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PHIPSON ON EVIDENCE

TWENTIETH EDITION

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CHAPTER 45

FACT FINDING AND THE ASSESSMENT OF EVIDENCE

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1. THE JUDGE AND HIS TASK

45-01 The assessment of competing factual evidence is probably in most cases more difficult than dealing with issues of law, where there are statutes, rules, textbooks and precedent to guide the judge. The circumstances of and the available evidence to resolve contested issues of fact vary considerably. In an assault case in the Crown Court it may simply be the oral evidence of the victim and the defendant. In such a case the witness evidence is crucial and decisive. But even with an assault there may be medical evidence and video or mobile phone evidence to assist the decision maker. At the other end of the spectrum are commercial cases where there may be a significant amount of documentary evidence to consider. In many cases it is the facts and ascertaining the facts that is central. As Justice Cardozo remarked[1]:

> "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 appreciation of evidence involves what can be described as a triangular balancing act between the three concepts of relevancy, admissibility and probative value. This chapter relates to the consideration of evidence in order to make findings of fact that has already satisfied any tests for relevance and admissibility. Hence this chapter does not deal with admissibility of evidence (this is covered in the rest of this work), but how the judge is to assess the evidence. The assessment of evidence and the assigning of probative value to individual pieces of evidence in the context of the evidence as a whole is an inherently complex task.

45-02 The responsibility and burden of a judge to decide on issues of fact and to reach the correct decision is a heavy one. Decisions and any comments a judge may make on the evidence can have a major impact on the lives of the parties and witnesses. Thus it is incumbent upon a judge to do the best he can to review the evidence fairly and properly. This requires the judge to actually consider all the relevant evidence

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[1] B. Cardozo, *The Nature of the Judicial Process* (Yale, 1921), pp.128–9.

placed before him. In commercial and higher value civil cases, the judge will usually have the opportunity to read at least the case summary, list of issues (if there is one), pleadings (although sometimes these can be so complex, long, and unclear that they obscure rather than elucidate), witness statements, the written submissions and the core documents, prior to the commencement of the trial, so he can start the hearing with at least the key factual issues in mind. Judges with long lists and back to back short trials, as in the county courts up and down the country, may not be so fortunate. Even in such cases it can be helpful to canvass with the parties at the beginning of the hearing what are the factual issues in dispute.

In criminal cases, it is helpful for the judge to have read the prosecution case summary, the indictment and charges, the defence case statement and the main witness statements prior to the opening of the prosecution case. It is appreciated that in practice, defence case statements vary in their detail and engagement with the issues, and where it is unclear as to what are the key facts in dispute, then a judge is fully entitled to require it to be amended or ask defence counsel to set out what is in issue on a factual level. A jury may be assisted in appropriate cases by being informed prior to evidence being called what are the key issues in dispute, so that they have them in mind when they hear the evidence. This is often done by the prosecution in opening. Thus, whether a case is a civil dispute or a criminal prosecution, the early identification of the actual facts in dispute that need to be resolved in order to reach a judgment is very important. This provides a key framework for the assessment of the evidence at trial. Indeed in France hearings will often open with the presiding judge explaining what he has read, setting out the issues (including the key facts in dispute) and asking the parties whether there are any further issues, before stating that he wants the evidence to be confined to those issues. Thus, when oral evidence is given, it focuses on the factual issues in dispute, rather than background and collateral matters.

45-03 In order to fulfil the judge's duty to deal with cases fairly, he is required to read or hear and to take into account and analyse all the relevant and admissible evidence. With pre-reading it may be possible to have at least a preliminary view of where the truth may lie. An account may for example appear to be improbable or contradicted by another witness or document. However, it is only fair and right to keep an open mind until all the evidence has been given and considered as a whole. All too often an impressive witness statement or expert report has at the end of the day been proven to have in fact fallen short and been wrong.

45-04 A judge should be aware of his own limitations. Sometimes a judge is faced with complex technical evidence way outside his experience. In such a case, the judge should not be slow to ask questions and seek assistance from the parties and the experts called. In some cases it may be appropriate to require the experts to provide a background presentation for the court. In others it may even be necessary to appoint an assessor to sit with the judge.[2] Some tribunals may have on their panels experts in the field which can be a considerable assistance, such as the economists who sit as panel members in the Competition Appeal Tribunal. The limitations that a judge may face are not confined to technical or intellectually complex matters. A judge may need to deal with witnesses from cultural backgrounds not familiar, if not alien, to him. He should not assume that where their mannerisms and ways of thinking and answering questions is different to what he is used to or even his own,

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[2] CPR r.35.15; see para.33-17.

that is a sign that their evidence is somehow unreliable, suspect or evasive. The ideal judge should have a good understanding of society and human culture as well as being understanding of others. The judge needs to appreciate the variety of cultural experiences, political, economic and social which impact upon the law and the factual context in which cases are tried.[3] He should be well read and knowledgeable.

Another aspect a judge must bear in mind is that he may have both conscious and sub-conscious prejudices, preferences and biases.[4] A significant problem is unconscious bias, which can occur in all sorts of manifestations. As Lord Neuberger once noted it is almost by definition an unknown unknown, and therefore difficult to get rid of or allow for.[5] A judge should not allow these or emotion to sway his assessment of evidence. That is not to say a judge may not feel sympathy for a victim to a serious crime or a defendant with severe personal difficulties, but he should not allow sympathy to dictate his assessment of evidence. It is important that the judge is and seen to be an objective and impartial arbiter of factual disputes.

45-05 It is often stated that in general the legal system in England is adversarial, with well-defined exceptions such as proceedings under the Children Act 1989 and wardship proceedings in the Family Division and coroner's inquests. This is to be contrasted with the inquisitorial civilian law system followed in continental Europe and elsewhere. The former implies that the sole task of the judge is to consider the evidence that the parties choose to place before him and the arguments raised by the parties. The latter is taken to imply that the judge takes an active role and can direct what evidence is to be given and initiate steps to gather evidence so that he can investigate the facts. In practice the gulf between the two is not so great as may seem. In England and Wales under the CPR and CrimPR judges take a much greater role in managing cases than hitherto. They can make directions in advance of trial such as in relation to the calling of expert evidence which determines the precise issues on which evidence is to be given and in what form. In civil cases they can direct that lists of issues and an agreed statement of facts be prepared. That said key differences remain which can make a real difference in how evidence is obtained and presented. For example, in civilian and middle eastern legal systems, the court has the power (and frequently does so in commercial cases) to appoint directly an expert to investigate the matter, make enquiries of the parties and seek documents from them, and to report his findings to the court. This goes well beyond the role of a single joint expert in England in most cases. Another aspect of most civilian jurisdictions is that a trial judge or panel is appointed fairly early on after a claim has been filed and allocated. Thus a particular judge has conduct of a case from beginning to end which can assist in the case management of the case. Perhaps unfortunately this process is not followed in England and Wales. Apart from large and complex cases where a trial judge may be allocated from the case management conference stage or specialist tribunals such as the Competition Appeal Tribunal in which the panel is appointed early on and continues until the final hearing, in England and Wales a number of judges can deal with aspects of a case prior

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3 Sir Anthony Mason (former Chief Justice of the High Court of Australia). "The Art of Judging" (2008) 12 *Southern Cross University Law Review* 33 at 36.

4 T.Stafford, J.Holroyd and R. Scaife, "*Confronting bias in judging: A framework for addressing psychological biases in decision making*" (2018, University of Sheffield).

5 Lord Neuberger, "Fairness in the courts: the best we can do", address to the Criminal Justice Alliance (10 April 2015).

to trial and the trial judge is only appointed shortly before the final hearing. There are practical and resource reasons for this.

In England a judge can be proactive in the way he conducts a trial and can state that he wants the parties and the evidence to focus on the key factual issues in dispute. Where one or both parties are litigants in person, as so frequently occurs in the county court given the cost of legal representation and lack of legal aid, a judge may need to take a proactive role at trial by probing matters of fact and asking questions of the parties and witnesses.[6] No doubt most trial judges have faced the situation where a litigant in person (sometimes with limited English or conversational skills) is told it is his turn to ask questions of witnesses, simply looks lost, not knowing what to ask, let alone how. However, a judge conducting the questioning of witnesses and cross-examination in lieu of the litigant has its shortfalls and dangers, and in general a judge should not place himself in the position of an advocate.[7] In a civilian law and middle east legal systems primarily it is the judge who asks the questions of witnesses not the parties or their advocates. Whether one is dealing with a common law or civilian law system, the object is the same, which is to find the truth within the constraints of the legal system and the evidence before the court. There is much to be learned from how cases and evidence are dealt with in different legal systems.

45-06 The traditional figure of a stern, cold and unfriendly judge is fortunately largely a matter of the past. An understanding, patient and calm judge is more likely to put both advocates and witnesses at ease, for which coming to court at least for witnesses and the parties can itself be a stressful and unhappy experience. Tempers may flare and witnesses can become distressed, but it is the responsibility of the judge to endeavour to calm things down even by, if necessary, allowing a short break. A judge who is moderate in his approach is far more likely to be perceived as fair, than the testy, impatient and unnecessarily critical judge.

45-07 A judge should find his facts carefully.[8] How difficult that task is and how long it takes varies from case to case. Once the evidence has been given and the parties made their oral and any written submissions, consideration needs to be given as to whether or not to give an oral judgment there and then, or after a short break, or to reserve the matter and give a written judgment at a later date. Day in and day out decisions are given in county courts and magistrates courts, especially after short straightforward trials, on the day or final day of the hearing. This is both appropriate and efficient and to reserve judgment to a later date in many cases creates unnecessary delay, not just for the case in question, but the system as a whole. However, for longer or more complex cases reserving judgment is usually preferable, even if it is only to the next day. This gives the judge the time to assess, go over the evidence and to give a judgment which explains why, for example, he

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6 There are limits as to how far a judge should go in being proactive during a trial and he should bear in mind the overall fairness of the proceedings: *Serafin v Malkiewicz* [2020] UKSC 23 at [40]–[46]. An unrepresented party will often need some assistance with the trial process.

7 *PS v BP* [2018] EWHC 1987 (Fam), the judge refused to allow a father to cross-examine a mother where the allegations were that he had abused her, but the judge questioned the mother. At the end of the day there are situations where it does fall to the judge to conduct the questioning of a witness, but the matter needs to be handled very carefully: *K and H (Children)* [2015] EWCA Civ 543 at [52]–[62].

8 Mr Justice Mostyn, "The Craft of Judging and Legal Reasoning", speech to Bristol University Law School (8 December 2014), para.33.

prefers one account of a key disputed fact.[9] What is key is that any judgment engages with the issues and the evidence. Where for example a party's evidence is disbelieved, the judgment must set out why and not simply ignore the evidence.[10] A useful summary has been given of the correct approach[11]:

> "Without attempting to be comprehensive or prescriptive, not least because it has been said many times that what is required will depend on the nature of the case and that no universal template is possible, I would make four points which appear from the authorities and which are particularly relevant in this case. First, succinctness is as desirable in a judgment as it is in counsel's submissions, but short judgments must be careful judgments. Second, it is not necessary to deal expressly with every point, but a judge must say enough to show that care has been taken and that the evidence as a whole has been properly considered. Which points need to be dealt with and which can be omitted itself requires an exercise of judgment. Third, the best way to demonstrate the exercise of the necessary care is to make use of 'the building blocks of the reasoned judicial process' by identifying the issues which need to be decided, marshalling (however briefly and without needing to recite every point) the evidence which bears on those issues, and giving reasons why the principally relevant evidence is either accepted or rejected as unreliable. Fourth, and in particular, fairness requires that a judge should deal with apparently compelling evidence, where it exists, which is contrary to the conclusion which he proposes to reach and explain why he does not accept it."

45-08 No one is saying that the task of a judge is an easy one. It is a great responsibility involving skill, learning, hard work and common sense. The difficulty that can be encountered in this task is well illustrated by what was said by the eminent and highly experienced trial judge Justice J.R. Midha at his farewell speech from the Delhi High Court[12]:

> "In the Court of Justice, both the parties know the truth; it is the judge who is on trial."

To this for the reasons set out below may be added one qualification, that it is not necessarily the case that the parties actually know the truth, even if they genuinely believe that they do so. However, it reflects the reality that the parties determine what evidence that they decide to produce, only calling witnesses that they consider will assist their case, their lawyers ensuring that the accounts of their witnesses are broadly consistent, and selecting experts that support their case perhaps after a process of choosing the expert with views which are helpful, but not an expert who has views that could undermine the party's case.

2. Assessing the Evidence Overall

45-09 Evidence can take many forms from a variety of sources. The different types and sources of evidence are considered in the next section. There is no shortage of judgments and learned articles on the assessment of evidence, and which types should

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9 *PS v BP* [2018] EWHC 1987 (Fam) at [18], where an ex tempore judgment failed to identify the material which was said to corroborate a party's account; *Simetra Global Assets Ltd v Ikon Finance Ltd* [2019] EWCA Civ 1413, judgment in civil fraud case set aside as failed to analyse key evidence and explain key findings; *Goodman v Faber Steel* [2013] EWCA Civ 153 at [17]–[18], judgment failed to explain why a witness's account was to be preferred to the documentary evidence.

10 *Kogan v Martin* [2019] EWCA Civ 1645 at [88].

11 *Simetra Global Assets Ltd v Ikon Finance Ltd* [2019] EWCA Civ 1413 at [46] (Males LJ).

12 7 July 2021. Cited in *Ahuja Investments Ltd v Victorygame Ltd* [2021] EWHC 2382 (Ch) at [1].

be preferred over others, whether it be primary over secondary, first hand over hearsay, or direct over inferences. In reality there are no hard and fast rules in this area, as much depends on the type of case and the evidence placed before the court. A simple everyday example bears this out. A victim of a burglary is spoken to by a police officer shortly after the incident and gives a detailed description of the burglar. The officer notes this account down. Twelve months down the line the victim gives his direct evidence before the court in a trial, but either he cannot recall the details or adds in details not in his original account. The police officer is called and produces his notes. His notes are hearsay, but probably a lot more reliable than the direct evidence of the victim. The correct approach is not to start with some form of hierarchy of evidence, but to consider all the evidence, in whatever admissible form, and to test and consider each item of evidence against the rest of the evidence. That one should consider different threads of evidence in order to reach a finding of fact on an issue is illustrated by the directions given by Pollock CB to a jury on a burglary charge in Kingston Crown Court in 1866, which still holds good today[13]:

> "Thus it is that all the circumstances must be considered together.
>
> It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, for then, if any one link broke, the chain would fall. It is more like the case of a rope composed of several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength."

As has been observed, the nature of the evidence that the fact-finding tribunal may consider in deciding whether or not to draw an inference is almost limitless.[14] Criminal cases, civil disputes involving conspiracies and fraud often are inferential cases where circumstantial evidence needs to be drawn together and considered. In such cases the fact-finding process involves the assessment of various strands of evidence. As reflected in Pollock CB's direction, the nature of circumstantial evidence is that its effect is cumulative, and the existence of a successful case based on circumstantial evidence is that the whole is stronger than the individual parts.[15]

45-10

In the context of complex commercial disputes, Legatt J's approach in *Gestmin* is often cited as to how evidence in such cases should be treated. After noting the fallibility and unreliability of human recollection he concluded[16]:

> "In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, 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. 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, as I see it, 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. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in

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13 *R. v Exall* (1866) 4 F. & F. 922 at 929.

14 *Fortune v Wiltshire Council* [2012] EWCA Civ 334; [2013] 1 W.L.R. 808 at [22], per Lewison LJ, citing Pollock CB's famous direction.

15 *Lakatamia Shipping Co Ltd v Su* [2021] EWHC 1907 (Comm) at [63]–[65]; citing *JSC BTA Bank v Ablyazov* [2012] EWCA Civ 1411 at [52], per Rix LJ.

16 *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) at [22].

his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

Whilst that may be a sensible and reasonable approach in a case where there is plenty of contemporaneous documentary evidence as may be found in a commercial case, it is far removed from most criminal cases in the magistrates and Crown courts, or indeed many disputes in the county court where the critical evidence for the court to evaluate is that given by witnesses, not infrequently supplemented by mobile phone, video evidence and forensic evidence in criminal cases. Hence subsequent cases have stressed that *Gestmin* is not to be taken as laying down any general principle for the assessment of evidence.[17] It is one of a line of judicial observations that emphasise the fallibility of human memory and the need to assess witness evidence in its proper place alongside contemporaneous documentary evidence and evidence upon which undoubted or probable reliance can be placed. The remarks of Leggatt J in *Gestmin* were expressly addressed to commercial cases, where documentary evidence will often be the first port of call ahead of unaided memory, and in relation to not recent events, and in that context they are most useful.[18] That said, his observations on the reliability of witnesses' recollections may apply across a wide range of cases, especially where a witness is giving evidence of events a long time before.[19] Even in a commercial case where events go back a number of years and there is a significant volume of contemporaneous documents, there may be key factual issues to be resolved where either there is an absence of documents covering those issues, such as what may have been said at a particular meeting for which there is no record, or the documents themselves are equivocal or ambiguous.

45-11 Where there is a lack of contemporaneous documents then it is necessary to place greater weight on the inherent plausibility or implausibility of witnesses' accounts, and having made such an assessment, a judge's findings are rarely interfered with on appeal.[20] As More-Bick LJ has stated[21]:

"76. In relation to the appeal against the judge's finding that the payment made by Mr. Jafari-Fini to Mr. Constable was a bribe I regret to find myself in disagreement with Carnwath L.J. Whenever an allegation of fraud or similar misconduct is made it is particularly important to consider the whole of the evidence before reaching a final conclusion, to test the oral evidence by reference to any contemporaneous documents and to consider the inherent probabilities. Having said that, however, it must be recognised that since the final conclusion must be capable of accommodating any facts which are admitted or which are established by evidence which is not capable of being seriously challenged, such facts provide a useful starting point for the assessment of the more controversial parts of the evidence.

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17 *Blue Topic Ltd v Chkhartishvili* [2015] EWHC 3640 (Ch) at [32]; *GML International Ltd v Harfield* [2020] EWHC 909 (QB) at [65]; *B-M (Children: Findings of Fact)* [2021] EWCA Civ 1371 at [23]–[32].

18 *Kogan v Martin* [2019] EWCA Civ 1645 at [88]–[89]; *B-M (Children: Findings of Fact)* [2021] EWCA Civ 1371 at [23]–[25].

19 *GH v The Catholic Child Welfare Society* [2016] EWHC 3337 (QB) at [24].

20 *Group Seven Ltd v Notable Services LLP* [2019] EWCA Civ 614 at [21]–[23]; *Volcafe Ltd v Cia Sud Americana de Vapores SA* [2018] UKSC 61; [2018] 3 W.L.R. 2087 at [41]; *B-M (Children: Findings of Fact)* [2021] EWCA Civ 1371 at [25]; *Natwest Markets Plc v Bilta (UK) Ltd* [2021] EWCA Civ 680 at [48]–[51].

21 *Jafari-Fini v Skillglass Ltd* [2007] EWCA Civ 261 at [76] and [80].

80. It is necessary to bear in mind, however, that this is not one of those cases in which the accounts given by the witnesses can be tested by reference to a body of contemporaneous documents. As a result the judge was forced to rely heavily on his assessment of the witnesses and the inherent plausibility or implausibility of their accounts. In these circumstances considerable weight must be given to the fact that the judge had the great advantage of seeing most of the principal actors give evidence. We have not had that advantage and in my judgment are not well-placed to differ from his assessment of the truthfulness and reliability of Mr. Rowland or any of the other witnesses, particularly in relation to matters that are not reflected in any of the documents. The judge accepted Mr. Rowland's account of his conversation with Mr. Constable and in my view was entitled to do so since, when viewed in the context of the other evidence, it was not inherently implausible. When deciding whether he could rely on Mr. Constable's confession as evidence of what had happened he was right to bear in mind that it involved an admission of serious impropriety which no professional man would be likely to make unless it were true. I think he was entitled to reach the conclusion that it probably was."

As stated in *Natwest Markets* in the context of a commercial case dealing with events going back a number of years[22]:

"49. In a case such as the present, where the events in question took place over 9 years before the trial and occurred in a narrow period of around 3 weeks, the salutary warnings about the recollections of witnesses in *Gestmin SGPS SA v Credit Suisse UK Ltd* [2015] EWHC 3560 at [22] and *Blue v Ashley* [2017] EWHC 1928 at [68] are pertinent. It was therefore of paramount importance for the judge to test that evidence against the contemporaneous documents and known or probable facts if and to the extent that it was possible to do so.

50. We say, 'if and to the extent that it was possible to do so', because it is important to bear in mind that there may be situations in which the approach advocated in *Gestmin* will not be open to a judge, or, even if it is, will be of limited assistance. There may simply be no, or no relevant, contemporaneous documents, and, even if there are, the documents themselves may be ambivalent or otherwise insufficiently helpful. The case could be one about an oral promise which turns entirely on the word of one person against another's, and the uncontested facts may well not point towards A's version of events being any more plausible than B's. Even in a case which is fairly document-heavy (as this one was) there may be critical events or conversations which are completely undocumented. The CarbonDesk dinner is a good example. Whilst there are documents from which inferences might be drawn about what was or was not said at that dinner, there are no notes of the discussions and no memoranda or emails sent afterwards which appear on their face to record or report what was said on that occasion.

51. Faced with documentary lacunae of this nature, the judge has little choice but to fall back on considerations such as the overall plausibility of the evidence; the consistency or inconsistency of the behaviour of the witness and other individuals with the witness's version of events; supporting or adverse inferences to be drawn from other documents; and the judge's assessment of the witness's credibility, including his or her impression of how they performed in the witness box, especially when their version of events was challenged in cross-examination. Provided that the judge is alive to the dangers of honest but mistaken reconstruction of events, and factors in the passage of time when making his or her assessment of a witness by reference to those matters, in a case of that nature it will rarely be appropriate for an appellate court to second-guess that assessment."

[22] *Natwest Markets Plc v Bilta (UK) Ltd* [2021] EWCA Civ 680.

3. Types of Evidence

45-12 Evidence in any individual case may come in different forms and from a number of sources. The common law systems have traditionally focused on oral evidence from witnesses whose accounts are tested in cross-examination. In civilian law systems oral evidence in most cases of civil disputes has a lesser role. Judges in modern times are more conscious of fallibility of human memory and hence to look for other forms of evidence to assist in getting to the truth in a matter.

(a) Factual witnesses

45-13 People notice and remember different things. Therefore it should come as no surprise that different witnesses of a particular event will have accounts which differ. In the context of criminal trials it is commonplace for the prosecution to call witnesses whose evidence may differ on points of detail, if not more fundamentally. The evidence is usually given orally in chief and then subjected to cross-examination. That such inconsistencies will often become apparent is inherent in the process. The police take statements which record what has been recounted to them and they should not filter out inconsistencies or try to influence improperly the account being given. When the witness comes to give evidence, no doubt having refreshed his memory from his statement, he gives his account again orally which may have differences with his written statement on which he is cross-examined. In civil cases the approach is different and has the result in most cases of such inconsistencies, at least those within the witnesses being called by a party, being not reflected in the witness statements which usually stand as evidence in chief. The statements are usually taken by a lawyer familiar with the dispute and pleaded issues and the process in effect has a bias in ensuring that the witnesses give a consistent account which supports a particular party. Further in some cases, especially large commercial disputes, the witnesses or at least some of them may have gone through one form or another of witness training, which may affect the manner in which they give their evidence.[23]

45-14 That human memory is fallible and the observation that even honest witnesses may give evidence which is untrue is well known. As Browne LJ once put it[24]:

> "I think that in civil cases (unlike criminal cases) the witnesses are seldom lying deliberately. But I am very sceptical about the reliability of oral evidence. Observation and memory are fallible, and the human capacity for honestly believing something which bears no relation to what actually happened is unlimited."

In short, memories are creative and judges should bear this in mind.[25]

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[23] Such training in the form of familiarisation of the court and evidence giving process is permissible; in contrast with witness coaching, where the witness is trained specially in relation to the case in dispute and the evidence to be given.

[24] "Judicial Reflections", *Current Legal Problems*, 1982, p.5. Some may feel that this provides a rather generous impression of the extent to which witnesses lie. It is fair to say that most judges are reluctant to make findings of deliberate lying unless it is necessary, rather than stating that the witness is simply mistaken.

[25] This is made explicit with regard to witness statements for use at trials in the Business and Property Courts, where the Appendix to CPR PD 57AC, expressly states at para.1.3: "Witnesses of fact and those assisting them to provide a trial witness statement should understand that when assessing witness evidence the approach of the court is that human memory: (1) is not a simple mental record of

An honest and credible witness can have a strong impact on a judge or jury, and injustices can occur if the witness is simply mistaken. It is this risk that jurors are expressly directed on by the judge in his summing up especially where identification is in issue.[26]

In *Gestmin*, Leggatt J explained the difficulties with human memory in clear terms[27]:

> "15. 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.
>
> 16. 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.
>
> 17. 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 (referred to in the literature as a failure of source memory).
>
> 18. Memory is especially unreliable when it comes to recalling past beliefs. 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.
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> 19. 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

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a witnessed event that is fixed at the time of the experience and fades over time, but (2) is a fluid and malleable state of perception concerning an individual's past experiences, and therefore (3) is vulnerable to being altered by a range of influences, such that the individual may or may not be conscious of the alteration." As to the correct approach for the preparation of witness statements, see *Mansion Place Ltd v Fox Industrial Services Ltd* [2021] EWHC 2747 (TCC) and cases cited there.

[26] See paras 15-16 to 15-23; *R. v Turnbull* [1977] Q.B. 234 CA.

[27] *Gestmin SCPS S.A. v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) at [15]–[21]; approved in *R. (Bancoult No.3) v Secretary of State for Foreign and Commonwealth Affairs* [2018] UKSC 3 at 103, per Lord Kerr.

natural desire to give a good impression in a public forum, can be significant motivating forces.

20. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) 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 his or her 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.

21. It is not uncommon (and the present case was no exception) 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. Such questions are misguided in at least two ways. First, they erroneously presuppose that there is a clear distinction between recollection and reconstruction, when all remembering of distant events involves reconstructive processes. Second, such questions disregard the fact that such processes are largely unconscious and that the strength, vividness and apparent authenticity of memories is not a reliable measure of their truth."

These observations have found widespread support, not just by judges but also psychologists. As Leggatt J stated in a later case[28]:

"68. A long list of cases was cited by counsel for Mr Blue showing that my observations in the *Gestmin* case about the unreliability of memory evidence have commended themselves to a number of other judges. In some of these cases they were also supported by the evidence of psychologists or psychiatrists who were expert witnesses: see e.g. *AB v Catholic Child Welfare Society* [2016] EWHC 3334 (QB), paras 23-24, and related cases. My observations have also been specifically endorsed by two academic psychologists in a published paper: see Howe and Knott, '*The fallibility of memory in judicial processes: Lessons from the past and their modern consequences*' (2015) Memory, 23, 633 at 651-3. In the introduction to that paper the authors also summarised succinctly the scientific reasons why memory does not provide a veridical representation of events as experienced. They explained:

> '… what gets *encoded* into memory is determined by what a person attends to, what they already have stored in memory, their expectations, needs and emotional state. This information is subsequently integrated (*consolidated*) with other information that has already been stored in a person's long-term, autobiographical memory. What gets *retrieved* later from that memory is determined by that same multitude of factors that contributed to encoding as well as what drives the recollection of the event. Specifically, what gets retold about an experience depends on whom one is talking to and what the purpose is of remembering that particular event (e.g., telling a friend, relaying an experience to a therapist, telling the police about an event). Moreover, what gets remembered is reconstructed from the remnants of what was originally stored; that is, what we remember is constructed from whatever remains in memory following any forgetting or interference from new experiences that may have occurred across the

[28] *Blue v Ashley* [2017] EWHC 1928 (Comm) at [68]–[69].

> interval between storing and retrieving a particular experience. Because the contents of our memories for experiences involve the active manipulation (during encoding), integration with pre-existing information (during consolidation), and reconstruction (during retrieval) of that information, memory is, by definition, fallible at best and unreliable at worst.'
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> 69. In addition to the points that I noted in the *Gestmin* case, two other findings of psychological research seem to me of assistance in the present case. First, numerous experiments have shown that, when new information is encoded which is related to the self, subsequent memory for that information is improved compared with the encoding of other information. Second, there is a powerful tendency for people to remember past events concerning themselves in a self-enhancing light."

45-15 Apart from the general unreliability of human memory, it is important to appreciate the actual potential sources of unreliability. These were explored by Lord Bingham in his insightful article The Judge as Juror.[29] The first source of unreliability is in relation to short incidents or fast-moving events, where the person is present but actually does not see or notice or register certain key facts. However, by a process of probing or enquiry by others, such as police officers or solicitors, the gap in the persons knowledge is filled. Once recollection is altered in this way it is very difficult to remove or segregate the false memory. The second relates to where the person did notice the event at the time, but over time the witness loses that recollection. It is often said that recollection fades over the time. However, some events may be so unusual or shocking that the time that they may be ingrained in the memory for a lifetime. Having seen someone stabbed to death in front of you even 40 years ago is something difficult to forget, albeit the surrounding details may have been lost. In any event, an account given soon after the event is rightly regarded as likely to be more accurate than one given years later when a matter comes up for trial. In criminal cases where statements are often taken by police shortly after the event, the first account record is often an important focal point.

A third source of unreliability is what can be shortly described as wishful thinking. A witness becomes convinced in his own mind that a particular fact occurred either because the contrary would put him in a bad light or the fact if true is for his own benefit or that of the party calling him.

45-16 Many of these threads were pulled together in the well-known dissenting speech of Lord Pearce in *Onassis* when he stated[30]:

> "'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 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

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[29] T. Bingham, "The Judge as Juror: The Judicial Determination of Factual Issues" in *The Business of Judging* (Oxford, 2000), pp.3–24. He wrote this article during the period of when he was the Lord Chief Justice (1996 to 2000), having been the Master of Rolls (1992 to 1996); he was later to become the Senior Law Lord (2000 to 2008). It is hard to think of a finer judge.

[30] *Onassis v Vergottis* [1968] 2 Lloyd's Rep. 403 at 431.

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."

45-17 It is often hard to distinguish between the credibility and reliability of witnesses. That said where there are conflicting accounts of witnesses, the issue of credibility in the sense of honesty may need to be confronted. Judges differ in their experience and opinion as to the extent that witnesses lie in the course of their evidence. On the one hand, it has been argued that the formal if not solemn atmosphere of court and the risk of being caught out, is a strong motive for witnesses to tell the truth. Witnesses can be prosecuted for perjury for giving untruthful evidence. On the other hand, very few people are actually prosecuted for perjury and that threat is probably not on most untruthful witnesses minds to form of deterrent. When one looks at motive, defendants in criminal trials will usually have a powerful motive to lie as their liberty is at stake. In a civil context, in many cases the parties have a financial motive. These motives may influence even an otherwise honest person to lie in court or at least distort the truth. It is probably for this reason a judge will sometimes place more reliance on witnesses independent of the parties.

45-18 The principal tests or factors to take into account in determining whether a witness is lying more or less overlap with those which apply in assessing the reliability of a witnesses account. These are:

(1) the consistency or otherwise of the witness's evidence with what is agreed, or clearly shown by other evidence, to have occurred;
(2) the internal consistency of the witness's evidence;
(3) consistency with what the witness has said or deposed on other occasions;
(4) the credit of the witness in relation to matters not germane to the litigation;
(5) lies established in evidence or in the context of the proceedings;
(6) the demeanour of the witness;
(7) the inherent probabilities of the witness's account being true.[31]

All these matters can be explored and tested in cross-examination, a key part of the process in getting to the truth of a witness's account.[32] That said not all accounts are tested in cross-examination as the witness may not be available to at-

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[31] This expands on Lord Bingham's list in "The Judge as Juror", p.5, as (5) and (7) have been added. See also para.45-24 for a list of indicators that a witness's account may lack credibility. Sometimes motive is mentioned as a factor in assessing a witness's credibility, but motive on its own is rarely a factor as in general litigants have a motive to win the case and to lie if necessary and many witnesses they call may have their own motives, if not simply to support the case of the party calling them.

[32] *Carmarthenshire Council v P* [2017] EWHC 36 (Fam); [2017] 4 W.L.R. 136, where Warby J stated that "the general rule is that oral evidence given under cross-examination is the gold standard because it reflects the long established common law consensus that the best way of assessing the reliability

tend the trial for a variety of reasons and the statement is tendered as hearsay. Where the statement or the relevant facts are in dispute, then it is for the court to determine what weight should be given to it. What weight should be given depends on the circumstances including the reasons why the witness is unavailable, the general factors listed above to assess credibility and reliability, and the importance of the evidence to the case as a whole. It is generally unsatisfactory for the key witness evidence not to be tested in cross-examination. Hearsay is best used to establish peripheral or relatively uncontroversial matters. Where a statement is admitted on a hearsay basis without tendering the maker for cross-examination, and this conflicts with evidence from the witness box tested in cross-examination, the judge may tend to prefer the oral evidence if it appears credible.[33]

Experience tells us that evidence of a witness after the process of cross-examination may come out significantly different to the facts asserted in a witness statement. It is for this reason it is sometimes useful to require a witness to explain orally as part of his evidence in chief his version of events in respect of a particular incident. Where credibility is in issue and allegations of dishonesty are made, it may be preferable to require certain evidence to be given in chief, rather than leaving everything to cross-examination. For example, in a road traffic case where there are conflicting eyewitness accounts of the crash, it is open to the judge to direct that the witnesses' evidence as to the moments up to and the collision itself to be given in chief and for the rest of his evidence in chief to be by way of confirming his witness statement. A similar approach may be adopted where an important factual issue turns on what was said or not said on a particular occasion. Allowing a witness to give his account in his own words first prior to cross-examination, can give a judge a better feel for the truth.

Consistency As regards (1) to (3), consistency is an important consideration in considering the evidence of a particular witness as well as the evidence as a whole. If a witness's account is agreed, then there is no issue to resolve. If it is consistent with facts which are agreed, then the assistance one may derive from that may depend on whether those facts are also consistent with the case of the opposing party. Thus, for example, in a road traffic case, the damage to a vehicle could be consistent with the version of events of both parties. It is when such evidence is inconsistent with a witnesses' account that the court may draw the conclusion that the witness is in error either deliberately or by misrecollection. Such inconsistencies may be revealed from facts which are agreed or from other evidence in the form of that given by other witnesses or physical evidence or the contemporaneous documents. Merely because a number of witnesses for one party give evidence of a fact does not mean that an event happened as all of them may be mistaken. Assessing facts is not playing a game of numbers where one adds up the number of witnesses for each side. Going back to the example of a road traffic case, in civil cases it is not uncommon for the driver and passengers in a car to give roughly the same account of a collision even though in reality they may have in fact noticed different things at the time. The process of taking the witness statements may have filled in gaps and altered their memory in order to come out with a version which supports that driver's case. The inconsistency with physical and forensic evidence **45-19**

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of evidence is by confronting the witness"; cf. *Ismail v Joyce* [2020] EWHC 3453 (QB) at [26]–[28]. See also *Natwest Markets Plc v Bilta (UK) Ltd* [2021] EWCA Civ 680 at [51].

[33] See *Gubarev v Orbis Business Intelligence Ltd* [2020] EWHC 2912 (QB) at [114]–[118] for the treatment of hearsay statements; para.29.16.

can be quite stark and conclusively undermine the credibility of a witnesses account. For example, in a burglary trial a defendant who claims that he never entered the burgled property when confronted with video, DNA or fingerprint evidence showing clearly his presence at the scene, is most probably going to be disbelieved and will be regarded by the jury as lacking credibility. As the authorities and commentary referred to above make clear, contemporaneous documents are often the most reliable indicator of what happened and witness accounts should be assessed against what the documents show.[34]

The second aspect of consistency, is the internal consistency of the witness's evidence, does the witness contradict himself on the particular fact, or does what he says on a particular fact contradict his account on another fact?

Thirdly, the court may have regard as to whether a witness's account is consistent with what he has said or deposed to on other occasions. Thus, if a party gives evidence which is contradicted by his pleaded case or raises a case which if true he ought to have pleaded and it was not pleaded can be relevant to both to credibility and reliability. If a witness's account is contradicted by what he said at the time as reflected in the contemporaneous documents such as an email or other message, then the court may ultimately prefer the earlier account. Ancillary to this is oral evidence at trial which is not reflected in what is set out in the contemporaneous documents without there being any contradiction. For example, there may be a note of a meeting which omits a fact which the witness claims was said at that meeting. The court will then have to take a view of the reliability and completeness of the note. In criminal cases where the evidence in chief is usually given orally, it is quite common for a witness to be cross-examined by reference to his witness statement in order to draw out any omissions and inconsistencies. Certain types of case typically generate a number of accounts by a witness or a party which may end up being assessed at trial. Corporate fraud cases may involve employment issues (including an internal investigation and a disciplinary process), regulatory issues (where a witness is questioned both by those acting for his employer and the regulators), civil proceedings (where a witness statement is taken) and criminal proceedings.

45-20 **Credit** As regards (4), this relates to the credit of a witness in relation to matters not relevant to the issues in an action. In practice much time can be spent by advocates cross-examining witnesses to show that they have done something dishonest in the past or have lied on other occasions. However, such exercises need to be kept within reasonable bounds and the implications of such dishonesty or lies if proved require careful consideration. The need to focus on the case and issues in hand and not to allow proceedings to be diverted by collateral issues is reflected by two matters of practice. First, the court will usually refuse to order disclosure as to credit (as opposed to similar fact evidence which may be appropriate).[35] Secondly, in general (subject to well-known exceptions) answers to questions as to collateral facts, put in cross-examination are regarded as final, in the sense that the cross-examining party may not then seek to contradict such answers by other evidence.[36]

How helpful evidence of lies on other occasions is a matter of debate and of

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[34] For the importance of contemporary documents see para.45-30.
[35] Matthews and Malek, *Disclosure*, 5th edn (2017), paras 5.44 and 5.45.
[36] See paras 12-14, and 12-46 to 12-51.

course depends on the lie, it's circumstances and what it actually can demonstrate for the case in hand. People lie for a variety of reasons and many people will lie on quite minor things, not necessarily for any sinister purpose. In a social context a person may lie out of politeness or in order to avoid embarrassment. A person invited to a dinner and finds the food not to his taste, but is asked, in front of his host who has gone to the trouble of preparing the meal, whether he likes the food, will often say yes. That may be a lie, but that can be scarcely said to reflect on whether he may lie in court in a particular case. Lies on important matters where a dishonest reason can be shown and convictions for dishonesty, can of course be relevant and taken into account, but caution must be exercised. Where juries are involved they must be directed appropriately.[37]

Dishonesty or lies in the past can be taken into account when assessing the probabilities where appropriate in a case where fraud or another form of dishonesty is involved. In a very broad sense it may be said that it is inherently improbable that a particular defendant will commit a fraud. However, if the court is satisfied (or it has been admitted) that a defendant has acted fraudulently or reprehensibly on one occasion, it cannot necessarily be considered inherently improbable that such defendant would have done so on another.[38]

45-21 As regards (5), lies in relation to matters in issue in the action are matters which can be significant in assessing a witness's evidence as a whole. Steyn J regarded it to be a medieval notion to presume that if a person has lied on one aspect of a case, then he should be taken to have lied about other matters.[39] However, once the court has concluded that a witness has lied on such a matter, it may be entitled to conclude that the witness is dishonest such that it should be very slow to accept his evidence on any disputed fact in the absence of corroboration. In a case of fraud, the court may conclude from such lies that it makes it all the more probable that the defendant has committed the fraud alleged.[40] However, lies in themselves do not necessarily mean the entirety of a witness's evidence should be rejected. A witness may lie in a stupid attempt to bolster a case, but the actual case nevertheless remains good irrespective of the lie. Of course a witness may lie because the case is based on lies and is untrue.[41]

45-22 **Demeanour** As regards (6), demeanour in the past has probably been given too much emphasis in assessing the credibility of a witness. Demeanour in this context means in the context of a witness anything which characterises his mode of giving evidence, including his appearance and manner, but does not appear in a transcript of what he actually said (i.e. anything other than the spoken word). Lord Shaw once stated[42]:

"witnesses without any conscious bias towards a conclusion may have in their demeanour,

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37 See para.36-37.

38 *Otkritie International Investment Management Ltd v Urumov* [2014] EWHC 191 (Comm) at [89].

39 *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd* [1987] 2 W.L.R. 1300.

40 *Kazakhstan Kagazy Plc v Zhunus* [2017] EWHC 3374 (Comm) at [158]; *Bank of Moscow v Kekhman* [2018] EWHC 791 (Comm) at [57]–[66].

41 *Singh v Singh* [2021] EWHC 2272 (Ch) at [62].

42 *Clarke v Edinburgh Tramways* [1919] S.C. (HL) 35 at 36. Indeed the tone of expression and emphasis of particular words may mean that the same sentence may have different meanings, which would not be evident from a transcript. This can have significant if not fatal results as in *R. v Bentley (Deceased)* [2001] 1 Cr. App. R. 21, where a phrase could have been understood as requesting a co-defendant to hand over a revolver to a police officer or to shoot him.

in their manner, in their hesitation, in the nuance of their expressions, in even the turns of an eyelid, left and impression upon the man who saw and heard them which can never be repeated in the printed page."

However, as Atkin LJ observed as long ago as 1924[43]:

"… 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".

Some judges consider that they are good at assessing witnesses from their demeanour, that said and with respect, such skills should be exercised carefully and only where a judge can be confident that he can fairly and safely draw any conclusion from demeanour.

First, judges may lack the ability to tell anything from demeanour that may safely be relied upon. As MacKenna once explained[44]:

"I question whether the respect given to our findings of fact based on the demeanour of the witness 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 it 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."

This caution is supported by empirical studies as noted by Leggatt LJ in an immigration case[45]:

"39. To the contrary, empirical studies confirm that the distinguished judges from whom I have quoted were right to distrust inferences based on demeanour. The consistent findings of psychological research have been summarised in an American law journal as follows:

'Psychologists and other students of human communication have investigated many aspects of deceptive behavior and its detection. As part of this investigation, they have attempted to determine experimentally whether ordinary people can effectively use nonverbal indicia to determine whether another person is lying. In effect, social scientists have tested the legal premise concerning demeanor as a scientific hypothesis. With impressive consistency, the experimental results indicate that this legal premise is erroneous. According to the empirical evidence, ordinary people cannot make effective use of demeanor in deciding whether to believe a witness. On the contrary, there is some evidence that the observation of demeanor diminishes rather than enhances the accuracy of credibility judgments.'

OG Wellborn, "Demeanor" (1991) 76 Cornell LR 1075. See further Law Commission Report No 245 (1997) "*Evidence in Criminal Proceedings*", paras 3.9–3.12. 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.

40. This is not to say that judges (or jurors) lack the ability to tell whether witnesses

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43 *Societe d'Avances Commerciales (SA Egyptienne) v Merchans' Marine Insurance Co (The "Palitana")* (1924) 20 Ll. L. Rep. 140 at 152: see also *Coghlan v Cumberland* [1898] 1 Ch. 704 at 705; *Fox v Percy* [2003] HCA 22 at [29]–[31].

44 T. Bingham, "The judge as Juror", p.9.

45 *R. (SS) v Secretary of State for the Home Department* [2018] EWCA Civ 1391 at [39]–[40].

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."

Secondly, demeanour may be created or altered to give a favourable impression. Defendants who rarely wear suits in their daily lives are often smartened up for the dock and don a suit and tie in order to impress the court. John Griffiths QC enjoyed telling the story of a claimant in a personal injury case in a county court in Wales. He was a miner claiming damages for injury to his leg in a pit accident. He was a most impressive witness as he walked slowly to the witness box in evident pain. It was only later that the solicitor explained to his counsel that the claimant had taken the trouble to place a nail in his shoe.

Thirdly, people differ in their mannerisms and these indeed vary from culture to culture. A person with her eyes down, which may be a sign of modesty or respect expected in a particular culture, should not be regarded as being evasive; being unwilling to look at a person does not demonstrate that the witness is lying. In any event it is wrong to draw any conclusions as to particular attributes or norms which could be said to exist within particular nationalities or cultures. To rely upon demeanour in most cases is to attach importance to deviations from a norm when there is in truth no norm within any particular society or culture.

Fourthly, giving evidence is for many a stressful experience, so blushing or getting upset may tell you nothing about their credibility.

Fifthly, lying for many is not an uncomfortable thing and the witness may have no moral difficulty in lying so their appearance would be the same whether they are lying or telling the truth. They can give lies with confidence. Indeed as Lord Bingham put it[46]:

"… the ability to tell a coherent, plausible and assured story, embellished with snippets of circumstantial detail and laced with occasional shots of life-like forgetfulness, is very likely to impress any tribunal of fact. But it is also the hallmark of the confidence trickster down the ages."

Sixthly, we live not only in a multicultural society but often witnesses from different nationalities appear in court where English is not their first language. Such witnesses may even need the assistance of an interpreter where it will be even more difficult if not impossible to draw any inference from demeanour. As Scrutton LJ remarked[47]:

"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."

Whilst demeanour and impression may be relevant and has a role in some cases where a judge can be confident that a witness is lying by including demeanour in the mix, demeanour should in general only be a small factor and not a dominant fac-

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[46] T. Bingham, "The Judge as Juror", p.10.

[47] *Compagnie Naviera Martiartu of Bilbao v Royal Exchange Assurance Corporation* (1922) 13 LI. L. Rep. 83 at 97.

tor in determining credibility. As stated by Leggatt LJ[48]:

> "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. 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 family cases at least where the Courts are often asked to make findings of serious wrongdoing largely on the basis of an assessment of witness accounts without much or no relevant documentation, demeanour and impression can have a significant role. In such cases the approach set out by Peter Jackson LJ should be borne in mind[49]:

> "25. No judge would consider it proper to reach a conclusion about a witness's credibility based solely on the way that he or she gives evidence, at least in any normal circumstances. The ordinary process of reasoning will draw the judge to consider a number of other matters, such as the consistency of the account with known facts, with previous accounts given by the witness, with other evidence, and with the overall probabilities. However, in a case where the facts are not likely to be primarily found in contemporaneous documents the assessment of credibility can quite properly include the impression made upon the court by the witness, with due allowance being made for the pressures that may arise from the process of giving evidence. Indeed in family cases, where the question is not only 'what happened in the past?' but also 'what may happen in the future?', a witness's demeanour may offer important information to the court about what sort of a person the witness truly is, and consequently whether an account of past events or future intentions is likely to be reliable.
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> …
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> 28. Of course in the present case, the issue concerned an alleged course of conduct spread across years. I do not accept that the Judge should have been driven by the dicta in the cases cited by the Appellants to exclude the impressions created by the manner in which B and C gave their evidence. In family cases at least, that would not only be unrealistic but, as I have said, may deprive a judge of valuable insights. There will be cases where the manner in which evidence is given about such personal matters will properly assume prominence. As Munby LJ said in *Re A (A Child) (No. 2)* [2011] EWCA Civ 12 said at [104] in a passage described by the Judge as of considerable assistance in the present case:
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> > 'Any judge who has had to conduct a fact-finding hearing such as this is likely to have had experience of a witness - as here a woman deposing to serious domestic violence and grave sexual abuse - whose evidence, although shot through with unreliability as to details, with gross exaggeration and even with lies, is nonetheless compelling and convincing as to the central core… Yet through all the lies, as experience teaches, one may nonetheless be left with a powerful conviction that on the essentials the witness is telling the truth, perhaps because of the way in which she gives her evidence, perhaps

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48 *R. (SS) (Sri Lanka) v Secretary of State for the Home Department* [2018] EWCA Civ 1391 at [41].
49 *B-M (Children: Fact Finding)* [2021] EWCA Civ 1371 at [25]–[29].

> because of a number of small points which, although trivial in themselves, nonetheless suddenly illuminate the underlying realities.'
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> 29. Still further, demeanour is likely to be of real importance when the court is assessing the recorded interviews or live evidence of children. Here, it is not only entitled but expected to consider the child's demeanour as part of the process of assessing credibility, and the accumulated experience of listening to children's accounts sensitises the decision-maker to the many indicators of sound and unsound allegations."

45-23 **Inherent probabilities** As to (7), the inherent probability of a witnesses account is always an important consideration, alongside the documentary and other evidence in the case, in assessing both credibility and reliability. Often the court is confronted with two conflicting but plausible accounts, but a witness's account may in some cases be inherently unlikely. What may be inherently improbable may not look so when one considers other evidence, such as in the case of fraud where one can start with a general position that it is unlikely a person may have committed a fraud, but once it has been proven he has committed past dishonesty or given material lies, then a judge may be entitled not to work from any assumption that a fraud in the present case is improbable.[50]

45-24 A long list of indicators of a not credible and unreliable witness may be given, some of the most common ones are as follows[51]:

(1) evasive and argumentative answers;
(2) tangential speeches avoiding the questions;
(3) blaming legal advisers for documentation (statements of case and witness statements);
(4) disclosure and evidence shortcomings;
(5) self-contradiction;
(6) internal inconsistency;
(7) inconsistency with contemporaneous documents;
(8) shifting case;
(9) new evidence; and
(10) selective or absence of disclosure.

To this list can be added some more equivocal and subjective indicators:

(11) getting flustered at difficult questions;
(12) giving incredible detail and making things up on the spot;
(13) changes in demeanour and signs of being uncomfortable when giving certain answers;
(14) answers which are inherently incredible and contrary to sense;
(15) making uncorroborated allegations of fabrication;
(16) wild speculation;
(17) scripted and well-rehearsed witness.

However, the assessment of a witnesses' credibility and reliability does not involve the application of some form of checklist. It involves considering a witness's

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[50] See para.45-20.

[51] *Painter v Hutchinson* [2007] EWHC 758 (Ch) at [3]; *Singh v Singh* [2021] EWHC 2272 (Ch) at [61]; *Thornton v Northern Ireland Housing Executive* [2010] NIQB 4 at [13] (Gillen J provides a list of factors in assessing credibility).

evidence in a common sense way in the light of all of the evidence and the inherent probabilities.

(b) Expert evidence[52]

45-25 Expert evidence can play a key if not a decisive part in a court's determination of the facts in a case. However, the facts are for the judge or, in a criminal case on indictment, the jury. It can be all too easy to be blinded by technical expert evidence and so led to a particular result. Hence where there is a jury, it is incumbent upon the judge to warn the jury not to decide a case against the defendant solely on the basis of expert evidence, even where the expert evidence is not contested. An expert may conclude from DNA evidence that there is a one in a million chance that DNA found at a scene is not that of the defendant, but a jury should not convict a defendant of burglary solely because of that.

45-26 Whilst expert evidence can be of great assistance in determining the facts, one should be aware of the limitations. First, one should be wary of drawing too much from such evidence and not permit it to take away the role of the judge or jury which is to find the facts.[53]

Secondly, whilst truthfulness and credibility of expert evidence is in general less of an issue as with factual witness, they can be partisan and lack objectivity. They are generally paid professional witnesses and selected by parties because they will support their cases. The experts who are selected are the ones who agree with a party's position, and those who don't a party would not call. There can be no doubt that in practice there is an element of expert shopping. In personal injury cases there are medical experts who tend only to give evidence for claimants or defendants. In cartel and competition claims economic experts with particular views are selected. However, with professional expert witnesses there are constraints against giving partisan evidence. If an expert is found to have crossed the line in a case and criticised by a judge, then this could adversely affect his career both as a professional and expert witness.[54]

Thirdly, a judge may find it difficult to follow and understand highly technical expert evidence, a problem magnified in jury trials, where it is essential that such evidence is put into a comprehensible form.[55]

Fourthly, it is important to appreciate that an expert may be influenced by the form of his instructions and the framing of the questions on which his opinion is sought.

45-27 How is one to choose between competing experts? Demeanour is usually of no assistance, nor is credibility an issue in the vast majority of cases. That said the various matters to taken into account may be summarised as follows:

(1) The qualifications, expertise and practical experience of the expert. In many cases the professional qualifications of the experts are broadly comparable. A view may need to be taken in any particular case of the practical experience of the expert in the precise field that relates to the issues in the action on which he is giving expert evidence. There are numerous examples in the authorities of judges preferring one expert over another because he has more practical experience or familiarity with the matters in issue.

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[52] See generally, Ch.33.
[53] See para.45-25.
[54] See para.33-39.
[55] See para.45-04.

(2) The published work or other material such as reports in other cases of the expert which may be inconsistent with the evidence being given.
(3) Any weakness or inconsistencies arising from cross-examination.
(4) Whether the expert's evidence comes across as impartial and objective.

45-28 Where the court rejects an expert's evidence or prefers one expert over another, the reasons for this must be set out in the judgment.[56] The court is not bound to follow the uncontroverted evidence of an expert where there is good reason not to do so.[57]

(c) Documentary evidence

45-29 Right up to the 1960s most evidence in criminal trials was oral evidence from witnesses of fact. Even in civil cases the amount of documentation was relatively modest. Advances in technology and the explosion in available documentation, initially due to the availability of photocopying and now widespread computer generated or held information, have radically changed the volume and types of evidence available to be deployed at trial. This has increased the length of most trials as well as their cost. The burden on the parties and the judge to shift through mases of documents can be considerable. On the other hand, it can enable the trier of fact to make more accurate findings and to get to the truth of the matter.

Of course, there are cases where the evidence largely turns on conflicting oral accounts of witnesses with no available documents to assist the court in determining the truth, particularly in criminal cases and small cases in the county court, but these are not the majority. Usually there is something other than the evidence of the witnesses themselves to assist the court in determining where the truth lies.

45-30 Contemporary documents play an important part in establishing the truth. As Lord Bingham noted[58]:

> "In this process of establishing the truth, compulsory disclosure plays a crucial part. Letters, diary entries, memos and minutes made or written at the time often provide a surer guide to the truth than what the participants say years later when differences have arisen."

In commercial cases in particular, judges have emphasised the importance of contemporary documents. As stated by Males LJ in *Simetra*[59]:

> "In this regard I would say something about the importance of contemporary documents as a means of getting at the truth, not only of what was going on, but also as to the motivation and state of mind of those concerned. That applies to documents passing between the parties, but with even greater force to a party's internal documents including emails and instant messaging. Those tend to be the documents where a witness's guard is down and their true thoughts are plain to see. Indeed, it has become a commonplace of judgments in commercial cases where there is often extensive disclosure to emphasise the importance of the contemporary documents. Although this cannot be regarded as a rule of law, those documents are generally regarded as far more reliable than the oral evidence of witnesses, still less their demeanour while giving evidence. The classic statement of Robert Goff LJ in *The Ocean Frost* [1985] 1 Lloyd's Rep 1 at p.57 is frequently, indeed routinely,

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[56] *Flannery v Halifax Estate Agencies Ltd* [2000] 1 W.L.R. 377; *Simetra Global Assets Ltd v Ikon Finance Ltd* [2019] EWCA Civ 1413 at [38]–[47]; see paras 33-66 and 33-82.
[57] *Griffiths v TUI (UK) Ltd* [2021] EWCA Civ 1442.
[58] Matthews and Malek, *Disclosure*, 2nd edn (2000), foreword.
[59] *Simetra Global Assets Ltd v Ikon Finance Ltd* [2019] EWCA Civ 1413 at [48].

cited:

> '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. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth. I have been driven to the conclusion that the Judge did not pay sufficient regard to these matters in making his findings of fact in the present case.'"

Contemporary documents may be useful in themselves in establishing the facts, but in addition they are often the primary method of putting witnesses' recollections and evidence in context. They assist the process of cross-examination. As Warby J as stated in *Dutta*[60]:

> "There is now a considerable body of authority setting out the lessons of experience and of science in relation to the judicial determination of facts. Recent first instance authorities include *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3650 (Comm) (Leggatt J, as he then was) and two decisions of Mostyn J: *Lachaux v Lachaux* [2017] EWHC 385 (Fam) [2017] 4 W.L.R. 57 and *Carmarthenshire County Council v Y* [2017] EWFC 36 [2017] 4 W.L.R. 136. Key aspects of this learning were distilled by Stewart J in *Kimathi v Foreign and Commonwealth Office* [2018] EWHC 2066 (QB) [96]:
>
> 'i) *Gestmin*:
>
> — We believe memories to be more faithful than they are. Two common errors are to suppose (1) that the stronger and more vivid the recollection, the more likely it is to be accurate; (2) *the more confident another person is in their recollection, the more likely it is to be accurate*.
>
> — Memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is even true of "flash bulb" memories (a misleading term), i.e. memories of experiencing or learning of a particularly shocking or traumatic event.
>
> — *Events can come to be recalled as memories which did not happen at all or which happened to somebody else*.
>
> — The process of civil litigation itself subjects the memories of witnesses to powerful biases.
>
> — Considerable interference with memory is introduced in civil litigation by the procedure of preparing for trial. Statements are often taken a long time after relevant events and drafted by a lawyer who is conscious of the significance for the issues in the case of what the witness does or does not say.
>
> — *The best approach from a judge is to base factual findings on inferences drawn from documentary evidence and known or probable facts. "This does not mean that oral testimony serves no useful purpose… 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. *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"*.

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60 *R. (Dutta) v General Medical Council* [2020] EWHC 1974 (Admin) at [39].

ii) *Lachaux*:
- Mostyn J cited extensively from *Gestmin* and referred to two passages in earlier authorities.[61] I extract from those citations, and from Mostyn J's judgment, the following:
- "Witnesses, especially those who are emotional, who think 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 incident occurred. Therefore, *contemporary documents are always of the utmost importance…*"
- "…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 fact 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…*"
- Mostyn J said of the latter quotation, "these wise words are surely of general application and are not confined to fraud cases… it is certainly often difficult to tell whether a witness is telling the truth and I agree with the view of Bingham J that *the demeanour of a witness is not a reliable pointer to his or her honesty*."

iii) *Carmarthenshire County Council*:
- The general rule is that oral evidence given under cross-examination is the gold standard because it reflects the long-established common law consensus that the best way of assessing the reliability of evidence is by confronting the witness.
- However, oral evidence under cross-examination is far from the be all and end all of forensic proof. Referring to paragraph 22 of *Gestmin*, Mostyn J said: "*…this approach applies equally to all fact-finding exercises, especially where the facts in issue are in the distant past*. This approach does not dilute the importance that the law places on cross-examination as a vital component of due process, but it does place it in its correct context.

[45] The dissenting speech of Lord Pearce in *Onassis and Calogeropoulos v Vergottis* [1968] 2 Lloyd's Rep 403, 431; Robert Goff LJ in *Armagas Ltd v Mundogas SA* [1985] 1 Lloyd's Rep 1, 57.'

I have emphasised passages that have particular resonance in this case."

When assessing documentary evidence the following should be borne in mind: **45-31**

(1) Just because something is recorded in a document does not necessarily mean it is true or accurate. Thus when a note of a meeting has been created, the accuracy will depend on how detailed it is and what facts the maker may have decided or remembered at the time to note down. At meetings a statement may not seem significant or even been heard or remembered by the time the note was prepared.

(2) The interests and possible motives of the maker may be relevant. A party writes a letter setting out his position to the other party. That does not mean what is stated in the letter is true. However, if the other party replies and either refutes an assertion of fact or replies and expressly accepts it or

[61] T. Bingham, "The Judge as Juror", p.10.

simply does not reply at all, that may be highly relevant. Thus looking at one document in isolation may give a wrong impression. A document should be considered in the context of other documents as well as any witness evidence relating to it.

(3) Documents get lost, mislaid and destroyed, thus the documents before the court may not show the complete picture.

(4) Where what is stated or recorded in a document is in dispute, then the court should consider the circumstances of its creation, possible reasons why it may be inaccurate, and the motives and interests of the maker.

(5) There is no fixed rule or presumption that documentary evidence is always to be preferred to the evidence of the witnesses to which it may conflict. There may be circumstances in which the documents can be shown to be inherently unreliable or the oral evidence may throw an entirely different light on the apparent meaning of a document.[62]

45-32 Technological advances and scientific techniques have transformed the sources of evidence for criminal trials in particular. Examples commonly found in criminal trials include the following:

(1) Identification evidence, including, video camera, fingerprint and DNA evidence. These can pinpoint a defendant at a particular scene.

(2) Mobile phones can hold a vast amount of data, including not just messages, but photos and tracking information showing the presence and movements of the phone and its user from place to place.[63]

(d) Agreed and undisputed facts

45-33 In most cases there is a considerable amount of common ground or at least undisputed facts, and the facts in dispute are relatively narrow. There are of course cases which are like total war, where every point both relevant and irrelevant is contested by the parties. It is one of the functions of case management to narrow the issues and to deal with and resolve the relevant factual disputes.[64]

The agreed facts or those which are incontrovertible provide an important framework for considering the evidence in dispute and any judgment. When looking at a witnesses account an important consideration is whether such account is consistent with the agreed and undisputed facts. In a civil case an agreed case summary and statement of facts is a useful tool as are agreed facts which can be put before the jury in a criminal trial.

(e) Absence of evidence

45-34 A court should try a case and decide on the basis of the evidence before it and not speculate on what further evidence could have been called. Hence juries are typically directed to only consider the evidence that they have heard in court and not to speculate on what other evidence might have been called or what an absent potential witness may have said. It is of course open to the court to find a case or

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62 *GML International Ltd v Harfield* [2020] EWHC 909 (QB) at [65].

63 For an example of a case where such evidence fundamentally undermined a defendant's account, see *R. v Brecani* [2021] EWCA Crim 731; [2021] 2 Cr. App. R. 12.

64 See para.45-02.

allegation of fact to be proved if a party does not call any evidence to rebut it.[65] Inferences can be drawn from a defendant's failure to give evidence at trial or to answer questions if called.[66] In civil cases, the court can in certain circumstances draw an inference against a party who fails to produce evidence which ought to have been available to him but he has chosen not to call or produce.

(i) Absence of witnesses

45-35 The court may be entitled to draw adverse inferences from the absence of a witness who was available to and might have been called by a party. However, the court does not usually do so, not least because there may be all sorts of reasons why a particular witness is not called and one usually cannot be confident to infer what the witness would actually have said. Further, in general it is for a party to choose which witness he wishes to call and there is no property in a witness, and in the case of a witness in the jurisdiction the opposing party can seek to compel a witness's attendance by means of a witness summons.

It is in a comparatively small number of cases that it would be appropriate to draw an adverse inference,[67] but where it is sought to do so, the party inviting the court to exercise such a discretion must[68]:

(1) Set out clearly (a) the point on which the inference is sought and identifying the inference sought; (b) the reason why it is said that the missing witness would have material evidence to give on that issue; (c) why it is said that the party seeking to have the inference drawn has himself adduced relevant evidence on that issue; and (d) why the party seeking the inference could not himself be expected to call or witness summons the witness.
(2) Explain why such inference is justified on the basis of other evidence that is before the court.

It is then open to the other party to resist such an inference by giving a good reason why the witness is absent or silent. If he is able to do so, then no inference should be drawn. If there is some credible explanation given, even if not wholly satisfactory, the potentially detrimental effect of his absence or silence may be reduced or nullified.[69]

As to whether to draw an adverse inference, the Supreme Court has held in *Efobi* this to be a matter of ordinary rationality[70]:

"41. The question whether an adverse inference may be drawn from the absence of a wit-

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[65] It is of course open to a party not calling witness to seek to test his opponent's witnesses' accounts in cross-examination. But if he does not cross-examine a witness on a material fact, then it may be difficult to persuade the court that such evidence should be disbelieved: see para.12-12; *Edwards Lifesciences LLC v Boston Scientific Scimed Inc* [2018] EWCA Civ 673 at [62]–[63]. It is important that key allegations are put to a witness, especially of misconduct or lying: *Howlett v Davies* [2017] EWCA Civ 1686; [2018] 1 W.L.R. 948 at [39]; *IsZo Capital LP v Nam Tai Property Inc*, BVIHC (COM) 2020/0165, (3 March 2021), paras 80–85.

[66] Ch.35 which deals with criminal cases, but such an adverse inference can be drawn in civil cases as well.

[67] *Magdeev v Tsvetkov* [2020] EWHC 887 (Comm) at [150]–[154].

[68] *Ahuja Investments Ltd v Victorygame Ltd* [2021] EWHC 2382 (Ch) at [23]–[25].

[69] *Wisniewski v Central Manchester Health Authority* [1998] P.I.Q.R. P324; *Jaffray v Society of Lloyd's* [2002] EWCA Civ 1101 at [406]–[407].

[70] *Efobi v Royal Mail Group Ltd* [2021] UKSC 33; [2021] 1 W.L.R. 3863 at [41]; *Ahuja Investments v Victorygame Ltd* [2021] EWHC 2382 (Ch) at [31]–[34].

ness is sometimes treated as a matter governed by legal criteria, for which the decision of the Court of Appeal in *Wisniewski v Central Manchester Health Authority* [1998] PIQR P324 is often cited as authority. Without intending to disparage the sensible statements made in that case, I think there is a risk of making overly legal and technical what really is or ought to be just a matter of ordinary rationality. So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules."

(ii) Absence of documents

45-36 In civil cases the process of disclosure of documents is an important one in ensuring "cards on the table" in the endeavour to establish the truth. In certain circumstances an adverse inference may be drawn from the failure of a party to produce documents or through his destruction of documents with the intent that they may not be available for disclosure. The court should only draw an adverse inference if it is satisfied that the party had the documents in the first place and was responsible for the absence. There are two inferences that may be drawn. First, the court may draw an adverse inference as to the credibility of the party who has withheld or destroyed the documents. Thus, the inference may be drawn that the deliberate destruction or withholding demonstrates a consciousness of the weakness of the party's cause in general, and from that consciousness may be inferred the fact itself of the cause's lack of truth and merit.

The second main inference is that the specific document is unfavourable to the cause of the party who has destroyed or withheld it. For such an inference there should usually at least be some evidence of its contents and the inference should only be in relation to the specific fact or issue to which it relates.[71]

(f) Inherent probabilities, impression and common sense

45-37 In any fact-finding process, the judge has to consider the inherent probabilities in assessing evidence and deciding the case. The inherent probabilities in the context of assessing witness evidence has been considered above,[72] but applies in relation to considering the evidence as a whole. It should be borne in mind even the most improbable may in fact occur. Indeed insurance companies will often insure against even the most remote possibilities, but over time valid claims in respect of them may occur. However difficult it may be in practice to assess credibility and reli-

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[71] Matthews and Malek, *Disclosure*, 5th edn (2017), para.17.38 (see cases there cited); *IsZo Capital LP v Nam Tai Property Inc*, BVIHC (COM) 2020/0165, (3 March 2021), paras 176–181.

[72] See para.45-23.

ability of witnesses, and the problems with memory, that does not relieve the judge from the task of making findings based on all of the evidence.[73]

45-38 One should not ignore the overall impression the evidence may have on a judge, which be difficult if not impossible to replicate on an appeal. As remarked by Hoffmann J in *Biogen*[74]:

> "The need for appellate caution in reversing the trial judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance … of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation."

45-39 Finally a judge as with any arbiter of fact should apply his wisdom and common sense, which is perhaps one of the virtues of the jury system who are entrusted to apply their collective common sense in deciding the guilt or otherwise of a defendant.

4. The Judge and Jury

45-40 It is trite that matters of law are for the judge and issues of fact are for the jury in trials on indictment. However, the judge has a key role in what facts are presented and in what way and in directing the jury as to how they should treat and assess the facts when it comes to their deliberations. The judge's role is to manage cases in the light of the overriding objective that cases be dealt with justly.[75]

A judge's duty is to ensure that the trial is conducted fairly and the evidence dealt with in a way which excludes inadmissible evidence or that which should be excluded, and presented in a form comprehensible for the jury. That entails ruling on matters such as the admissibility of confessions, bad or good character of the accused and witnesses, expert evidence and hearsay evidence. Thus, the judge has a major role in determining what evidence goes before the jury out of the evidence sought to be introduced by the prosecution and the defence.

When it comes to the treatment of the evidence admitted, whilst on one level it is a matter for the jury to decide what evidence they accept and the conclusions as to fact and guilt that they derive from that, they do so within the confines and guidance of a judge's directions of law and summing up. Some of these directions may be complex for a juror to absorb and follow, especially if they are given in the traditional way of an oral summing up. It is now recognised that in the vast majority of cases (outside simple short trials with a single defendant) it is far better for directions to be given in writing, even if the absence of written directions is in general not a ground to set aside a conviction in the absence of errors and deficiencies in an oral summing up and directions.[76]

As to the contents of a summing up the principles have been summarised as

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[73] *Martin v Kogan* [2019] EWCA Civ 1645 at [88]; *BXB v Watch Tower and Bible Tract Society of Pennsylvania* [2020] EWHC 156 (QB) at [15]–[16].

[74] *Biogen Inc v Medeva Plc* [1997] R.P.C. 1 at 45.

[75] Crim PR r.1.1.

[76] *R. v Grant* [2021] EWCA Crim 1243 at [47].

follows[77]:

(1) The summing up should remind the jury of the salient facts and competing cases that provides assurance about the basis of their decision.
(2) Counsels' closing speeches are no substitute for a judge's impartial review of the facts.[78]
(3) The summing up should not rehearse all the evidence and arguments.[79]
(4) A recitation of all the evidence and all the points made on each is unlikely to be helpful; brevity and a close focus on the issues is a virtue and not a vice.[80]
(5) A summing up must, of necessity, be selective but providing the salient points are covered and a proper balance is kept between the case for the prosecution and the defence, the Court of Appeal will not be lightly drawn into criticisms on points of detail.
(6) A succinct and concise summing-up is particularly important in a long and complex trial to assist the jury in its consideration of the evidence. The longer the case the more important is a short and careful analysis of the issues.[81]
(7) In a trial that has made use of schedules, timelines, digital material and the like whilst there may be a need to cross reference evidence from different sources, for example where a defendant has a particular point to make, it is a pointless exercise for a judge to recount the contents of a factual timeline or (in a different context) a schedule relating to the use of mobile phones, which the jury have in front of them, which has been the basis on which the evidence has been deployed and which they will have with them in retirement.
(8) There is nothing novel in the concept that a long trial can and should be summed up succinctly.[82] The dangers of boring a jury rather than assisting them must have occurred at some point to any judge who has sat in the Crown Court; but it is a danger that it is particularly important to avoid in a case which is based largely on documents with which the jury are familiar, on which they have already heard closing submissions and which they will consider further after the summing-up.
(9) It is not usually necessary to remind the jury of all the points made in counsel's speech.[83]
(10) If no complaint or suggestion is made at the time of a summing-up it may be regarded on an appeal as relevant to the validity of any later complaint. A trial in the Crown Court is not to be regarded as a dress rehearsal for a challenge to a conviction in the Court of Appeal. If a point is material, it

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77 *Crown Court Compendium: Part I: Jury and Trial Management and Summing Up* (December 2020), at 1-5 drawn from *R. v Reynolds* [2019] EWCA Crim 2145 at [50]–[69].
78 *Amado-Taylor* [2000] 2 Cr. App. R 189 at 191D.
79 *McGreevy v DPP* (1973) HL (NI) 2 Cr. App. R. 424 at 431.
80 See Rose LJ in *Farr* (*The Times,* 10 December 1998) cited in Amado-Taylor at 192A.
81 *D. Heppenstall & Potter* [2007] EWCA Crim 2485.
82 *Charles* (1979) 69 Cr App. R. 334 at 338–9, this Court (Lawton LJ) addressed the issues that may arise from a lengthy summing-up following the order in which the evidence was given ("a notebook summing-up"): "The method of summing up in this kind of case, particularly the reading out of the judge's note of all the evidence is, in our judgment, unsatisfactory. It is unsatisfactory for a number of reasons. In plain language it must bore the jury to sleep; and that is what happened in this case."
83 *R. v Lunkulu* [2015] EWCA Crim 1350 at [43].

should be taken at a time and place when it can be dealt with most conveniently and so that the jury can consider if it necessary. Defence counsel has a duty to correct any misstatement of fact.[84]

(11) In general, and as a matter of fairness, if a judge is considering introducing an issue that has not been canvased in the course of a trial, he or she should at least warn a defence advocate before final speeches, so that the correctness of the proposed course can be discussed and an opportunity afforded to the defence to deal with it.[85]

(12) As to the propriety of judicial comment there is a potential tension between the importance of a judge not usurping the jury's function and a judge's legitimate expression of a view, even a strong view in a proper case, of the evidence. There can be no all-embracing rule, other than that a judge's personal views must be considered carefully before being expressed; and, if they constitute the appearance of advocacy on behalf of the prosecution, they will not necessarily be regarded as appropriate simply because the jury had been told that they are not bound to accept the judge's views or by the use of the timeless refrain, "it is entirely a matter for you."

45-41 A summing up should contain the following as appropriate:

(1) A direction as to burden and standard of proof.

(2) A summary of the key evidence and the issues for the jury together.

(3) A route to verdict which sets out in an orderly fashion what the jury must ask itself in respect of the charges.

(4) A statement that they should treat and consider the defendant's evidence fairly just as any other witness in the case.

(5) An emphasis that the assessment of the facts, what is relevant or material, and any inconsistencies is a matter for them.

(6) Where events are not recent (and even when relatively recent) the difficulties in recollection and fact, different people may recall or have noticed or seen different things.

(7) How to deal with lies with a *Lucas* direction tailored to the facts of the case stressing just because a person may have lied about one thing does not mean he has lied about others or is guilty.[86]

(8) The dangers of identification evidence and how an honest and confident witness may still be in error.[87]

(9) How to treat character, both good and bad. In the absence of a bad character direction a jury may well be unfairly prejudiced against an accused and presume from the fact of a previous conviction, he must be guilty of the offence charged.[88]

(10) Advice to the jury that they should consider all the evidence, consider the inherent probabilities and use their collective common sense.

There are numerous other possible directions depending on the issues and evidence in each case. The directions should be tailored to meet the facts of the case

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84 *Charles* (1979) 69 Cr. App. R. 334 at 338.

85 *Evans (DJ)* (1990) 91 Cr. App. R. 173.

86 See para.36-37.

87 See Ch.15.

88 See Chs 18–22. As to directions, see paras 18-08 to 18-19 (good character) and 19-66 and 19-67 (bad character).

in hand. Directions will often require a lot of thought and they should be discussed with counsel before they are given. The summing up and directions need not all be given at the same time and in recent times judges have been given split summing ups with directions as to law provided to the jury prior to closing speeches and the factual summing up after the party's speeches. Whilst sometimes there may be a temptation for a judge to give some personal prejudicial comment on the evidence this is to be deprecated.

45-42 In the introduction to this work is a reference to a trial in the 1840s[89] where after a 2 minute 53 second trial on a theft charge, the judge's terse direction to the jury was:

> "Gentlemen, I suppose you have no doubt? I have none."

In 1952 Bentley was convicted of the murder of a police officer and subsequently executed. It was not until 1998, somewhat belatedly, the conviction was overturned by the Court of Appeal. The trial judge's unfair and unbalanced directions to the jury were described by Bingham LCJ in the following critical terms[90]:

> "66. The killing of P.C. Miles had, very understandably, aroused widespread public sympathy for the victim and his family and a strong sense of public outrage the circumstances of his death. This background made it more, not less, important that the jury should approach the issues in a dispassionate spirit if the defendants were to receive a fair trial, as the trial judge began by reminding them. In our judgment, however, far from encouraging the jury to approach the case in a calm frame of mind, the trial judge's summing-up, particularly in the passages we have quoted, had exactly the opposite effect. We cannot read these passages as other than a highly rhetorical and strongly worded denunciation of both defendants and of their defences. The language used was not that of a judge but of an advocate (and it contrasted strongly with the appropriately restrained language of prosecuting counsel). Such a direction by such a judge must in our view have driven the jury to conclude that they had little choice but to convict; at the lowest, it may have done so."

One would hope that summing ups like these are a relic of the past. Standards have undoubtedly improved over time and there is plenty of guidance in the authorities, judicial training and the Crown Court Compendium as to how to conduct a trial and guide the jury in their task to assess the evidence and to reach their verdict. It is the duty of every judge, whether as the trier of fact in a civil trial or in guiding a jury, to carry out his task carefully, fairly and to review the evidence in an objective and dispassionate manner.

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[89] See para.1-05.

[90] *R. v Bentley (Deceased)* [2001] 1 Cr. App. R. 21 at [66].