

Episode 149: Summary

Episode name: The Devil's in the Details: Drafting Affidavits That Speak for Themselves

Guest(s): Sonya Willis

What area(s) of law does this episode consider?

Drafting affidavits.

Why is this topic relevant?

Affidavits play a vital role in the courtroom, providing a way for witnesses to share their evidence in a structured, written format. But drafting them isn't as straightforward as it might seem. In fact, the way affidavits are written has been under the judicial microscope recently, with some strong criticism directed at practices that blur the lines between the witness' accurate recollection and the lawyer's own interpretation.

Because drafting robust affidavits is a craft in itself. It isn't just about putting words on a page, it's about presenting evidence clearly to the court whilst preserving the integrity of the witness's own recollection in their own words. Missteps here can have serious consequences, from affidavits being rejected to breaches of professional conduct rules.

What legislation is considered in this episode?

[Evidence Act 1995 \(NSW\)](#); [Evidence Act 2008 \(Vic\)](#); [Evidence Act 2001 \(Tas\)](#); [Evidence Act 2011 \(ACT\)](#); [Evidence \(National Uniform Legislation\) Act 2011 \(NT\)](#)
(**Evidence Act**)

[Civil Procedure Act 2005 \(NSW\)](#)

What cases are considered in this episode?

[White v Data Transfer Services Pty Ltd & Ors \(No 2\) \[2022\] NSWSC 963](#) (**White v Data Transfer**)

- The plaintiff, Mr. White, claimed \$2,000,000 under a Deed of Loan and Guarantee, despite no direct monetary payment being made. The key issue was whether the acknowledgment of the loan in the Deed estopped the defendants from denying its receipt. The court found that the acknowledgment precluded the defendants from disputing the loan, affirming their liability under the Deed.

[Kane's Hire Pty Ltd v Anderson Aviation Australia Pty Ltd \[2023\] FCA 381](#) (**Kane's Hire**)

- Jackman J criticised the common New South Wales practice of presenting conversation evidence in direct speech when witnesses only recall the general substance. The key issue was whether direct speech should be used in legal evidence when a witness cannot remember the exact words spoken. The court

found that direct speech should only be used for verbatim recollections and outlined six principles to ensure clarity in presenting conversation evidence.

[Lantrak Holdings Pty Ltd v Yammine \[2023\] FCAFC 156](#) (**Lantrak Holdings**)

- The Yammine parties alleged that the Liemant parties entered into an oral collateral contract to honor a previous sale price, but delays in expert evidence disclosure led to procedural complications. In a higher court than *Kane's Hire*, Jackman J reaffirmed his criticism of the practice of presenting evidence of conversations in direct speech when the witness can only recall the gist. Jackman J noted the difficulty of presenting complex memories under pressure, which may affect credibility. He also suggested that affidavits might better reflect a witness's memory, particularly for those less able to recall details under the stress of oral testimony.

[Gan v Xie \[2023\] NSWCA 163](#) (**Gan v Xie**)

- Between August and September 2016, Ms. Gan invested over \$305,150 and RMB805,000 in MFC, a pyramid scheme, alleging that Ms. Xie misrepresented its legitimacy, profitability, and safety, leading to financial losses. The Court of Appeal upheld Jackman J's reasoning in *Lantrak Holdings* and *Kane's Hire*, affirming that witnesses who recall only the gist of a conversation can still provide reliable testimony, however, expressed a preference for direct speech.

[Wild v Meduri \[2024\] NSWCA 230](#) (**Wild v Meduri**)

- Following the death of Elisabetta Meduri in 2020, disputes arose over her 2009 Will, with her daughter Rose contesting probate and property distributions while her brothers Dominic and John sought to uphold the Will's terms. The Court of Appeal rejected Jackman J's criticism of presenting conversations in affidavit evidence using phrases like "words to the following effect." The court upheld the longstanding practice of summarising conversations in this way as an acceptable affidavit drafting practice, emphasising that it allows witnesses to convey the gist of conversations while remaining open to cross-examination.

[Watson v Foxman \(1995\) 49 NSWLR 315](#)

- McLelland CJ discussed the inherent fallibility of human memory, especially as time passes and litigation intervenes, noting that memories are often shaped by subconscious factors. The relevant issue was how to address the inherent unreliability of witness testimony and recollections in legal proceedings, especially when memories are influenced by self-interest or the pressures of litigation. The court acknowledged that memory is not a precise reproduction of past events and that recollections are often influenced by subjective interpretations and motivations.

What are the main points?

- The disagreement concerning affidavit drafting between the NSW Supreme Court and the Federal Court relates to the issue of imperfect memory and the reliability of witness testimony. The debate centres around best recollection evidence provided in affidavit, as opposed to when the witness can recall words verbatim or where they cannot remember at all.
- The disagreement surrounding affidavit drafting practices was initially raised in *White v Data Transfer*, however, that case involved clearly poor lawyering practices, such as fabricating witness statements and misleading clients.
- In *Kane's Hire* and *Lantrak Holdings*, Jackman J expressed concern about lawyers inserting words into clients' and witnesses' mouths when drafting affidavits. Jackman J emphasised the importance of using inverted commas only when a witness is absolutely certain of the exact words spoken. He advises that uncertain or paraphrased statements should not be enclosed in quotes in affidavits.
- In *Gan v Xie*, the NSW Court of Appeal initially upheld Jackman J's preference for direct speech in affidavits, however, emphasised that a witness's inability to recall exact words does not automatically render their testimony unreliable. However, in *Wild v Meduri*, Bell CJ and Kirk JA strongly criticised Jackman J's position, defending the longstanding practice of using phrases like "to the following effect" to convey the substance of conversations.
- In *Wild v Meduri*, Bell CJ emphasised that the longstanding practice of using phrases like "to the following effect" allows witnesses to present the gist of conversations, which can then be tested under cross-examination. Bell CJ argued that it would be undesirable for a single judge to unilaterally end this longstanding practice.

What are the practical takeaways?

- When drafting an affidavit, ensure that only relevant information is included to effectively communicate with the court. Focus on extracting relevant details from witnesses in order to present a clear and concise case.
- Accurately portray conversations in affidavits by using language that the witness would use themselves. This helps to avoid putting words in the witness' mouth.
- Try to engage witnesses in meaningful conversations to accurately reflect their level of knowledge when drafting their affidavits. By challenging witnesses to recall details and think deeply about their experiences, you may obtain a clearer and more precise representation of events.

- Be prepared with a list of questions when conducting a witness interview to ensure all necessary information is obtained. However, simply following a script without engaging with the witness can lead to missing crucial evidence and can create a negative impression.
- Cross check witness statements, and be cautious of identical recollections among multiple witnesses as it may raise suspicions of collusion.
- As a bottom line, lawyers must prioritise their duty to the court when drafting documents like affidavits, ensuring they are concise and informative to help judges make informed decisions.
- When preparing any document, not just court-related ones, consider the audience's knowledge, language comprehension, and expertise level in order to most effectively communicate the intended message.

Show notes

[Supreme Court of New South Wales, Practice Note SC Gen 23 - Use of Generative Artificial Intelligence \(Gen AI\)](#)

[Head, A & Willis, S 2024 'Assessing law students in a GenAI world to create knowledgeable future lawyers', *International Journal of the Legal Profession*, 31\(3\), pp. 293-310](#)

[Hack, A & Willis, S 2024 'Direct speech evidence after Kane's Hire and Gan v Xie: did you get the gist?', *Law Society Journal Online*](#)

[Hack, A & Willis, S & Fernandez, S 2024 'Wild ride for NSW lawyers: new guidance on direct speech evidence', *Law Society Journal Online*](#)