherent jurisdiction to set aside There is an inherent jurisdiction to set aside a summons upon application or on its own motion: *Raymond v Tapson* (1882) 22 Ch D 430 at 434-5; *Purnell Bros v Transport Engineers* (1984) 73 FLR 160 at 175; *Oakes v Kingsley Napley* [1999] EWCA Civ 1389; *Fried v NAB* [2000] FCA 911 at [18]; (2000) 175 ALR 194 at 198. A summons will be set aside if it appears to the court that it is irrelevant, speculative, fishing or oppressive: *Senior v Holdsworth* [1976] QB 23 at 35; [1975] 2 WLR 987 at 994; [1975] 2 All ER 1009 at 1016.

(3) The order may be made:

(a) at a conference; and

(b) at a party's request or on the court's initiative.

[11.15.4] Application to be supported by evidence and draft An application by a party should normally be supported by a sworn statement and draft summons. The applicaion should specify the relevant issues which justify the making of the order, the manner in which the party to be summoned may help and, if a summons to produce, the reason why the documents might be necessary.

(4) The summons must:

(a) give the full name of the witness; and

[11.15.5] Proper recipient Serious consideration ought to be given to the proper recipient - as to partnerships see *Lee v Angas* (1866) LR 2 Eq 59 at 63-4; *New Ashwick v IAMA Ltd (No1)* [2000] SASC 416 at [18]; as to unincorporated associations see *Rochfort v TPC* (1982) 153 CLR 134 at 140; 43 ALR 659 at 662; 57 ALJR 31 at 32; as to employees see *Eccles v Louisville Rwy* [1912] 1 KB 135 at 145-6, 148; as to companies see *Penn-Texas v Murat Anstalt (No 2)* [1964] 2 QB 647 at 663-4; [1964] 2 All ER 594 at 599; [1964] 3 WLR 131 at 140-1.

(b) if it is a summons to produce documents, clearly identify the documents; and

[11.15.6] Extent of identification Documents may be identified as a class if the class is sufficiently clear in all the circumstances: *Burchard v Macfarlane* [1891] 2 QB 241 at 247; [1891-4] All ER 137 at 141; *Lucas Industries v Hewitt* (1978) 45 FLR 174 at 192; (1978) 18 ALR 555 at 573; *Berkeley Administration v McClelland* [1990] FSR 381 at 382; [1990] 2 QB 407; [1990] 2 WLR 1021; [1990] 1 All ER 958; *Re Perpetual Trustee v Commissioner for ACT Revenue* (1993) 29 ALD 817 at 820-821. It should be borne in mind, however, that a summons is usually addressed to a layperson and so should contain a description of the documents or class of documents in plain language: *Southern Pacific Hotel Services v Southern Pacific Hotel Corp* [1984] 1 NSWLR 710 at 720. A summons which places too onerous a burden on the witness to decide which documents relate to issues between the parties is liable to be set aside as oppressive: *Finnie v Dalglish* [1982] 1 NSWLR 400 at 407; *Re Asbestos Cases* [1985] 1 WLR 331 at 337-8; [1985] 1 All ER 716 at 721; *Panayiotou v Sony* [1994] Ch 142 at 151; [1994] 2 WLR 241 at 248; [1994] 1 All ER 755 at 762-3; *Chapman v Luminis* [2001] FCA 1580 at [44]; *Tajik Aluminium v Hydro Aluminium* [2005] EWCA Civ 1218 at [25] - [27].

(c) state when and where the witness is to attend court; and

[11.15.7] Return of summons before trial Consideration ought to be given to whether to make the summons to produce documents returnable at the trial or before. Although it is usually desirable that a person should produce documents in advance of the trial, it is usually undesirable that the person should give oral evidence in advance of it: *Charman v Charman* [2005] EWCA Civ 1606 at [24]; [2006] 1 WLR 1053. At least one object of early return of a summons is to appraise the parties of the strengths and weaknesses of their case at an early stage, hence, no narrow view as to the legitimacy of early return ought to be taken: see *Khanna v Lovell White Durrant* [1995] 1 WLR 121 at 123.

(d) be in Form 20.

Service of summons

11.16 A summons under rule 11.15 must be served personally, unless the court orders otherwise.

Travel expenses

11.17 (1) At the time of service, the person must be given enough money to meet the reasonable costs of travelling to comply with the order.

[11.17.1] Meaning of "costs of travelling" Often called "conduct money". It is uncertain whether the cost of "travelling" may, as in other jurisdictions, also include the reasonable costs of accommodation, meals, etc where the witness is summoned sufficiently far from home.

[11.17.2] No allowance otherwise There is no provision in the rules for the payment of expenses associated with attending to give evidence otherwise, even of an expert nature. There is said to be a duty (at least upon citizens) to aid in the administration of justice and so there can be no recovery for loss attributable to a summons outside that provided by the rules: *Collins v Godefroy* (1831) B & Ad 950 at 952; 109 ER 1040 at 1040; *Megna v Marshall* [2004] NSWSC 191 at [7]; (2004) 60 NSWLR 664 at 665. As to costs of compliance with a summons to produce documents see r.11.18(3).

[11.17.3] Consequences of failure to pay The failure to pay travel expenses may cause much difficulty but should not be a ground for ignoring the summons: *Pyramid v Farrow Finance* (1995) 1 VR 464. If travel expenses are not tendered at the time of service, the witness should immediately draw attention to that failure and the party issuing the summons would be well advised to tender the anticipated expenses without delay or at least to give an appropriate undertaking.

(2) However, if the summons is not served personally, it is sufficient if the person is reimbursed the reasonable costs of travelling to comply with the order when the person attends court in answer to the summons.

(3) A person who gives evidence without being summoned is entitled to be reimbursed his or her reasonable costs of travelling to give the evidence as if the person had been summoned.

Producing documents or objects

11.18 (1) A person summoned to produce documents may do so by giving the documents to the court office at the place stated in the summons.

[11.18.1] Alternative procedure The traditional procedure was to call on the summons in open court and for the person summoned to produce the documents, if there were no objections or applications to set aside the summons. A production of documents and objects in this way is an admission of their existence in the possession of the person summoned and that they match the description in the summons: *Environmental Protection Authority v Caltex* (1993) 178 CLR 477 at 502; 118 ALR 392 at 407. If there is an objection by the person summoned (which may be advanced personally or by counsel) then the grounds would be stated and the court should arrange to deal with the issues. If a person responding to the subpoena stated that there are no documents to produce, it was within the court's discretion to determine whether the documents exist and whether they are in the possession of that person. Some examination of the person by the issuing party may be allowed for that purpose: *Trade Practices Commission v Arnotts (No2)* (1989) 21 FCR 306 at 314. It may still be necessary to utilise the traditional procedure in cases where the production might be opposed or otherwise controversial, as there is no other way for the issues to be raised and ventilated where the documents are merely handed in.

(2) The court officer must give the person a receipt for the documents.

(3) If a person who is summoned to produce documents is not a party, the person is entitled to be paid or reimbursed the reasonable costs of producing the documents.

[11.18.2] Purpose and scope of rule This subrule is clearly intended to compensate a person summoned to produce documents for the expense or loss reasonably incurred in complying: *Fuelxpress v LM Ericsson* (1987) 75 ALR 284 at 285. The subrule is otherwise silent as to the types of costs which may be recovered. Examples might include: The costs (at usual charge-out rates) of staff required to search, collate, copy, etc the documents (*Deposit & Investment v Peat Marwick Mitchell* (1996) 39 NSWLR 267 at 289, 291-2); The costs of preserving the confidentiality of any documents (*Charlick v Australian National Rwys* (1997) 149 ALR 647 at 649-51; *Hadid v Lenfest* (1996) 65 FCR 350 at 353; (1996) 144 ALR 73 at 76**);** Legal costs associated with checking the validity of a widely drawn summons (*Deposit & Investment v Peat Marwick Mitchell* (1996) 39 NSWLR 267 at 277, 289, 292).

Failure to comply with summons

11.19 (1) Failure to attend court as required by a summons to attend and give evidence, or produce documents, without a lawful excuse is contempt of court.

(2) A person who fails to attend court as required by a summons to attend and give evidence, or produce documents, without a lawful excuse may be dealt with for contempt of court.

[11.19.1] Excuses Such lawful excuses may include the failure to tender travel expenses (*Frenchman v Frenchman* [1997] EWCA Civ 1304; *Donnelly v Archer* [2003] FCA 197 at [15]) or the failure to allow reasonable time for compliance (*Bidald v Miles* [2005] NSWSC 977 at [6]). An unacceptably careless attitude to inquiries (esp. by a lawyer) which led to documents failing to be produced probably would not afford an excuse: *Ditfort v Calcraft* (1989) 98 FLR 158 at 172.

[11.19.2] Setting aside summons Prudent witnesses should apply to set aside the summons or attend as required and make objection at that time. Objections based on privilege can be raised after the witness is sworn. A person who is summoned and whose application to set aside the summons is refused may, even though not a party to the substantive proceedings, bring an appeal: *Senior v Holdsworth; Ex parte Independent Television News* [1976] 2 QB 23 at 32; [1975] 2 All ER 1009 at 1015.

Evidence taken in Vanuatu for use in proceedings outside Vanuatu

[11.20.1] Hague Convention and validity of rule The scheme of this rule borrows from the scheme of the *Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters* (18 March 1970) to which Vanuatu is **not** a party. Neither France nor Britain extended the Convention to the New Hebrides. Absent any applicable convention, letters rogatory might be used on the basis of comity. There is, however, a real question as to whether there is a sufficient statutory basis for this rule and therefore its validity should not be assumed.

11.20 (1) Evidence taken in Vanuatu for use in a proceeding outside Vanuatu can only be taken in accordance with this rule.

(2) If the court receives a letter of request from a court in another country asking that evidence be taken in Vanuatu for use in proceedings in the other country, the evidence must be taken in accordance with this rule.

(2) The letter of request must have with it a sworn statement by an officer of the court of the other country verifying the letter of request.

(3) The court is to give effect to the letter by:

(a) issuing a summons to the person named in the letter to appear and give evidence or produce documents or both; and

(b) hearing the witness's evidence orally; and

(c) making a written record of the evidence; and

(d) sending this to the court in the requesting country.

(4) The written record must be signed by the judge before whom the evidence is given and sealed.

(5) A person who gives evidence under this rule is to be treated as if the person is giving evidence in proceedings in the Supreme Court.

[11.20.2] Example See generally *First American v Zayed* [1998] 4 All ER 439; [1999] 1 WLR 1154.

Evidence taken outside Vanuatu for use in proceedings in Vanuatu

[11.21.1] See [11.20.1].

11.21 (1) A party to a proceeding may apply to have evidence in the proceeding taken from a witness outside Vanuatu.

(2) The application must have with it a sworn statement that:

(a) the person's evidence is relevant and admissible; and

(b) the evidence cannot be obtained from a person in Vanuatu.

(3) If the court is satisfied that:

(a) the person's evidence is relevant and admissible; and

(b) the evidence cannot be obtained from a person in Vanuatu; and

(c) there is an arrangement between Vanuatu and the country concerned for the taking of evidence in that country for use in civil proceedings in Vanuatu;

the court must issue a letter of request addressed to a court in the other country asking that the court take the witness's evidence.

[11.21.2] Meaning and nature of "letter of request" The expression "letter of request" is used in the Hague Evidence Convention, to which Vanuatu is not a party. This expression has become interchangeable with "letter rogatory" which, absent any applicable convention, is perhaps better evocative of the exact provenance of such a letter which may need to be forwarded through diplomatic channels.

(4) The written record must be signed by the judge before whom the evidence is given and sealed.

(5) A person who gives evidence under this rule is to be treated as if the person is giving evidence in proceedings in the Supreme Court.