THE IMPORTANCE OF CONTEMPORARY DOCUMENTS
Simon Hill - 25.5.21

1. Contemporary documents are usually part of the evidence before a court or tribunal when it comes to undertake a judicial fact finding process - whether as part of a trial or at a separate hearing. In contrast to familiar warnings about the human memory's fallibility, assuming information is recorded on durable mediums, contemporary documents should retain the evidence/narrative/account in exactly the same form and substance as was first created, close in time to the events themselves. The passage of time until judicial determination should not therefore degrade the quality and reliability of the evidence/narrative/account therein.

2. To consider the importance of contemporary documents, it is important to consider them alongside the other types of evidence, including witness evidence.

3. In *Onassis and Calogeropoulos v Vergottis* [1968] 2 Lloyd's Rep 403, Lord Pearce said (in a dissenting speech), at 431,

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

4. Robert Goff LJ in *Armagas Ltd v Mundogas (The Ocean Frost)* [1985] 1 Lloyd's Rep 1, page 57 gave the '*classic statement…frequently, indeed routinely, cited'* (Males LJ in *Simetra Global Assets Ltd v Ikon Finance Ltd* [2019] EWCA Civ 1413 ('*Simetra'*)). Robert Goff LJ said:

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

5. In his book entitled 'The Business of Judging: Selected Essays and Speeches' in 2000, in chapter 1 entitled 'The Judge as Juror', Lord Bingham addressed this issue. Warby J in *R (on the application of Dutta) v General Medical Council* [2020] EWHC 1974 (Admin) ('*Dutta*'), at paragraph 40, said of this: '*Of the five methods of appraising a witness's evidence, he identified the primary method as analysing the consistency of the evidence with what is agreed or clearly shown by other evidence to have occurred. The witness's demeanour was listed last, and least of all.*

6. In *Gestmin SGPS (SA) v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm)('*Gestmin*'), Leggatt J (as he then was) handed down what was later referred to by Richard Hermer QC (Sitting as a Deputy High Court Judge) in *Barrow v Merrett* [2021] EWHC 792 (QB)('*Barrow*') as 'the celebrated judgment' (paragraph 31). Under a subheading 'Evidence based on recollection', Leggatt J said, at paragraphs 15 to 22:

   '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.

   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 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.

22. 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 his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.'* [Bold added]

7. Of the above, *'…their wisdom is reflected by the frequency in which they are cited and the range of cases in which they are invoked'* (*Barrow* - paragraph 36)

8. In *Simetra*, Males LJ gave guidance on the importance of contemporary documents, referring to *The Ocean Frost* passage cited above. Males LJ said, at paragraphs 48 and 49:

   '…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, cited….*

   ….

It is therefore particularly important that, in a case where there are contemporary documents which appear on their face to provide cogent evidence contrary to the conclusion which the judge proposes to reach, he should explain why they are not to be taken at face value or are outweighed by other compelling considerations…' [Bold added]

9. In *Kimathi v Foreign and Commonwealth Office* [2018] EWHC 2066 (QB) ('*Kimathi*'), under the subheading 'The approach to evidence', Stewart J said that *'In recent years there have been a number of first instance judgments which have helpfully crystallised and advanced learning in respect of the approach to evidence*' (paragraph 96), stating that 3 decisions in particular required citation. Those decisions were *Gestmin*, *Lachaux v Lachaux* [2017] 4 WLR 57 ('*Lachaux*') and *Carmarthenshire County Council v Y* [2017] 4 WLR 136 ('*Carmathenshire*'). In Kimathi, Stewart J summarised the 3 cases, but for present purposes, I quote only her summaries for *Lachaux* and *Carmathenshire*, at paragraph 96:

   (ii) Lachaux:

   • *Mostyn J cited extensively from Gestmin and referred to two passages in earlier authorities. 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."* [Bold added]

   (iii) Carmarthenshire.…:

   • *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.*"

10. Stewart J in *Kimathi* then added, at paragraph 97:

    'Of course, each case must depend on its facts and (a) this is not a commercial case (b) a central question is whether the core allegations happened at all, as well as the manner of the

happening of an event and all the other material matters. Nevertheless, they are important as a helpful general guide to evaluating oral evidence and the accuracy/reliability of memory.'

11. In *Dutta*, Warby J described Stewart J in paragraph 96 as having distilled the '*Key aspects of this learning*' from the 3 cases.

12. In *Mundil-Williams v Williams* [2021] EWHC 586 (Ch), HHJ Keyser QC (sitting a Judge of the High Court) said, about the unreliability of the witness evidence, at paragraph 49:

    'The written and oral evidence of witnesses may be important, and I think that some of the evidence given at trial was indeed important, but as I have already observed it has to be approached with caution. The passage of time adversely affects the reliability of recollections of past events, even if evidence is honestly and confidently given. And the court must be alive to the risk that recollections have been subconsciously moulded to a witness's perceived best advantage or, more regrettably, that a witness is giving evidence that is merely self-serving.'

13. In *Barrow*, Richard Hermer QC (sitting as a Deputy High Court Judge) said, at paragraph 33:

    'In so far as [counsel for the claimant's] submission was addressed to the observation that the objective evidence is always an extremely helpful source both in itself, and as a guide to calibrating the recollection of witnesses, she is plainly right.'

Independently Generated Non-Self Serving Contemporaneous Documents

14. Merely because a document was created contemporaneous to the event described therein, does not make it infallible.

15. For instance, a participant to an event may realised almost immediately after an event that they were in the wrong, and may begin constructing an exculpatory narrative almost immediately, to exculpate him/herself from blame. False/self serving narratives, or cherry picked facts, can be constructed/identified quickly, and entered into statements/records quickly - statements/records that will later qualify as having been made contemporaneous with the event therein described.

16. Some issues will therefore be:
    1. Was the recording made before it importance could have been realised?
    2. Could the recording have been made for self-serving/exculpatory reasons/purposes?
    3. Could the author have been persuaded to record something inaccurate?

17. Usually, the best types of evidence as those made at the time, by dis-interested institutions, who can typically be relied upon to: (1) accurately record what is happening; (2) keep those records safe and away from any risk of tampering; (3) produce them subsequently in complete and authentic form. Obvious examples would include: Banks and the HMLR.

Case Study - Dutta

18. Return to *Dutta*, and to consider Warby J's criticism of the 1st instance tribunal's approach to assessing the evidence. Dutta involved Dr Dutta, a cosmetic surgeon, brought before the Medical Practitioner's Tribunal by the General Medical Council, on charges misconduct in his professional dealings with patients. In summary, by inappropriately pressurising a patient to undergo an operation, failing to obtain proper consent, and misleading the patient as the product to be implanted.

19. In order to understand Warby J's criticisms, it necessary to quote from the Determination the tribunal reached. Warby J put the parts he wanted to emphasize, in italics. I shall make that emphasis appear in bold.

*[29] The Tribunal noted that **neither party sought to challenge Patient A's credibility**. It is also noted that she made some concessions during her oral evidence, which enhanced her credibility.*

*[31] However, the Tribunal noted that whilst weight could be assigned to the documentation, it is not determinative. The Tribunal noted the record of Patient A's appointments with Dr Dutta, including a 30-minute appointment on 5th March 2009, commencing at 1:30pm. It also noted the email from Dr Dutta to Mr. McDonald at the hospital in which the procedure was to be undertaken, dated 5th March 2009 and sent at 3:54pm, detailing that the date of the procedure was to be 11th April 2009. A questionnaire completed by Dr Dutta after his consultation with Patient A was completed after the email as it details that Mr. McDonald had been emailed. **As such, the documentation does not preclude that between 1:30pm and 2pm Dr Dutta offered the discount to Patient A, but between then and the sending of the e-mail, it had become clear that the procedure could not be undertaken so soon.***

*'[33] **The Tribunal assessed that Patient A's account of Dr Dutta offering her a discount was emphatic and assured**, and that whilst it may be expected that recollections of events could be inaccurate and have evolved over time, it is **less likely that an event would be contrived in its entirety as a result of the passage of time.'***

20. Warby J said, at paragraphs 42 and 43:

***'Instead of starting with the objective facts as shown by authentic contemporaneous documents**, independent of the witness, and using oral evidence as a means of subjecting these to critical scrutiny, the Tribunal took the opposite approach, starting with Patient A's evidence. It is an error of principle to ask do we believe her? before considering the documents. Further, the Tribunal's approach to the oral evidence of Patient A involves the second of the two common errors identified by Leggatt J in Gestmin. Reliance on a witness's confident demeanour is a discredited method of judicial decision-making. Paragraphs [29] and [33] of the Determination provide a clear illustration of the fallacy identified by Leggatt J. These flaws are all the more significant given the antiquity of the events in dispute, which were ten years old at the time of the hearing. As Mostyn J emphasised in the Carmarthen case, the older the events, the more important it is to hold fast to these principles of reasoning. The flaws are surprising, as [counsel for the claimant/appellant] had expressly referred the Tribunal to the passage from Kimathi that I have cited. I would add two points. First, the second emphasised sentence in paragraph [33] does not clearly or sufficiently acknowledge the fluidity of memory, or the fact that an honest witness can construct an entirely false memory. Secondly, the fallacy that confident evidence from an honest witness is accurate evidence is starkly illustrated by Patient A's insistence that the authentic documents shown to her in cross-examination must have been faked. It is plain that her only basis for saying so was that the documents were at odds with what she was saying. She was seeking to explain away the problem in a way that maintained her belief in her own account, a classic symptom of cognitive dissonance.'*

The third error I have mentioned emerges from paragraph [31] of the Determination. When deciding what to make of the apparent mismatch between its impressionistic assessment of Patient A and the contemporaneous documents, the Tribunal's approach was to ask itself whether the documentation was determinative, and such as to preclude the novel case theory which the Tribunal came to adopt. This was, in effect, to require Dr Dutta to establish to the criminal standard a defence to the Charge (and to an amended version of the Charge, which had not been put to him).

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