Judging – Determining Facts – Judge P I Lakatos SC

It has been observed by experienced lawyers and judges that litigation and a court case are generally a once-in-a-lifetime experience to which litigants attach great importance – A M Gleeson QC, ***Judging the Judges*** – (1979) 53 ALJ 344 at paragraph [14]. Similarly in ***Goodrich Aerospace Pty Limited v Arsic*** [2006] NSWCA 187, Ipp JA (with whom Mason P and Tobias JA agreed) wrote at paragraph [16]:

> *Individuals who have been parties in trials in superior courts usually remember the event for the rest of their lives. The demeanour findings made in those trials will usually affect the parties far more than any legislative Act or decision by the executive government. Indeed, the difference between success in life and ruin may turn on a single demeanour finding.*

The role of a judge is multifarious involving the control of persons (parties, witnesses, lawyers and support staff); ensuring that the process of the case is seamless and efficient; giving interlocutory and other judgments on law and procedure and most significantly for present purposes, the task of fact-finding.

In terms of public perception, the task of fact-finding assumes particular importance. It is not commonplace that those who observe legal proceedings comprehend or are deeply immersed in legal issues. The parties in particular, and lay observers in general, more often identify errors of fact and errors in fact-finding as matters where it is contended, the legal process has failed. It is very rare that any public commentary complains about a judge making an error in relation to the application of the rule against perpetuities or the tendency evidence rule, for example.

Many eminent judges and lawyers have written on the subject of fact-finding. This paper is designed to be a practical guide to less experienced judges as to how to undertake this important task. The paper is substantially based on the first chapter of Tom Bingham's (formerly Senior Law Lord: Lord Bingham of Cornhill) book: ***The Business of Judging***. Chapter 1 is entitled: The Judge as Juror: The Judicial Determination of Factual Issues. I have attempted to supplement Lord Bingham's thoughts with the views of Australian and NSW judges. Needless to say, the general views of these eminent jurists and lawyers have much in common, hence confirming (in my mind, at least) the common-sense and wisdom of what Lord Bingham has set out in his work.

Importance of Fact Finding

To many litigants, in both civil and criminal proceedings, findings of fact are likely to be crucial because most cases turn largely if not entirely on the facts. The famous American jurist **Justice Cardozo** observed that**:**

> *Lawsuits are rare and catastrophic experiences for the vast majority of men, and even when the catastrophe ensues, the controversy relates most often not to the law, but to the facts* – ***The Nature of the Judicial Process*** (Yale, 1921), 128-9.

In addition, factual findings once made at first instance are very hard to dislodge on appeal, and many disgruntled litigants will most often complain about incorrect factual decisions rather than legal decisions. See generally the comments of the High Court in **Fox v Percy** [2003] HCA 22; (2003) 214 CLR 118, where Gleeson CJ, Gummow and Kirby JJ made reference to the reticence of appellate courts to interfere in credibility findings of a trial judge, who was accepted to be in a better position to make such credibility assessments. Their Honours at paragraph [30] and following stated:

[*30]… However, it is equally true that, for almost as long, other judges have cautioned against the dangers of too readily drawing conclusions about truth and reliability solely or mainly from the appearance of witnesses. Thus, in 1924, Atkin LJ observed in* ***Societe d'Avances Commerciales (Societe Anonyme Egyptienne) v Merchants' Marine Insurance (The Palitana)****:*

> *… I think that an ounce of intrinsic merit or demerit in the evidence, that is to say, the value of the comparison of evidence with known facts, is worth pounds of demeanour.*

[31] Further, in recent years, judges have become aware of scientific research that has cast doubt on the ability of judges, or anyone else, to tell truth from falsehood accurately on the basis of such appearances. Considerations such as these have encouraged judges, both at trial and on appeal, to limit their reliance on the appearances of witnesses and to reason to their conclusions, as far as possible, on the basis of contemporary materials, objectively established facts and the apparent logic of events. This does not eliminate the established principles about witness credibility; but it tends to reduce the occasions where those principles are seen as critical. (Citations Omitted)

Their Honours approved the observations of Samuels JA in ***Trawl Industries v Effem Foods Propriety Ltd*** (1992) 27 NSWLR 326, particularly at p 348 D–F, where Samuels JA counselled that it should not be taken for granted that a trial judge can reliably assess the credibility of a witness simply on the basis of demeanour and reference was made to a number of papers and law reform commission reports substantiating that view.

The question of fact-finding involves determining an event which occurred in the past as recounted by persons who were said to be present. It involves three aspects:

a. a court is often presented with conflicting versions;

b. the court's determination takes place within evidential and procedural constraints; and
c. the determination has significant and practical consequences;

In the adversarial context, what is not involved is the determination of the truth but whether a party has discharged its onus of proof – **Air Canada v Secretary of State for Trade** [1983] 2 AC 394 at 411, per Lord Denning MR cf the judge's obligation is to find out the truth, and to do justice according to law – **Jones v National Coal Board** [1957] 2 QB 55 at 63, 64 per Denning LJ. However, different views have been expressed, on the basis that if adversarial proceedings involve a thorough and balanced process, in the great majority of cases the truth will out.

Suggested Method of Fact Finding

It is convenient to deal with this issue in two categories: eyewitnesses and expert evidence. The issues are far more pointed in the eyewitness category than opinion evidence given by experts. Lord Bingham draws upon the writings of other barristers and judges in formulating a number of steps that he recommends in approaching this task – cf Eggleston QC, ***Evidence, Proof and Probability*** (1978) p. 155.

A. Eye-Witnesses:

The starting point is to determine what facts are common ground, which normally sets the parameters of the contest between the parties. The next step is to determine what facts are incontrovertible.

This may be done by reference to contemporaneous records made outside the purview of any dispute. In particular, documents prepared in the ordinary course of a business or in the ordinary course of other record-keeping, which is

unaffected by the knowledge or anticipation of any legal dispute, have been considered by many judges and others to be a further solid foundation to determining the facts and in particular, in assessing the weight of eyewitness accounts.

In a New South Wales case, reference to business records provided Sackville J in the long running ***Seven Network Ltd v News Ltd*** [2007] FCA 1062 case, with the means by which to resolve the competing versions of the witnesses to the business transactions that were involved. Sackville J's careful analysis in that case in determining the reliability and weight to be committed to the testimony of Mr Kerry Stokes, is an object lesson in the constructive manner in which to undertake that task. His Honour discounted reliance on an assessment of Mr Stokes' demeanour, making the comment that he presented as an intelligent sophisticated businessman, who was the head of his organisation and generally gave evidence in a calm and controlled way. It was that presentation of Mr Stokes that caused Sackville J to carefully analyse the utility of any reliance upon demeanour findings and in due course to substantially reject reliance upon any such findings.

The exceptions, which assisted his Honour, were specific responses by Mr Stokes to specific subject matter, based upon a contrary view expressed in the internal company documents. In this regard, Sackville J placed major reliance on internal company emails in determining the truth of preceding events. His Honour reasoned that given the expectation that such internal documents would remain private, and all the other circumstances relating to the creation of those internal memoranda, there was no reason to suppose that their content was otherwise than factual.

In ***State Rail Authority v Earthline Constructions (in liq)*** (1999) 73 ALJR 306, the State Rail Authority sued for the recovery of $2 million which it alleged, had been mistakenly paid to the defendant's behalf based on fraudulent invoices

presented by Earthline. A key witness for the plaintiff was an employee of the defendant who gave evidence of the fraudulent system. The trial judge O'Keefe J rejected her evidence based largely on demeanour findings. His Honour considered that she was internally inconsistent, argumentative, evasive, did not present well in the witness box and made up evidence in the witness box when confronted with problems in her evidence.

The Court of Appeal dismissed the appeal and left standing the trial judge's demeanour findings. The High Court allowed the appeal. Gaudron, Gummow and Hayne JJ at paragraph [63] observed that the trial judge in determining whether to accept the witness's evidence, was heavily swayed by his impression of her when giving oral evidence. Their Honours noted that this circumstance did not preclude the Court of Appeal in concluding that in the light of other evidence, a primary judge had too a fragile base to support a finding that a witness was unreliable. Their Honours made reference to a number of documents including unchallenged affidavit material supporting the witness. In the event, the majority took the view that there had not yet been a determination of the plaintiff's case upon a consideration of the real strength of the body of evidence presented and accordingly, there should be new trial. In separate judgments, Kirby J and Callinan J expressed similar views.

In the personal injuries area, the courts have cautioned against overreliance on medical reports and records including on accounts given by the plaintiff to their doctors and/or the doctors of the defendant. The superior courts have expressed a reticence to give undue weight in civil cases to accounts provided to health professionals, said to be inconsistent with a party's oral testimony **– Mason v Demasi** [2009] NSWCA 227 at paragraph [2], per Basten JA. His Honour expressed reservations based upon a number of factors including that the health professional who took a history had not been cross-examined about the reliability and accuracy of the recording; the fact that the history was probably taken in furtherance of a different forensic purpose depending on the status of

professional; the record did not identify the questions which may have prompted the answers; the record was likely to be a summary prepared by the health professional rather than a verbatim recording as well as other factors including fluency in English and the general circumstances of the professional's knowledge of the background of the incident. In short, this is one occasion in which reference to documents (even if contemporaneous) requires further consideration and it would be wrong to accept the records at face value.

A further difficulty can occur where cultural differences come into play. One such example occurred in an arbitration in London involving a dispute between Chinese delegates and the European party over an agreement relating to the sale of six new bulk carriers. The Chinese witness who signed the pro forma contract (as to which there was a dispute concerning whether it represented the full agreement) indicated that he felt he had "to sign something … to justify the delegation's expensive trip to Europe and to his superior and the State authorities". Documents subsequent to the trip indicated a record of continuous negotiations over outstanding issues – hence the earlier documentary evidence did not provide the full picture – **Phillip Yang** "The Eastern and Western Cultural Influences on Maritime Arbitration and its recent development in Asia" (2013) CMI Yearbook 2013, p. 396 and referred to in the speech of **Bathurst CJ** "Doing Right by 'all Manner of People': Building a more inclusive Legal System" – 1 February 2017. This example underscores the unreliability of unquestioned reliance on incomplete documents (and for that matter demeanour findings) at least in relation to those witnesses from a different culture and strengthens the need to rely upon the picture presented by all contemporaneous documents.

The final category of evidence which is useful in assisting in determining an eyewitness's reliability, is the presence of physical evidence e.g. tyre marks, blood stains, DNA and the like. That is to say, evidence which is independent of human recollection. I do not suggest that physical evidence is always determinative, but

experience shows that the parameters established by such physical evidence, are more reliable basis on which to determine past facts.

It is necessary not to overstate the cogency of physical evidence or more particularly the expert opinions surrounding that kind of evidence. In ***Tuite v R*** [2015] VSCA 148, the Victorian Court of Appeal examined the validity of a new statistical methodology used in evaluating DNA ratios. The Court concluded that the issue of reliability was not a criterion of the admissibility of opinion pursuant to section 79 (1) of the Evidence Act 2008 but was relevant matter in determining whether the evidence should be excluded under section 137. The Court relied upon the views of the US Supreme Court in ***Daubert v Merrell Dow Pharmaceuticals Inc*** [1993] 509 US 579, which directed trial judges to ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable. The US Supreme Court considered that an expert testimony must be "scientific knowledge", an inference or assertion which is to be derived by the scientific method. The Court considered that for an expert's testimony to pertain to "scientific knowledge" there must be established a standard of evidentiary reliability – pp. 589-590.

It should be noted that ***Tuite*** was overruled by the High Court in ***IMM v R*** [2016] HCA 14. In the judgment of the plurality (French CJ, Kiefel, Bell and Keane JJ, with whom Gageler, Nettle and Gordon JJ disagreed on this issue), their Honours concluded at paragraph [52] that no question as to the credibility or the reliability of the evidence can arise and further at paragraphs [54] and [58]:

> *[54] …The Evidence Act contains no warrant for the application of tests of reliability or credibility in connection with ss 97(1)(b) and 137.*
>
> *[58] It would not seem to be necessary to resort to an assessment of the reliability of evidence of this quality for it to be excluded under s 137. For the reasons already given, evidence which is inherently incredible or fanciful or preposterous would not appear to meet the threshold requirement of*

relevance. If it were necessary, the court could also resort to the general discretion under which evidence which would cause or result in an undue waste of time may be rejected.

Credibility

Lord Bridge of Harwich observed some time ago in ***Whitehouse v Jordan*** [1981] 1 WLR 246 at pp. 269–270 that the importance of credibility assessments varies between "*a wide spectrum from, at one end, a straight conflict of primary facts between witnesses, where credibility is crucial and the appellate court can hardly ever interfere, to at the other end, an inference from undisputed primary facts, where the appellate court is in just as good a position as the trial judge to make the decision.*" The result is that the more reliable the technique of fact-finding, the more susceptible it is to appellate review.

Lord Pearce in ***Onassis v Vergottis*** [1968] 2 Lloyd's Rep 403 dealt with the issue of credibility and the susceptibility of the trial judge's assessment to appellate review. In the Court of Appeal [1968] EWCA Civ J0123-2, Lord Denning Master of the Rolls described the facts in the following way:

This is a tale of three friends who fell out. Their quarrel has reached the Courts. It has found its vent in the dispute about shares. Each side says the other is lying. Charges of fraud are freely made. Goodness knows where the truth lies.

The first of the three friends is Mr Aristotle Onassis. He is 61, a Greek shipowner as rich as Croesus. He carries on business in Monte Carlo. He has a house in Paris. Another near Athens. He owns the Island of Scorpios off Greece and has a splendid yacht "Christina".

The second is Mr Panaghis Vergottis. He is 77, also a Greek shipowner, a close friend of Sir Onassis for over 30 years. He is rich but nowhere near so rich as Mr Onassis. He lives at the Ritz Hotel in London, which speaks for itself. Both men were devoted to the third, a lady, Madame Maria Calogeropoulos, better known as Maria Callas. She is 43, also Greek. She is highly gifted as an opera singer and as an actress. She has a worldwide reputation.

Now these three have all borne the highest character. …

The dispute revolved around the joint purchase by the plaintiff and the defendant of a ship in 1964. Each of them paid half of the upfront cost and the rest of the funds were left on mortgage. Each of them received 50 shares in the company incorporated for the ownership of the vessel. The plaintiff Mr Onassis gave 26 shares to Madame Callas. The latter put up a sum of money which was treated as a loan by her to the company at 66% interest. It was used as working capital for the company, at least that was the version evidenced by the documents.

However, the case turned on the proposition that Mr Onassis and Madame Callas asserted that the documents did not tell the truth and that a letter written by the defendant was a lying document. That letter represented Madame Callas' contribution as a loan whereas it was in truth, they contended, a subscription for 25 shares in the company. The result of that transaction would have been that Madame Callas owned 51 of the 100 shares in the company and the subject of the litigation was the claim that the defendant should hand over 25 of his shares to Madame Callas, she having bought those shares and received 26 shares as a gift.

The documents strongly supported the case of the defendant. The plaintiff and Madame Callas gave evidence of a number of conversations which supported the

proposition that after the parties to the litigation had acquired the vessel, Madame Callas was to have 51% interest in it.

The Master of the Rolls crystallised the contest as follows:

> *It was open to the Judge and accepted by him that the case depended on the credibility of the witnesses, and his view of their credibility was the determining point in the case. After considering the case with the greatest care and after many days of hearing, he found in favour of Mr Onassis and Madame Callas. He said "This is simply a question of how the witnesses struck me as they gave their evidence. I formed a highly favourable view of Mr Onassis and Madame Callas. Mr Vergottis made an unfavourable impression on me, and I have no hesitation", he said, "in holding that the plaintiff's story is the true story and the defendant's story is the untrue story."*

> *Now the Judge, it is true, has a great advantage over this Court. He sees and hears the witnesses, and we do not. But demeanour is not always a touchstone of truth. A man who appears to be convincing may yet be mistaken. He may, without being fraudulent, have reconstructed the facts in his mind so as to support his own case. Conversely, a man who appears shifty and spiteful may yet be truthful. The heat engendered by the case may have made him angry, but not a liar. It is for this reason that a judge of fact should always test the evidence by reference to the documents or the probabilities of the case.*

The Court of Appeal (comprising Lord Denning MR, Lord Justice Salmon and Lord Justice Edmund Davies) overturned the trial judge's findings and remitted the matter for a new trial.

The House of Lords overturned the decision of the Court of Appeal. Viscount Dilhorne at p. 407 expressed the view that:

In determining whose evidence to accept, a Judge will have regard to the probabilities and the documentary evidence. It cannot, in my view, be said that Mr Justice Roskill failed to do so but in the opinion of the Court of Appeal, he misdirected himself in certain respects and failed to take "sufficiently into account the weight of the contemporary documents".

The seminal passage is contained in the judgment of Lord Pearce (who along with Lord Wilberforce) dissented in the decision. His Lordship counselled that a trial Judge has except on rare occasions, a very great advantage over an appellate Court and an appellate court should not interfere unless satisfied both the judgment ought not stand and the divergence of view between the trial Judge and the Court of Appeal had not been occasioned by any demeanour of the witness or truer atmosphere of the trial or by any other advantages which a trial Judge undoubtedly possesses. Lord Pearce continued at 431:

"Credibility" involves wider problems than mere "demeanour" which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. Credibility covers the following problems. First, is the witness a truthful or untruthful person? Secondly, is he, though a truthful person, telling something less than the truth on this issue, or, though an untruthful person, telling the truth on this issue? Thirdly, though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly and, if so, has his memory correctly retained them? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by overmuch discussion of it with others? Witnesses, especially those who are emotional, who think that they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary

documents are always of the utmost importance. And lastly, although the honest witness believes he heard or saw this or that, is it so improbable that on balance more likely that he was mistaken? On this point it is essential that the balance of probability is put correctly into the scales in weighing the credibility of a witness. And motive is one aspect of probability. All these problems compendiously are entailed when a Judge assesses the credibility of a witness; they are all part of one judicial process. And in the process, contemporary documents and admitted or incontrovertible facts and probabilities must play their proper part.

The majority of the House of Lords held that the Judge had not misdirected himself and even though there was insufficient mention of the points in the defendant's favour, it could not be assumed that he had ignored them. There was no substantial wrong or miscarriage in the decision.

A further category is where evidence is so significantly in conflict as to force the conclusion that one or other of the witnesses, has given false evidence. It is useful to examine the likely motives of the witnesses to give their testimony as they have done. In addition, if any of the witnesses, has a hope of gain from the litigation, that might be a significant factor. It is not uncommon that a witness seeks to avert blame or criticism from him or herself or those with whom he or she has a close connection. A further motive which is sometimes found, is the misplaced loyalty of a witness to one of the parties.

The main tests for identifying false evidence include: whether the evidence is consistent with what is agreed between the parties or what is incontrovertible. It is useful to have regard to whether the evidence contains internal consistencies. It is also relevant to consider whether the evidence is consistent with earlier versions of that witness. A further matter is whether the credit of the witness on matters not relevant to the case, has an impact on the on the veracity of the

evidence. The final matter is a consideration of the demeanour of the witness in giving his or her evidence.

Care needs to be taken not to accord excessive weight to the cross-examination of a witness as to credit on extraneous matters. The reason is because there might be many other explanations for a witness to be reticent about revealing matters of a personal and private nature. Persons might be embarrassed by what they do or the company they keep. Many persons would regard questions relating to for example, their sexuality or other matters of a private nature as unwarranted intrusions into their personal history or habits. Similar considerations might apply relating to discussions between witnesses known to each other about matters they both witnessed. It is a common forensic tactic (and sometimes a valuable forensic tactic) to question witnesses as to whether they had spoken about the evidence and the subject matter of the litigation prior to the court case. There are no bright line rules. Where the witnesses are related or close friends, it is easy to understand that such communications might be explained as the sharing of common experiences which have little or nothing to do with fabricating evidence.

It may be necessary in appropriate cases to limit the cross-examination of this kind because less scrupulous advocates may use the opportunity solely to place undue pressure upon the witness and to make the witness' time in the witness box embarrassing and unpleasant. In other words, the attempt is directed towards exacting a toll from the witness, rather than elucidating the true facts of the case.

Demeanour

Lord Loreburn in ***Kinloch v Young*** [1911] S.C. (HL) 1 at p.4, described a judge assessing "demeanour" in the following succinct way:

> *… the opportunity of watching the demeanour of witnesses – that he observes, as we cannot observe, the drift and conduct of the case; and also that he has impressed upon him by hearing every word, the scope and nature of the evidence in a way that is denied to any Court of appeal.*

See also Lord Pearce in **Onassis** Ibid. at p. 431.

Demeanour may be more formally defined as the conduct, manner, bearing, behaviour, delivery, inflection of a witness in providing testimony i.e. anything characterizing a witness's mode of giving evidence which does not appear in the transcript. In earlier years, it was an expedient method for judges to resolve contested facts to conclude that he or she considered X to be a witness of truth and wherever the evidence was in conflict with witness Y, the evidence of the former was to be preferred. The method has been found to be of dubious value for two reasons: real questions exist about the capacity of any judge (or person) to make such a judgment which is accurate and secondly, no reasons are given for this conclusion, contrary to judicial obligations generally to do so.

However demeanour is more lately thought to be a less reliable test – per McKenna J in ***Discretion,*** The Irish Jurist, vol IX (new series), 1 at p. 10; Lord Justice Browne – ***Judicial Reflections, Current Legal Problems*** *(1982), 5;* Eggleston QC Ibid. at p. 163; A M Gleeson QC*,* ***Judging the Judges*** Ibid. Gleeson QC voiced *"the healthy measure of scepticism"* which appellate courts accorded to what he termed: *"the Pinocchio theory"* i.e that dishonesty on the part of a witness manifests itself in a manner which does not appear on the transcript but is readily discernible by anyone physically present.

A difficult issue is where two plausible witnesses provide convincing versions but both versions cannot be correct. Demeanour is a doubtful tool because the ability to tell a coherent, plausible and assured story which is likely to impress a tribunal of fact, is often the hallmark of a con-man. Professional lawyers can mistake

nervousness and ill-at-ease as lack of credibility; and problems are compounded where different races or ethnicities are involved.

An example is to be found in **Coombe v Bessell** (unreported, Tasmanian SC, Zeeman J, 31 May 1994). In that case, a magistrate had predominantly based the decision on the demeanour of a witness as being of principal importance The magistrate described the witness as having a quite noticeably different demeanour when describing matters of common ground rather than contentious matters, a very uneasy witness with a tremor noticeable in his voice, characteristics which appeared when controversial evidence was being adduced, and parts of the evidence which betrayed a very defensive aspect. On appeal, it was revealed that the applicant had a speech impediment that accounted for his odd demeanour, which impediment had not been disclosed to the magistrate or the lawyers.

These are but examples which illustrate Lord Bingham's statement that:

> *To rely on demeanour is in most cases to attach importance to deviations from a norm when there is in truth no norm.*

Lord Justice Scrutton in ***Compania Naviera Martiartu of Bilbao v Royal Exchange Assurance Corporation*** (1922) 11 Ll. L. Rep. 83 observed at p. 97:

> *I have never yet seen a witness who was giving evidence through an interpreter as to whom I could decide whether he was telling the truth or not …*

Another test is whether one thing is regarded as more likely to have happened than another i.e. probability. One shortcoming of applying such a test is that it might be limited by the judge's experience of the range of probabilities. A further caveat is that this can be dangerous where the judge has limited experience e.g.

when gauging the reactions of a person from different race etc or discounting the possibility that an improbable account which may nevertheless be true – Wigmore, ***The Science of Judicial Proof*** (3rd edition) (Boston, 1937), pp. 443-5.

The experience of many judges is that whilst deliberately untruthful witnesses exist, this is not commonly so. Fallible memory and human capacity for honestly believing incorrect facts more often account for unreliable evidence.

In determining whether a witness is honest or dishonest, so long as there is any realistic chance of a witness being honestly mistaken, a judge will no doubt hold him or her to be so, out of a cautious reluctance to brand anyone a liar without clear evidence of such. Sackville J echoed those views in ***Seven Network Ltd*** Ibid. at paragraph [393]:

> *A trial judge in civil proceedings should exercise caution before pronouncing that a witness has given deliberately false evidence. Often it is necessary only to determine whether the witness' evidence, insofar as it is relevant to the issues, should be accepted in whole or in part or not at all. It may not matter very much, for the purposes of deciding the litigation…*

A connected issue is the question of the limits that a judge should confine him or herself to, in determining a particular issue. Gleeson QC took the view that it was usually prudent to say less, ibid. at pp. 346-7:

> *Judges ought to confine themselves, in expressing their reasons for judgment, to the resolution of the issues which arise for their determination. In most ordinary civil litigation the issues of fact and law are defined with reasonable precision. These sometimes include issues as to the credit of witnesses. They practically never include issues as to the moral worth of the parties or the social desirability of those limited aspects of the conduct of the parties which the litigation brings to the attention of the judge. Judges who take it upon*

themselves to make pronouncements upon those subjects can do a grave injustice. The matters on which they are pronouncing have not been litigated. The range of facts which would be relevant to the formation of a fair judgment, may extend far beyond the limited range of facts before the judge. Moreover the litigants have never submitted themselves or their conduct to such appraisal and can often fairly point out that the person who makes it has no special qualifications in that regard.

Lord Bingham identified three general sources of unreliability:

1. Evidence of an incident which occurs very quickly

In circumstances where an event occurs very quickly, witnesses often do not see or mentally register what happened. Accordingly, any later recollection is deficient by reason of these circumstances.

Psychological studies have also disclosed interesting traits of memory relevant to many witnesses. In a work by Elizabeth Loftus, University of Washington: ***Misfortunes of Memory*** – Royal Society, January 1983, the author notes a number of common recurring themes including:

- for a significant number of witnesses exposed to later misinformation, this gives rise to inaccurate recollections;
- once memory is altered in this way, it is difficult to retrieve the original memory;
- there is a tendency to reject misinformation if it comes from a biased or partial source;
- warnings about effects of misinformation are effective if given before but not after the misinformation;
- the longer the interval between the original event and the misinformation, the greater the chance of distortion;

- misinformation is less likely to be rejected the less prominently it features in the question put to the witness; and
- exposure to extreme and ugly violence tends to limit a witness's memory and render him or her more vulnerable to misinformation.

2. Loss of recollection

The common assumption is that recollection fades in a constant way. However, psychological studies confirm that loss of memories of un-striking, ordinary events occurs in the main, within the first six months or one year, with relatively little loss thereafter of what remains. In other words, there is a high rate of loss immediately following the event and thereafter a minimal loss – Alan Baddeley, ***The Psychology of Memory*** (Harper & Row, New York, 1976).

Recollection fades in a selective not a uniform way i.e. circumstantial detail falls away while crucial and striking features survive. A dominant impression lasts the longest. In the work by F C Bartlett, ***Remembering*** (Cambridge, 1932), the testing showed in effect that memory plays funny tricks. Loss of recollection by persons tested who had been asked to reproduce a narrative after a lapse of time, followed a systematic pattern: the summary given became shorter and details were omitted. Also omitted were features which did not fit in with the person's prior expectations. There was a tendency to introduce facts to explain incongruous features of the original narrative. Certain details became dominant; words and names were changed so as to become more familiar; and sometimes even the order of events would change.

3. Wishful thinking

This is often observed by trial judges and is usually a process of unconscious exoneration or advancement by a witness. An example of this phenomenon is to be found in the case of ***Blue v Ashley*** [2017] EWHC 1928 (Comm). There being no written confirmation of the agreement, Leggatt J observed at paragraph [65]:

> *It is rare in modern commercial litigation to encounter a claim, particularly a claim for millions of pounds, based on an agreement which is not only said to have been made purely by word of mouth but of which there is no contemporaneous documentary record of any kind. In the twenty-first century the prevalence of emails, text messages and other forms of electronic communication is such that most agreements or discussions which are of legal significance, even if not embodied in writing, leave some form of electronic footprint.*

His Lordship determined the issues at paragraph [142]:

> *In the course of a jocular conversation with three investment bankers in a pub on the evening of 24 January 2013, Mr Ashley said that he would pay Mr Blue £15 million if Mr Blue could get the price of Sports Direct shares (then trading at around £4 per share) to £8. Mr Blue expressed his agreement to that proposal and everyone laughed. Thirteen months later the Sports Direct share price did reach £8. But no reasonable person present in the Horse & Groom on 24 January 2013 would have thought that the offer to pay Mr Blue £15 million was serious and was intended to create a contract, and no one who was actually present in the Horse & Groom that evening – including Mr Blue – did in fact think so at the time. They all thought it was a joke. The fact that Mr Blue has since convinced himself that the offer was a serious one, and that a legally binding agreement was made, shows only that the human capacity for wishful thinking knows few bounds.*

As Nietzsche observed:

"I did this," says my memory, "I cannot have done this" says my pride, and remains inexorable. In the end memory yields.

B. Expert Witnesses

Expert witnesses may be and often are, partisan, argumentative and lacking in objectivity but not often dishonest. The problem is: how to choose between conflicting opinions of experts? Manner and demeanour of such witnesses gives little or no assistance. Nor can a comparison of the respective qualifications.

The only safe way to judge between conflicting experts, is on the basis of what the experts have actually said both in the reports and in the course of forensic questioning. However for a judge to prefer the opinion of one expert to another, he or she must understand what they have both said and form a reasoned basis for his or her preference. Minimal problems usually arise when an issue is not particularly complex or in a field in which the judge has had previous experience but it is not so, in complex areas.

Where possible and where the rules allow, the assistance of an expert assessor or an independent court report may help resolve the issues.

Conclusion:

What can be taken from the discussion above, is that in cases, where fact-finding is made difficult by the absence of objective corroboration, reliance upon oral testimony and particularly demeanour are of limited utility. Judges should be aware of the limitations of their own experience and capacities. To deal with issues as best one can, the safest course is to assess the version by reference to

contemporary materials, probabilities and also whether the version measures up to any surrounding objective circumstances. Finally, it is necessary to carefully articulate the basis of the fact findings – in my experience, by doing so, one's thoughts and conclusions are clarified and crystallised. Furthermore, any appellate review is made easier (a good thing if error has been made) and I suspect whether error is found or not, that appellate courts generally attempt to acknowledge that the primary judge has attempted to do his or her task diligently.

By way of postscript, I draw your attention to a case and an article which deal with issues of memory and accurate recall: ***Gestmin SGPS S.A. v. Credit Suisse (UK) Limited*** [2013] EWHC 3560 (Comm) per Leggatt J and an article: McClellan – **Who is telling the truth? Psychology, Commonsense and the Law"** (2006) 80 ALJ 655. I have found both very useful in informing the discussion in this area. I commend them to you.

P I Lakatos SC

District Court Judge – 22 November 2021