FACT OR FICTION?

Theo Huckle on the courts' approach to the reliability of oral witness evidence

On 6 April this year, a new practice direction (PD57A) concerning certification of trial witness statements and extended statements of truth came into force, based in large part on *Gestmin v Credit Suisse* [2013] EWCA 3560 (Comm). This is so far (and rather confusingly) for the Business & Property Courts only – and it will perhaps not concern many of us that the Admiralty court is likely to accede to these new provisions in October – though as Stephen Gold recently wrote in *New Law Journal*, 'How much of the PD spills out into other jurisdictions is anyone's guess'.

New requirements are imposed upon the witness in cases with significant disputed issues of fact, to indicate in the statement how well they remember things; whether their memory was refreshed by any particular documents; and, if so, which ones; and how good their memory was before they saw those documents. More controversially, solicitors must attach an appendix to a witness statement, listing every document that the witness was shown. Witness statements must stick to the facts (rather than the annoyingly common protracted *argument* or *explanation* of documents) and go through a minimum number of drafts; and witnesses must certify that they have 'not been encouraged by anyone to include in this statement anything that is not my own account'.

The court will visit condign punishment upon a witness or lawyer shown to have breached these rules, including exclusion of all or part of the trial statement or its redrafting, and severe costs sanctions. Underlying all of this, it appears, is concern as to whether the use of documents to confirm or refresh memory has the capacity to 'corrupt' recollection. It seems to imply that judges have concerns about the reliability of witness evidence generally, as opposed to documentary record, and perhaps for good reason.

Much, of course, depends on the nature of documents consulted by the witness. It must be true that a witness's accuracy could only be improved by consulting documents of his/hers which may properly constitute *aide memoire*, rather than relying on normally faulty recollection after the passage of considerable time periods. In this context, that memory *is* faulty is surely uncontroversial; the real question is *how* inaccurate is later memory?

Judges know this, of course. Yet it is a fiction deeply imbedded in our justice system that judges – and magistrates and juries in the criminal context - can tell from witnesses' demeanour and presentation whether they are telling the truth, and having decided which of conflicting witnesses is the truth-teller and which not, accept the evidence of the truth-teller and reach the just result. Apart from common sense, there is a lot of research data

which indicates that this is a simplistic and often simply false approach. Witnesses may appear 'shifty' because they are lying, or because they are terrified of appearing in court, or for myriad other reasons. Confident witnesses may be accomplished and persuasive liars and confidence-tricksters capable of taking in even the most sophisticated and intelligent observer. Judges know this too. They do not often say it, because that could call into question any full acceptance of a witness's factual account they need to make to resolve a case, which is after all their duty.

It may, then, be witnesses' reliance on contemporaneous documents which indeed show their accounts to be accurate, at least so far as the documentary support goes, and that this is more likely to make an account credible and (properly) acceptable than a judge's reliance on the witness's appearance and demeanour.

Fundamentally dishonest, only a little bit, or just mistaken?

It was reassuring that in the recent High Court clinical negligence case of *Brint v Barking etc. UHNHST* [2021] EWHC 290 (QB), HHJ Platts declined to apply the fundamental dishonesty dismissal provided for by s57 of the Criminal Justice and Courts Act 2015 on the basis that the account was wrong / mistaken, but not fundamentally dishonest. The case concerned an extravasation injury following a CT scan with contrast carried out by the defendant when the claimant was aged 69; she claimed for significant disabling injury, but the judge found only short-term relatively minor effects and no relevant breach of duty, so the claim failed. Very late, on the eve of trial, the defendant notified the claimant that it intended to allege that she had been fundamentally dishonest. The judge reviewed the recent redefinition of dishonesty by the Supreme Court in *Ivey v Genting Casinos Limited* [2017] UKSC 67. He found the claimant's evidence about the events at the time of the scan and her prior health condition was unreliable, but on this application he was against the defendant, stating that he was satisfied the claimant 'genuinely' believed her case to be true, and that 'applying the standards of ordinary decent people I find as a fact that although her evidence was wholly unreliable in the sense that I do not accept it, she has not been dishonest'.

The judge was influenced in reaching this view by a number of factors, including notably that the claimant was not motivated by financial gain, the consistency of her complaints from early stages, her pre-existing psychological profile and issues of inaccurate self-perception of her prior state of health, and the reality of her 'genuine and significant disability which she firmly believes has been caused by the [index] events'.

This followed a similar analysis by HHJ Williams in the Birmingham County Court case of *Keane v Tollafield* in August 2018. The judge applied *Gestmin* (see below) in holding that although the claimant's oral evidence had been confused, the defendant had not established on the balance of probabilities that she did not have a genuine belief in what she said in her statement at the time she made it, 15 months before the trial. She had not deliberately exaggerated her symptoms and would not be deprived of the protection of qualified one-way costs shifting for fundamental dishonesty under CPR r.44.16(1).

> *In our ordinary lives, we surely well understand that people 'misremember' events*

It is perhaps also fair to comment that in our ordinary lives, we surely well understand that people 'misremember' events, because the minds of persons remembering back over time will sometimes cause them genuinely to remember what did not happen, and that perhaps this is most likely to happen if it suits their belief about the rights and wrongs of their position in a dispute. The apocryphal 'collision between two stationary vehicles' is not always caused by somebody lying, but sometimes by stress / shock / fear and the mind's desire to remember that one did the right thing, driving carefully and drawing to a halt successfully.

There is thus an important distinction between 'rejecting' a witness's account and concluding that the witness has been 'lying' to the court. Judges have been increasingly reluctant to phrase their judgments as to dishonesty, perhaps partly because they accept that the judicial process is far from perfect, and their job is to do their best to identify where the truth lies rather than claim god-like omniscience in that regard. We are all very familiar with miscarriages of justice based on evidence accepted by tribunals of fact but later demonstrated to have been false (Roy Meadows, Jeffrey Archer etc.).

All of this makes it all the more important that a judge is slow simply to accept the witness on one side and reject the witness on the other, which fits with the liar v truth-teller analysis, but rather considers the evidence in a more granular way, accepting and rejecting aspects of the accounts of witnesses as required by the evidence as a whole.

However, as we will discover, there have recently been highly significant developments in the judicial approach to assessment of oral witness evidence.

The judicial method – the traditional view

As highlighted by Gordon Exall's excellent *Civil Litigation Brief* - from which some of my references below have been gleaned – there have been numerous ongoing developments in relation to witness credibility.

When considering the judicial process of assessing the credibility of an oral witness, a good place to start is the (dissenting) speech of Lord Pearce - subsequently cited with approval by many - in *Onassis v Vergottis* [1968] 2 Lloyds Rep 403, 431. Lord Pearce said that whereas 'demeanour' was mostly concerned with whether witnesses seemed to be telling the truth as they now believed it, 'credibility' involved four wider 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 over much 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 it is 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.'

Lord Pearce identified the following 'main tests' to determine whether a witness is lying, noting that their relative importance will vary from case to case: 'The consistency of the witness's evidence with what is agreed, or clearly shown by other evidence, to have occurred; the internal consistency of the witness's evidence; consistency with what the witness has said or deposed on other occasions; the credit of the witness in relation to matters not germane to the litigation; the demeanour of the witness.'

He added that the evidence may only be unreliable, and not dishonest, 'but the nature of the case may effectively rule out that possibility'.

In similar vein, in *Grace Shipping v Sharp* [1987] 1 Lloyd's Law Rep. 207, 215 Lord Robert Goff cited (apparently with the House's unanimous approval) his own judgment in the Court of Appeal in *Armagas Ltd v Mundogas S.A. (The Ocean Frost)* (1984) WL 281667. He said:

'Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities.'

Finally, some words from Lady Arden (recently retired and sadly missed from the Supreme Court) sitting in the Court of Appeal in *Wetton v Ahmed* [2011] EWCA Civ. 610, an appeal from HHJ Simon Brown QC: '[I]t is clear that what has impressed the judge most in his task of fact-finding was the absence, rather than the presence, of contemporary documentation or other independent oral evidence to confirm the oral evidence of the respondents to the proceedings.' The judge had not accepted the respondents' evidence, and the Court of Appeal was unmoved.

Lady Arden said a court's weighing up of witness evidence was not 'solely a matter of body language or tone of voice' in the witness box, but that a judge should also consider what 'other independent evidence', generally documentary, was available to support the witness. She added that documentary records, texts or emails 'may be particularly important in cases where the witness is from a culture or way of life with which the judge may not be familiar. These situations can present particular dangers and difficulties to a judge.'

Lady Arden added that an appeal court would generally treat a trial judge as having had a special advantage in seeing the witnesses give their evidence; though this would be lessened where the evidence is largely documentary. She added that contemporaneous written documentation may be conspicuous in its absence, if it were likely to have existed but has not been produced.

Having reviewed these and other judicial offerings on the subject, in the argument about a replica Porsche 917 in *Piper v Hales* [2013] EWHC B1 (QB) [37], HHJ Simon Browne QC added his own pithy summary, linking the issue of witness assessment and credibility with the value of statements:

'Contemporaneity, consistency, probability and motive are key criteria and more important than demeanour which can be distorted through the prism of prejudice: how witnesses present themselves in a cramped witness box surrounded for the first time with multiple files can be distorted, particularly elderly ones being asked to remember minute details of what happened and what was said, and unrecorded, nearly four years later as here. Lengthy witness statements prepared by the parties' lawyers long after the events also distort the accurate picture even though they are meant to assist the court.'

Perhaps the correct conclusion to reach here is that judges approach significant disputes of factual or expert witnesses on the basis that they look for documentary or other reliable objectively established record of what happened or the data underlying an opinion to support an account in oral evidence, and where they would expect such confirmatory objective evidence, may be wary of the oral account. Nevertheless, in the end a judge may be driven to 'accept the word of one party or the other', and, although it simplifies the process of judging to a result, this is where the real danger for truth discovery lies.

Remote hearings and witness assessment – a new approach?

Concerns have recently been raised in the pandemic context, including by the senior judiciary (especially by Sir Andrew McFarlane P on appeal from the Family Division: *Re A (Children) (Remote Hearing: Care and Placement Orders)* [2020] EWCA Civ 583), about the effect of hearings by 'vidcon platform' on a judge's assessment of evidence in certain types of case. It is widely thought inappropriate for serious disputes of fact to be tried 'remotely' by these methods, rather than 'in person' with the judge able to observe the witness in the traditional way.

However, in *A Local Authority v A Mother* [2020] EWHC 1086 (Fam), Lieven J said she did not think it was possible to say 'as a generality that a

remote hearing is less good at getting to the truth than one in a courtroom.' She added: 'Some people are much better at lying than others, and that will be no different whether they do so remotely or in court.':

In reaching this view, Lieven J relied on *ex p SS (Sri Lanka)* [2018] EWCA Civ 1391 [34ff.], where the Court of Appeal rejected an asylum appeal put partly (though in a late change) on the basis that the tribunal had failed to record observations on witness demeanour. Lord Leggatt gave the court's judgment, which was a *tour de force*. He noted that these days, an appeal court's reluctance to interfere with findings of fact was justified on different grounds, such as the efficient use of judicial resources.

He added: 'Generally speaking, it is no longer considered that inability to assess the demeanour of witnesses puts appellate judges "in a permanent position of disadvantage as against the trial judge". That is because it has increasingly been recognised that it is usually unreliable and often dangerous to draw a conclusion from a witness's demeanour as to the likelihood that the witness is telling the truth.

'The reasons for this were explained by MacKenna J in words which Lord Devlin later adopted in their entirety and Lord Bingham quoted with approval: "I question whether the respect given to our findings of fact based on the demeanour of the witnesses is always deserved. I doubt my own ability, and sometimes that of other judges, to discern from a witness's demeanour, or the tone of his voice, whether he is telling the truth. He speaks hesitantly. Is that the mark of a cautious man, whose statements are for that reason to be respected, or is he taking time to fabricate? Is the emphatic witness putting on an act to deceive me, or is he speaking from the fullness of his heart, knowing that he is right? Is he likely to be more truthful if he looks me straight in the face than if he casts his eyes on the ground perhaps from shyness or a natural timidity? For my part I rely on these considerations as little as I can help." *Discretion (1973) 9 Irish Jurist (New Series) 1, 10'*

Lord Leggatt continued: ' The reasons for distrusting reliance on demeanour are magnified where the witness is of a different nationality from the judge and is either speaking English as a foreign language or is giving evidence through an interpreter. Scrutton LJ once said that he had "never yet seen a witness giving evidence through an interpreter as to whom I could decide whether he was telling the truth or not" [*Compania Naviera Martiartu* (1922) 13 Ll L Rep 83, 97]...

'It would hubristic for any judge to suppose that because he or she has, for example, seen a number of individuals of Tamil origin giving oral evidence this gives him or her a privileged insight into whether a particular witness of that ethnicity is telling the truth. That would be to assume that there are typical characteristics shared by members of an ethnic group (or by human beings generally) which can be relied on to differentiate a person who is lying from someone who is telling what they believe to be the truth. I know of no evidence to suggest that any such characteristics exist or that demeanour provides any reliable indication of how likely it is that a witness is giving honest testimony.

'To the contrary, empirical studies confirm that the distinguished judges from whom I have quoted were right to distrust inferences based on demeanour.'

Lord Leggart quoted from Wellborn's piece in the Cornell Law Review summarising 'consistent findings of psychological research' into the issue. The journal noted that the 'empirical evidence' found that ordinary people could not make 'effective use' of demeanour in deciding whether to believe a witness; and in fact there was some evidence that 'the observation of demeanour diminishes rather than enhances the accuracy of credibility judgments'. Leggatt added that 'While the studies mentioned involved ordinary people, there is no reason to suppose that judges have any extraordinary power of perception which other people lack in this respect.'

The judge continued: 'This is not to say that judges (or jurors) lack the ability to tell whether witnesses are lying. Still less does it follow that there is no value in oral evidence. But research confirms that people do not in fact generally rely on demeanour to detect deception, but on the fact that liars are more likely to tell stories that are illogical, implausible, internally inconsistent and contain fewer details than persons telling the truth: see Minzner, "Detecting Lies Using Demeanor, Bias and Context" (2008) 29 Cardozo LR 2557. One of the main potential benefits of cross-examination is that skilful questioning can expose inconsistencies in false stories.

'No doubt it is impossible, and perhaps undesirable, to ignore altogether the impression created by the demeanour of a witness giving evidence. But to attach any significant weight to such impressions in assessing credibility risks making judgments which at best have no rational basis, and at worst reflect conscious or unconscious biases and prejudices.

Underlying all of this is concern as to whether the use of documents to confirm or refresh memory can 'corrupt' recollection

'One of the most important qualities expected of a judge is that they will strive to avoid being influenced by personal biases and prejudices in their decision-making. That requires eschewing judgments based on the appearance of a witness or on their tone, manner or other aspects of their behaviour in answering questions. Rather than attempting to assess whether testimony is truthful from the manner in which it is given, the only objective and reliable approach is to focus on the content of the testimony and to consider whether it is consistent with other evidence (including evidence of what the witness has said on other occasions) and with known or probable facts.'

In the introduction I referred to *Gestmin*. That was the case where Leggatt J set to on his quest to challenge some orthodoxies. Sitting in the Commercial Court, the judge was considering his proper approach to evidential discrepancies between recent and sworn witness statements prepared with the help of

lawyers in the context of electronic disclosure. As part of a rapid ascent to the highest court in the land, he lit a slow fuse for what may be something of a forensic explosion to come, and which all litigators need to have carefully in mind.

He said: 'An obvious difficulty which affects allegations and oral evidence based on recollection of events which occurred several years ago is the unreliability of human memory. While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony.

'One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.

'Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called "flashbulb" memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description 'flashbulb' memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.)

'External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all, or which happened to someone else…'

The judge added that memory is especially unreliable when it comes to 'past beliefs'. He said: 'Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time.

Witnesses may appear 'shifty' because they are lying, or because they are terrified of appearing in court

'The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.'

He added that the process of preparing for a civil trial also interfered with memory: 'A witness is asked to make a statement, often when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been "refreshed" by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall.

'The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read the statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events.'

The judge noted that it was 'not uncommon' for witnesses to be asked in cross-examination if they understand the difference between recollection and reconstruction, or whether their evidence is a genuine recollection or a reconstruction of events. But he said such questions were 'misguided', as they assume that there is a 'clear distinction' between recollection and reconstruction, and ignore the fact that such processes are largely unconscious.

He asserted that the best approach for judges in commercial cases was 'to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts.'

He added: 'This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely… in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events.'

And in conclusion: 'Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.'

This approach has been adopted by a number of Lord Leggatt's Commercial Court brethren (see *Watson Farley & Williams v Itzhak Ostrovizky* [2014] EWHC 160 QB Silber J; *Virulite LLC v Virulite Distribution Ltd* [2014] EWHC 366 (QB) Stuart-Smith J; *UBS v Kommunale Wasserwerke* [2014] EWHC 3615 Males J).

Although one sees occasional references to some of the above material and judicial consideration of these issues, in other contexts there was at least initially less detailed review of the matters exercising Lord Leggatt in particular, though extremely detailed review of the evidence itself. See, for examples, *Laporte & Christian v MPC* [2014] EWHC 3574 (QB) Turner J; *Gorgeous Beauty* [2014] EWHC 2952 (Ch) Arnold J; *Freemont (Denbigh) v Knight Frank* [2014] EWHC 3347 (Ch) Smith QC.

In *Lavis v NMC* [2014] EWHC 4083 (Admin), a midwife disciplinary case, *Gestmin* was cited, but Cobb J took the view that Lord Leggatt's comments 'were probably aimed at commercial cases' and that 'such an exclusive approach could not be taken in other jurisdictions...', so it is apparent that there was judicial resistance at play here. I confess to struggle to understand the distinction being drawn between commercial and non-commercial cases (save, I suppose, that there may tend always to be lots of documents in a commercial case), but this is perhaps unsurprising.

Confident witnesses may be accomplished and persuasive liars and confidence-tricksters

A moment's consideration shows that this approach, underlying the new rules and the requirements to explain what documents have been used to compile a witness statement, may be directly in conflict with the approach offered by Robert Goff LJ in *Armagas* as above. If a witness relies on documents, does this support their account, or undermine it? Perhaps both may be true, though probably not at the same time.

In 2017 Lord Neuberger, then Supreme Court President, gave his Neill Lecture at the Oxford Law Faculty, in which he joined the Leggatt theme. He declared himself 'very sceptical about judges relying on their impression of a witness, or even on how the witness deals with questions... Sometimes it might appear that factual disputes are being resolved by reference to who calls the best-performing witness, not who calls the more honest witnesses'.

In the clinical negligence case of *CXB v North West Anglia NHS Foundation Trust* [2019] EWHC 2053 (QB), HHJ Gore also said that the comment in *Gestmin* (that the best approach was to place little if any reliance on witnesses' recollections, and to base factual findings on inferences drawn from documentary evidence) should be treated with caution, since all the decided cases reminded judges that care had to be taken in making their assessment, and that full and proper reasons had to be given; but otherwise the judge is free to rely on witness recollection if satisfied by it.

This approach was approved by the Court of Appeal in *Kogan v Martin* [2019] EWCA Civ 1645, the case about the disputed rights to the screenplay of the sublime *Florence Foster Jenkins*. The court explained that *Gestmin* was not to be taken as laying down a general principle for the assessment of evidence, but rather emphasising the fallibility of human memory. Nevertheless, a proper awareness of that fallibility did not relieve judges of the essential judicial function of making findings of fact based upon *all* the evidence. It was correct that (some of?) the *Gestmin* observations were expressly addressed to commercial cases, and here, Meade J had wrongly applied them selectively and inconsistently to a situation involving private individuals.

However, this 'explanation' has not prevented judges looking to the authoritative *Gestmin* analysis in non-commercial cases generally, and in the injury claims context in particular.

In *Kimathi v Foreign and Commonwealth Office* [2018] EWHC 2066 (QB) Stewart J declined to apply s33 of the Limitation Act to save one of the Kenyan torture group claims after a 56-year delay. He summarised his judicial treatment of witness memory. He expressed caution at applying 'the full rigour' of *Gestmin* and subsequent authorities to a claimant's disadvantage where documentary support was lacking, but noted clear problems with relying on the claimant's largely uncorroborated evidence. The prejudice to the Foreign Office was too great to allow the claim to proceed.

2020 was a particularly good year. In *BXB v Watch Tower and Bible Tract Society* [2020] EWHC 156 (QB) the claimant succeeded in proving the Society was vicariously liable for her rape by one of its elders.

On the limitation issue, Chamberlain J noted that her evidence was the only evidence on some of the disputed points. Applying *Gestmin*, the judge bore in mind the fallibility of memory and the tendency of the human mind to construct a narrative after the event, but considered that any discrepancies in her evidence did not provide any basis for doubting it. He said her answers in cross-examination made him more confident of the reliability of her evidence.

In *Bannister v Freemans* [2020] EWHC 1256 (QB), Geoffrey Tattersall QC expressly applied *Gestmin* in an asbestosis case where he found that the claimant widow's factual evidence contained in witness statements contained inconsistencies, and there was no documentary evidence to either support or undermine the account relied on by the claimant. The claim failed.

Conversely, the claimant's claim for asbestosis succeeded in *Smith v SS Transport* [2020] EWHC 1954 (QB). Thornton J also expressly applied *Gestmin*, as explained in *Kogan*, saying that in approaching the claimant's evidence it had to be borne in mind that the fluidity and unreliability of human memory meant that little reliance could be placed on witnesses' recollections of what was said in meetings and conversations, and that factual findings had to be based on known or probable facts, or inferences drawn from the documentary evidence. But the court had to make findings of fact based on all the evidence, and where it disbelieved a party's sworn evidence, it had to say why.

Then in *Dutta v GMC* [2020] EWHC 1974 (Admin), Warby J applied Lord

Leggatt's documents-focussed approach in criticising the Medical Practitioners Tribunal's findings against a cosmetic surgeon for starting with the complainant's oral account and asking 'do we believe her' before considering the available documents, as well as relying on her 'confident demeanour', which he described as 'a discredited method of judicial decision-making.'

Finally for this review of developments so far, it is worth noting the family case of *Re A (A Child)* [2020] EWCA Civ 1230, in which the *Gestmin / Kogan* combination was considered again by the Court of Appeal. Following an analysis of the two cases, Lady Justice King said that while oral evidence was of 'great importance' in 'assessing the reliability of a witness', the court must be 'mindful of the fallibility of memory and the pressures of giving evidence'. She added: 'The relative significance of oral and contemporaneous evidence will vary from case to case. What is important, as was highlighted in *Kogan*, is that the court assesses all the evidence in a manner suited to the case before it and does not inappropriately elevate one kind of evidence over another.'

I suppose it is rather obvious that the judge's approach to assessment of the case depends on the particular case, and the evidence available upon which to determine the case. But aside from this, and an implied judicial determination to be permitted to rely upon witness evidence when that is all there is, Lord Leggatt's warnings about 'the fallibility of memory' appear to have obtained general agreement.

Moreover, it is difficult not to think that the decision in *ex p SS (Sri Lanka)* was something of a riposte to the attempt in *Kogan* and elsewhere to water down or restrict the reach of *Gestmin*. We do not – yet – see *ex p SS (Sri Lanka)* reviewed alongside *Gestmin*, but it surely ought to be?

A view from abroad (1)

Judges in other jurisdictions have traditionally been more sceptical of witness recollection and judicial confidence in it. Some readers may already have been amused by the forthright judgments of Justice Quinn in Ontario. In perhaps the best example in point, in *The Hearing Clinic (Niagara Falls) Inc v Ontario Ltd, Lewis & Lewis 2014 ONAC 5831 (CanLii)* he began a 1500-paragraph judgment:

'The story concerns the 2006 purchase and sale of a business – specifically, a hearing clinic. How difficult could that be? Two experienced multiple-clinic owners, each represented by a lawyer and with the almost-daily (sometimes hourly) assistance of chartered accountants, put together a transaction with more loose ends than a badly knit sweater.

'I have found it impossible to articulate a helpful overview of this trial. Sitting atop the evidence here is like scaling a very, very high mountain only to find that, when one reaches the summit, one is too far from everything to see anything. The best that I can do is say that the core of the case is the allegation that the individual defendants and their accountant knowingly made fraudulent misrepresentations and withheld information, such that the plaintiff overpaid for the hearing clinic...

'E-mails, hundreds of them, along with letters and other documents, proved to be the most reliable evidence. Without them, the truth would have been unattainable, leaving me at the mercy of witnesses and desperately self-interested litigants attempting to recall events today that took place in 2006. There are inherent evidentiary problems in asking witnesses to tell of such events. Sincerely believed memories that are innocently incorrect become more problematic for the court than do intentional lies.'

Indeed. The judge conceded the limits of judicial perspicacity, but in the case of Mr Fridriksson, it was easy in the end:

'Determining credibility can be a challenge for a trial judge. We have no special powers in that realm and, wherever possible, avoid reliance upon darts, dice and Ouija boards. However, rarely, has a witness generously offered up so many reasons to be disbelieved. Fridriksson was an evidentiary gift who kept on giving.'

The case showed how documentary evidence can undermine a witness's account. The judge said: 'A unique evidentiary feature of this case is the presence of numerous handwritten notes made by Fridriksson (selfie notes?), allegedly memorializing telephone conversations that he had with Dee Lewis and Terry Lewis and with the two accountants. My initial impression was: "Goodness, gracious, this is an organized man whose fastidious attention to detail will make my task easier." However, that impression faded as cross-examination revealed the self-serving fiction of the notes.'

The reader will know what happened. Costs of CAD$1m+ were awarded against the defeated claimant.

Appeals

Very much linked to questions about how good judges are at testing and assessing the truthfulness and accuracy of evidence given orally before them, and by what methodology, is the issue of attempts to appeal them when we think they just got it wrong. My own view is that our tenacity in upholding erroneous findings of initial tribunals has helped to harden the myth that judges are especially good at telling the liar from the truth-teller.

The criminal experience is instructive. In England & Wales the magistrate or juror is the arbiter of fact, and open to little challenge upon it. Cases often turn on 'pure' evidence of fact, unencumbered by documentary support or gainsay, where the court 'just has to decide who it believes', an exercise heavily dependant on demeanour. Of course, many issues of fact in civil cases can be similar, with the road traffic accident perhaps the archetypal example in the personal injury context.

The Court of Appeal *Criminal Division* has from time to time allowed appeals because it harboured a 'lurking doubt' about the correctness of a jury's conviction, a basis established by Lord Widgery CJ's court in *R v Cooper [1969] 53 Cr.App.R.82*. Lord Widgery recognised the court's reluctance to intervene, but noted that its powers were 'somewhat different' since the Criminal Appeal Act 1966. He said the Court should ask itself the 'subjective' question of 'whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done'. This might be based on the 'general feel of the case as the Court experiences it,' rather than based 'strictly on the evidence as such', he added.

This basis was approved by the House of Lords in *Stafford v DPP* [1974] AC 878 (subject to the caveat that evidence to be considered by the appellate court still had to be admissible) and used a number of times by the Court of Appeal (eg. *Pattinson & Laws* (1974) 58 Cr.App.R.417); but also mentioned without being applied on other occasions. However, the permissive test was significantly hardened by the CA in *R v Pope* [2012] EWCA Crim 2241.

In *Pope*, Lord Judge CJ stressed that where there is trial by jury, the 'constitutional primacy and public responsibility for the verdict' rests with that jury; and if the jury has convicted after proper directions, it is not open to the appeal court to set that conviction aside 'on the basis of some collective, subjective judicial hunch that the conviction is or may be unsafe'. Setting the bar high, he said any application of the 'lurking doubt concept' would need 'reasoned analysis of the evidence or the trial process, or both, which leads to the inexorable conclusion that the conviction is unsafe'; and so only in the 'most exceptional circumstances' would a conviction be quashed on this ground alone.

This remains the CA's position, reasserted the following year in *R v Stewart* [2013] EWCA Crim 1421, where the Court said: 'As for the "lurking doubt" submission, this case does not come close to the kind of exceptional case Lord Judge CJ had in mind in *Pope*, where a tribunal which has not heard the evidence should usurp the proper function of a jury because of a "judicial hunch". In any event, we have no such "hunch".'

It is a fiction deeply imbedded in our justice system that judges can tell from witnesses' demeanour and presentation whether they are telling the truth

There has been considerable recent controversy about this in light of the poor record of the Criminal Cases Review Commission (CCRC) in referring dubious convictions back to the CA for reconsideration, the Commission having often declined to refer back in cases where the original evidence is challenged, because there is no 'real possibility' of overturning the conviction.

Thirty years ago when the Birmingham Six were cleared, then Home Secretary Kenneth Baker set up a Royal Commission on Criminal Justice, which in 1993 recommended what became the CCRC. The Royal Commission said it should be 'made clear that the Court of Appeal should quash a conviction, notwithstanding that the jury reached their verdict having heard all the relevant evidence and without any error of law or material irregularity having occurred, if after reviewing the case, the Court concludes that the verdict is or maybe unsafe'.

Then, in March 2015, the House of Commons Justice Select Committee (JSC) concluded that the CCRC was not meeting its original intended role, and said the Law Commission should review the Court of Appeal's grounds for allowing appeals, with a possible statutory change to 'allow and encourage the Court of Appeal to quash a conviction where it has a serious doubt about the verdict, even without fresh evidence or fresh legal argument'. The JSC said this change should be accompanied by a review of its effects on the CCRC, and of the continuing appropriateness of the 'real possibility' test.

In September 2015, however, the Minister of Justice, Michael Gove, wrote to the JSC Chair dismissing this proposal as unnecessary, as he saw no reason why the CCRC could not already refer a case to the Court of Appeal on the basis of a 'real possibility' that a jury's verdict went against the weight of the evidence.

On that basis, Lord Widgery's 'lurking doubt' can justify a CCRC referral on the basis of a 'real possibility' that the conviction will be quashed, so that the JSC recommendation is unnecessary. However, many are entirely unconvinced by this in light of the *Pope* formulation.

A view from abroad (2)

A very different attitude to the issue of witness recollection and preparedness of the appellate court to interfere was memorably taken in the High Court of Australia (their equivalent Supreme Court) in the notorious criminal case of *Pell v Queen [2020] HCA 12*. On 7 April 2020, it allowed the appeal

of Cardinal Pell, clearing him of allegations of historic sexual assault on two choristers.

The court considered in detail the evidence put before the jury, and concluded that the other evidence in the case was *not* consistent with the complainants' account so that, despite that account clearly having been accepted by the jury, there was 'a significant possibility that an innocent person has been convicted'.

The High Court was very clear as to its proper role: 'The function of the court of criminal appeal in determining a ground that contends that the verdict of the jury is unreasonable or cannot be supported having regard to the evidence, in a case such as the present, proceeds upon the assumption that the evidence of the complainant was assessed by the jury to be credible and reliable. The court examines the record to see whether, notwithstanding that assessment - either by reason of inconsistencies, discrepancies, or other inadequacy; or in light of other evidence - the court is satisfied that the jury, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt.'

Unlike the approach in Australia, *R v SJ & MM* [2019] EWCA Crim 1570 was also a case that concerned historic child sexual offences (by foster parents upon their wards). Evidence from a prosecution witness of fact included adverse subjective opinion which should have been ruled inadmissible, but our CA held that the wrongful evidence did not undermine the safety of the conviction, as 'the critical issue was whether or not the jury were sure that [the complainants] were telling the truth'.

Although the standard of proof is different, the approach to judicial assessment of oral evidence of factual and expert witnesses is very similar in the Court of Appeal Civil Division. The Court of Appeal in all divisions has traditionally been very resistant to attempts to challenge the lower courts' assessment of witness evidence both factual and expert, tending to interfere only where the judge has very clearly misunderstood the evidence, or where fresh evidence is permitted to challenge or undermine the original evidence base, in accordance with *Ladd v Marshall* [1954] 1 W.L.R. 1489.

Given the clarity of Lord Leggatt's debunking of myths about oral evidence and its assessment in *Gestmin* and *ex p SS (Sri Lanka)*, I do wonder how long the traditional approach of our Court of Appeal can be maintained, at least in cases where documents and / or undisputed evidence are readily available to show what probably happened, and that the court below just got it wrong.

There are some modest signs of relaxation perhaps. In *Staechelin v ACLBDD Holdings* [2019] EWCA Civ 817, the Court of Appeal was led by Lewison LJ, who had also chaired the *ex p SS (Sri Lanka)* court. Here the case concerned a dispute over agent's commission on the sale of a painting. The judge had found $10 million commission payable. The appeal court held that there was clearly evidence on which the judge had based his findings. Rather, it was a question of whether the findings were rationally insupportable, *McGraddie v McGraddie* [2013] UKSC 58.

Importantly, however, the court said that a trial judge's findings were *not* inviolable (*Yaqoob v Royal Insurance (UK)* [2006] EWCA Civ 885), but it was of critical importance that in *Yaqoob* the trial judge had erred in basing his evaluation on the *demeanour* of the claimant in the witness box, which is not a solid foundation: *ex p SS (Sri Lanka)*. A judge's reasons for his findings had be given in sufficient detail to show the parties and the Court of Appeal the principles upon which he had acted, and the reasons that had led him to the decision. Here the judge's findings were rationally supportable and the appeal failed. He was presented with two contradictory accounts and did not find either wholly reliable, but it was for the judge to do his best with the material available.

Conclusions

The unanimous decision led by Lord Leggatt in *ex p SS (Sri Lanka)* marks a clear new modern appreciation of the weaknesses of judicial assessment of credibility of oral evidence. This is especially stark in relation to evidence of fact, but questions of the value of assessment of demeanour equally apply to expert evidence. The inexperienced expert witness's opinion may well be right, and the court must be careful not to reject it in favour of the bluster of the 'old hand' opponent.

It seems to imply that judges have concerns about the reliability of witness evidence generally

The accepted truth of this weakness has been used recently to justify remote hearings including for resolution of stark issues of fact: *A Local Authority*.

That the demeanour of witnesses giving oral evidence is not determinative, and that its importance is being regularly downplayed by senior judges, with notable impetus from Lord Leggatt in *Gestmin*, will increasingly call into question the reluctance of appellate tribunals to interfere with the evidential assessment below despite having the full transcripts and full trial bundles. The High Court of Australia appears to feel no such inhibition, at least as guardian of criminal justice: *Pell*.

There will now undoubtedly be greater scope to contend that an appellate court should review the evidence in more detail, and take its own view as to what is beyond doubt, or even just probable. Those with conduct of cases should seek to apply the requirements in the new PD57A (even if not strictly applicable), but be careful about the use of documents, which may either support or undermine the account given by a witness based upon them. Perhaps even both.

Theo Huckle QC *is senior Leading Counsel now in sole practice and associate member of Doughty Street, Apex (Cardiff), Cornwall St Chambers Birmingham/Oxford/ Shrewsbury) and No.18 Chambers (Southampton); theohuckleqc.com*