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Conflicts in Witness Evidence: How does the Court Decide?

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What we are covering

- **Why we need to understand how factual questions are resolved**
- **The difference between credibility and reliability**
- **A framework for analysing the facts**
- **The framework as applied in Scotland**
- **Practical guidance for legal advisors**



Understanding how factual questions are resolved

They might determine the entire case

*“Lawsuits are rare and catastrophic experiences ... even when the catastrophe ensues, the **controversy relates most often not to the law, but to the facts**”*

Justice Cardozo, The Nature of the Judicial Process (Yale, 1921)



Understanding how factual questions are resolved

Advising on Prospects: First Instance

Advice given: “I cannot hold out **any reasonable prospect** of establishing any liability on the part of the driver for this accident” [Para. 35]

But the defendant’s witness statements were inconsistent, showing that her recollection was vague and unreliable: “**These statements would have been a gift to any competent cross-examiner.** To my mind they were typical of a driver who is not keeping a proper lookout ...” [Para. 73]

VG -v- Kingsmill [2001] EWCA Civ 934



Understanding how factual questions are resolved

Advising on Prospects: Appeal

*"... an appellate court should not come to a different conclusion from the trial judge [on a finding of primary fact] on the basis of the printed evidence unless it is satisfied that **any advantage enjoyed by the trial judge through having seen and heard the witnesses could not be sufficient** to explain or justify his conclusion" [Para. 48]*

AW v Greater Glasgow Health Board 2017 CSIH 58



Credibility and Reliability

The Distinction

"...reliability, **not** credibility, was the issue..." [Para. 20]

Thomson v Kvaerner Govan Ltd 2004 SC (HL) 1

"Credibility and reliability are different. Credibility has to do with a witness's **veracity**, reliability with the **accuracy** of the witness's testimony." [Para. 41]

R. v. H.C., 2009 ONCA 56 (CanLII)



Credibility and Reliability

Credibility: an obvious choice?

The witnesses offered a "*rich display of **competitive dishonesty***"

*"The third defendant gave evidence in a facetious manner, including **winking** at the claimant's counsel at one stage, a manner which revealed to me that he regards telling the truth as simply **no more than a lifestyle choice.**"*

Rashid v Munir & Ors [2018] EWHC 1258



Credibility and Reliability

Reliability: less obvious...

*“There is no evidential basis for suggesting that any of the claimant’s witnesses were untruthful or deliberately misleading the court. **That does not mean their evidence should be accepted, even if they express their recollections to be firm and clear...**”*

CXB -v- North West Anglia NHS [2019] EWHC 2053 (QB)



Onassis -v- Vergottis 1968 2 Lloyds Rep 403

'Anchoring' the key principles

*"The story starts on a pleasant tranquil note with comfortable conversation between three trusted and successful friends, all admittedly dear to one another, on a luxury yacht in the eastern Mediterranean... **the two competing versions of what happened on the yacht were both perfectly possible**"*

*"the question [Roskill J] had to decide was who was telling the truth, Mr Onassis and Madame Callas, or Mr Vergottis: **'Which do I believe?'**"*

Lord Pearce's speech is key, and explains the ways that judges decide.



Gestmin -v- Credit Suisse (UK) [2013] EWHC 3560

The fallibility of memory: are we ignoring science?

"...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 witness testimony... the process of civil litigation itself subjects the memories of witnesses to powerful biases" [Justice Leggatt; Paras. 15 – 23]

Some endorsement from the scientific community, as recorded in *Blue -v- Ashley* [2017] EWHC 1928 (that case about the multi-million pound bonus allegedly agreed in the pub...); although for the moment the remarks may need to be "treated with caution": *CXB* [Para. 8]



Framework for Analysis

(1) Quality of Recollection

Reliability Factors: passage of time; mental (emotional state/illness) or physical (line of sight) obstacles; unconscious bias; impact of discussions with others...

Credibility Factors: motive to lie; clear evidence of prior dishonesty...



Framework for Analysis

(2) External Consistency

Is the evidence **consistent** with other documents; witnesses; agreed facts?

An **adverse inference** may be drawn from absence of an obvious external source:

- (i) **Documents:** Wetton -v- Safeed Ahmed & Ors 2011 EWCA Civ 610
- (ii) **Witnesses:** Morrison v Kelly 1970 S.C. 65



Framework for Analysis

(3) Internal Consistency

Has the witness' testimony been consistent throughout, or is it undermined by their prior statements or conduct?

Is it consistent with the pleaded case? (see *Robertson -v- Anderson*, 15 May 2001, Para. [55])



Framework for Analysis

(4) Overall Probabilities

Is the position of the witness plausible, or is it inconsistent with:

Human experience: *"not only is there no rational motive for such behavior, but there are the clear motives of **common sense and friendship against** such behavior"* Onassis, Lord Pearce

Accepted professional behavior: *"Both [midwives] confirmed what I would have expected, namely, that such strongly held wishes, if expressed, would have been noted and recorded in the relevant records, and they were not."* CXB, [Para. 30]



Framework for Analysis

(5) Demeanor

*"Witnesses without any unconscious bias towards a conclusion may have in their demeanor, in their manner, in their hesitation, in the nuance of their expressions, in even **the turn of an eyelid**, left an impression on the [Judge] who saw them which can never be reproduced in the printed page" [Page 36]*

Clarke v Edinburgh Tramways 1919 SC (HL) 35

But it has its shortcomings: "... **how witnesses present themselves in a cramped witness box surrounded for the first time with multiple files can be distorted**, particularly elderly ones being asked to remember minute details of what happened and what was said, and unrecorded, nearly 4 years later as here" [Para. 37]



Framework for Analysis

Is there a hierarchy among the factors?

No automatic hierarchy, but rather they should be considered “*as part of one judicial process*” Onassis

In Kogan, the Judge at first instance read Gestmin as an “*admonition*” against placing any reliance on the recollections of witnesses...

*“But a proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact upon **all** of the evidence. In particular, where a party’s sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence”* [Para. 88]



Application in Scotland

Sheila Tapp -v- Helen McColl [2016] CSOH 129

Dispute: did the accident exacerbate a pre-existing medical condition?

- **External consistency (documents):** *"The importance of [Onassis] for present purposes is that the correct and best way to test such a conflict is to look at contemporary documents, in the present case **the medical records of the pursuer**. I have already commented on these and I repeat that in my opinion **they simply do not support any case of exacerbation** [of the pre-existing medical condition] following the accident."* [Para. 33]



Application in Scotland

Robert Prescott -v- The University of St Andrews [2016] CSOH 3

*"... All remembering of events many years ago involves processes of a reconstructive nature; these processes are largely unconscious with the result, as Leggat J said [in Gestmin], that **the strength, vividness and apparent authenticity of memories are often not reliable markers of their truth.** Having seen and heard the pursuer give evidence, I have come to the view that I must evaluate the reliability of his claimed recollections with caution. **I have, wherever possible, tested his evidence against other evidence in the case and have considered objectively where the probabilities lie."** [Para. 42]*



Application in Scotland

McAnulty -v- McCulloch 2019 SLT 449

Dispute: was the racist comment made during a car journey?

- **External consistency (evidence of other reliable witnesses):** Steven Bonnar MP was in the back of the car and did not hear the comment. His evidence was the “*touchstone of the truth*”.
- The defender said Mr Bonnar was not in the car, and led various witnesses who confirmed there would have been no space: “*the rear [of the car] was full of carpet, boxes of leaflets and **even a toilet brush** right up to the day of campaigning for Steven Bonnar*” [Para. 18]



Application in Scotland

McAnulty -v- McCulloch 2019 SLT 449

Dispute: was the racist comment made during a car journey?

- **Quality of recollection (credibility):** The defender had *"previously been convicted of a charge of theft. This in itself does not establish that she lied, but it does show that she is not averse to acting dishonestly"*; and was part of a *"campaign against the pursuer" within the local SNP*" [Paras. 28 - 29]
- **Overall probabilities:** due to party in-fighting, the pursuer would have been wary of what she said: *"I regard it as implausible and inherently unlikely that the pursuer would have made the statement attributed to her..."* [Para. 25]



Application in Scotland

Shanley -v- Clydesdale Bank [2019] CSOH 75

Dispute: was the pursuer aware of the risks of a bridging loan?

- **Quality of recollection (reliability):** the passage of time (10 years+) was an important factor. The pursuer had “*had years to reflect – indeed, to **obsess** – on the events of late 2008*” and was now engaging in “***after-the-fact rationalisation***” of his behaviour.
- **Quality of recollection (credibility):** reference to finding in English proceedings that the pursuer had forged a critical document, and the “*considerable doubts such a finding raises as to the pursuer’s credibility...*”



Practical Tips

Case Preparation and Advice

- **Framework:** use the framework during case preparation and analysis.
- **Adverse inferences:** be aware of adverse inferences that might be drawn against you, or which you can draw against your adversary.
- **Test the evidence:** If the client's/witness' position seems inherently unlikely, tease out why your instincts might be wrong.



Practical Tips

Taking Witness Statements

- **Candour:** don't "gloss over" inconvenient evidence that calls for an explanation: *Shanley* [Para. 35]
- **Authentic Voice:** "Contrary to the guidance of the Commercial Court, many of the witness statements appeared to have been carefully edited... **the court derives the most benefit from statements which carry the author's authentic 'voice'**": *SSE -v- Hochtief* 2016 CSOH 177, [Para. 277]
- **Influence:** do not suggest the answer you need to support your legal argument. It may result in internal inconsistencies being exposed during cross-examination when the witness' *own* version of events is explained.



Practical Tips

Credibility Challenges

- **Investigate:** investigate witnesses in advance of proof for contradictions in their evidence, prior dishonesty, or ill-will towards your own witness:

"[the witness] accepted that he had described the pursuer to the press "as a twisted bitch", but claimed that he had no reason to have animosity towards her" McAnulty [Para. 20]

- **Ace Card:** even when there is no formal requirement, consider lodging in advance productions that may be used to test credibility.



Q&A / Observations



Essential Reading

- *Onassis -v- Vergottis* 1968 2 Lloyd's Rep 403
- *Gestmin -v- Credit Suisse (UK) Limited* [2013] EWHC 3560 (Comm)
- *Wetton (as Liquidator of Mumtaz Properties) -v- Ahmed and Others* [2011] EWCA Civ 610 (note: *Onassis* cited in the first instance decision that was upheld)
- *Kogan -v- Martin and Others* [2019] EWCA Civ 1645
- *McNulty -v- McCulloch* 2019 SLT 449



‘Lockdown’ Reading (...and viewing)

- Lord Bingham, "*The Judge as Juror: The Judicial Determination of Factual Issues*" published in "*The Business of Judging*", Oxford 2000, reprinted from *Current Legal Problems*, vol 38, 1985 p 1-27
- Moore, Bergman and Binder, "*Trial Advocacy: Inferences, Arguments and Trial Techniques*" (American Casebook Series) Paperback – 31 Jan. 1996
- Lord Mostyn, "*The Craft of Judging and Legal Reasoning Speech to Bristol University School of Law*", 8 December 2014
- Marcus Stone, "*Summary trials: deciding the facts*" (in three parts), *Journal of the Law Society of Scotland*, March, April and May 2008
- The Innocence Files, Netflix Series



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