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THE ART AND SCIENCE OF JUDICIAL FACT-FINDING
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Introduction

1. “The truth is rarely pure and never simple.” So says the society wit and cynic Algernon Moncrieff in Oscar Wilde’s sparkling comedy *The Importance of Being Earnest*. Most people, and I would guess every trial judge across the world and throughout the centuries, would agree that the truth is nuanced and multi-faceted. It is often mixed with other elements like personal perspective or subconscious bias. The task of deciding between two different accounts of what happened in the past has long been a key judicial task, and it is this aspect of the judge’s work – judicial fact-finding in civil proceedings – that I propose to talk about today.¹ In this country, the work of fact-finding in the trial court in most civil cases,² sits with the trial judge rather than a jury. It is the judge who has to decide who, what, where, when, how and why? What did the company director say at the wine bar after the board meeting? What speed was she driving at when the collision happened? Was the signature on the will genuine or forged? Was the cargo already damaged at the time it was loaded on board the ship or was it damaged during the voyage?
2. Now I sit as a Justice of the Supreme Court and my fact-finding days are largely over. Although of course I love the challenge and fascination of my current role, I do look back with some nostalgia to the almost 6 years I sat as a trial judge in the Business and Property Courts. I have enjoyed preparing this lecture and I hope you will forgive my apparent self-regard in drawing on my own experiences as I explore the often-overlooked topic of trial court fact-finding. I agree with the comment of Professor of Jurisprudence, William Twining, in an article called, (riffing on Prof Ronald Dworkin’s famous work) “Taking Facts Seriously”:

¹ I am grateful to my judicial assistant, Nigel Mpemba Patel, for their invaluable help in preparing this lecture.

² Libel and slander trials are the main exceptions.

“[T]he serious study of reasoning in regard to disputed matters of fact is at least as important and can be at least as intellectually demanding as the study of reasoning in respect to disputed questions of law.”³

Ancient times

3. Looking to the past, the judicial process of fact-finding has varied significantly based on time period, culture and region.
4. Ancient Athenians favoured using a jury to resolve disputes. In the democratic polis, the jury was composed of the citizenry at large, empowered to decide both fact and law. Drawn by lot from the adult male citizenry, the number of jurors a litigant would face depended on the nature of the matter. In the fourth century, private suits for a sum of money required 201 – 401 jurors depending on the value of the claim. In some cases of great importance, the jury could be made up of up to 6,000 citizens.⁴
5. In the Ancient Egyptian legal system, divine oracles were used to seek justice. In and around Thebes, the deceased pharaoh Amenhotep I was attributed with being the oracular voice. Egyptians believed his spirit resided in his statue and that that spirit could be summoned if the proper ceremonies were performed. Priests bearing the statue would carry it out of the temple and litigants would present their cases to the statue, either verbally or in writing. The God’s answers were interpreted by the swaying movements of the statue. In an account from a site called Deir el Medina, there is a request from a working man who asked the statue to reveal the identity of a person who was stealing from him. From the records we have, most issues were similarly mundane, centring on real estate and personal property.⁵
6. The Hebrew Bible also offers insight into the developing sophistication of the fact-finding process. In the Book of Numbers, we find what is known as the *Sotah* Ritual. This occurs when a man has a fit of jealousy and suspects his wife of infidelity. Perhaps that particular factual issue – has my spouse been cheating on me – is one of the most ancient and most frequently litigated factual disputes. There is a complicated ritual that the wife has to undergo. Some sacred water is put in an earthen vessel, some earth from the floor of the

³ William Twining, “Taking Facts Seriously” (1984) 34 *Journal of Legal Education* 22, 37

⁴ Mogens Herman Hansen *The Athenian democracy in the age of Demosthenes: structure, principles, and ideology* (University of Oklahoma Press 1999) 186–189.

⁵ Silvia Štubňová “Processional and chapel oracular practice in the Place of Truth.” (2017) *Journal of the American Research Center in Egypt* 53: 259-282.

Tabernacle is added to it, then some curses are first written down and then rubbed off into the water. She then has to drink the water. If she is indeed guilty of infidelity, her belly will immediately distend, and her thighs will sag. But if she is not harmed from drinking the water, that shows that she is not guilty and all is well – though I suspect that relations between her and her husband might be a little frosty for some time after.

7. So far so strange. But I take heart from the fact that the authors of the Bible and the people who devised the *Sotah* ritual, specified that the results should be that way round. I like to think that they realised that in fact it was very unlikely that drinking the water disgusting though it might be, would lead to the particular horrible consequences they describe. It was more likely, regardless of whether the wife had in fact strayed, that her husband's jealousy would be disproved.
8. Fast forward several centuries to the Bible's most famous example of judicial fact-finding – the judgment of Solomon. In the First Book of Kings Chapter 3, we read how King Solomon deals with a hotly contested factual dispute that had serious implications for the parties. The matter involved two women who came before the King each claiming that she was the mother of a living new-born boy and that the other woman was the mother of a dead new-born boy. When Solomon commands that the baby be cut in two and shared between them, the real mother reveals herself by begging the king to spare the child even if it means giving him up to the other woman.
9. The great advance that has been made by the time of this story over the *Sotah* ritual is that there is no supernatural element involved. The passage does not say that King Solomon asked for God's guidance or that some sign from heaven came down to point out for him which woman was telling the truth. Rather, Solomon resolves the factual dispute between the two women using his own wits and, importantly, his understanding of human nature. From that time to the present day, those tools have played a vital role in the judge's fact-finding exercise.

Evidence

10. But how do, and should, judges approach the task of establishing the facts within an adversarial context?
11. The rules of evidence, of course, provide the foundations upon which the judge can begin to construct the factual picture. Evidence of fact falls into two broad types: the

contemporaneous documents and oral testimony in the witness box. I will deal with these two broad categories in turn.

Documents

12. First, let's think about documents. The contemporaneous documents produced to the court by the parties have always been an important part of the fact-finding exercise and they are increasing in both volume and significance. By contemporaneous documents I mean documents that came into existence before the parties realised that there might be a dispute between them. It can be assumed that what they write then contains their real views uncoloured – consciously or unconsciously – by the parameters of the disagreement that has since arisen.
13. One of the most important functions of the solicitors when they are instructed to conduct proceedings in a dispute is to ensure that the contemporaneous documents are preserved by the client and that the client understands that in due course everything relevant will need to be handed over to the opposing side, even if it is helpful to the other side's case. That last point is a vital point not only because it serves to ensure that the judge has the best and fullest picture when she comes to make her findings. It is also important because the lawyers can advise the client on the prospects of ultimate success on the assumption that everything – good and bad – will be before the court. So you never need to advise, "Well you have a 75% chance of winning if the court never gets to see that email you sent but only a 35% chance of winning if the judge does see it".
14. In some kinds of proceedings, the duty of disclosure goes beyond even that already onerous duty. Where the Government is involved in defending judicial review proceedings, it has a duty of candour. This requires the Government to be open and honest by disclosing the information that the court need to fairly determine the issue. One notable example of the importance of the duty of candour was in the case that concerned the British Government's expulsion of the Chagos Islanders from their homes on the island of Diego Garcia in the middle of the Indian Ocean during the late 1960s and early 1970s to make way for a United States Air Force base to be built there.⁶ Three decades later, in a challenge to the legality of the forced removals, the Court analysed the minutes passing between the UK and US Governments in which, broadly, they decided to tell what they described as a "whopping

⁶ *R (on the application of Bancoult) v Secretary of State for the Foreign and Commonwealth Office* [2001] Q.B. 1067.

fib.” Whilst of course deploring the wording used in these exchanges, Laws LJ commended the “wholly admirable conduct of the relevant government servants and counsel instructed for the [Government] who have examined and then disclosed without cavil or argument all the material documents contained in the files of government departments, some of which [...] are embarrassing and worse.”

15. The advent of email and phone messaging has led to a step change in the document disclosure exercise. I would highlight a number of points that are relevant for fact-finding arising from the technological advances of recent years.
16. First, people may have become more circumspect now than those 1970s UK Government officials in what they put in letters and minutes. But every trial lawyer is constantly amazed and dismayed at the number of unwise comments that are included in emails between colleagues, then stored for years, waiting quietly there to emerge to bite them at some future date. I was once in an anti-trust case about a secret cartel when one participant had written a very incriminating message to another, concluding “You had better eat this email once you have read it!!!”. That document, referred to throughout the trial as the “eat me email”, had been printed out by some efficient secretary, filed away and there it was in the document bundle certainly very helpful for the fact-finding exercise the judge had to carry out. I think this is because people still think of email and text messages as just ephemeral chatter and as more akin to speech and phone calls rather than letters. But as a character in the movie “The Social Network” about the birth of Facebook says to Mark Zuckerberg, “The internet isn’t written in pencil, Mark, it’s written in ink.”
17. Secondly, the prevalence of email as a means of communication even between close family and friends means that there is contemporaneous evidence for the judge to consider now about the most mundane daily matters. Early in my career as a Chancery judge in 2013 I heard a case brought by two women seeking to set aside a will made by their deceased aunt Iris Wilson.⁷ In that will, made a few months before she died, Iris left everything she owned to a couple, Mr and Mrs Phythian, who had befriended her in the last year or so of her life. The nieces argued that Iris must have lacked mental capacity to understand what she was doing because there was no reason for her to disinherit the members of her close family. The Phythians said that Iris had effectively been abandoned by her nieces so that they had to step in to take care of her. It was not at all surprising they said that Iris, had gratefully

⁷ *Re Wilson* (Deceased) [2013] EWHC 499 (Ch).

changed her will to leave everything to them. 30 years ago, that kind of dispute would have involved the judge simply having to weigh up the credibility of the nieces and the Phythians in the witness box and work out which of their starkly contrasting narratives to believe as to how they had treated Iris.

18. But the nieces were able to place before the court the email traffic between them – from which emerged a picture familiar to anyone who has had to deal with a cranky elderly relative – which of them would have time to stock Iris’s freezer with bread that week, how annoying (expressed rather less politely) that one of them having with great difficulty arranged an appointment for a social worker to visit Iris, had just heard that Iris had refused to open the door to let the social worker in so they would have to start all over again, etc etc. I had no difficulty therefore in concluding that the nieces had not in fact abandoned Iris in her final year of life and I set aside the will on the basis of her lack of capacity.
19. Thirdly, the sheer volume now of email and messaging correspondence creates its own problems. This has posed serious challenges to the efficient management of litigation especially in the commercial courts and has been addressed by various studies as to how to keep it within manageable bounds.
20. The reforms made recently to the English and Welsh civil litigation disclosure regime originated in the Working Group initially chaired by Dame Elizabeth Gloster, a very eminent retired Court of Appeal judge and former Head of the Commercial Court. The primary concern expressed by the GC100 group of General Counsel to the Working Group was the massive increase in the volume of data that was being produced by businesses as part of disclosure under the Civil Procedure Rules. As one disclosure technology provider who was a member of the Working Group put it:

“Five years ago a 50 gigabyte case with around 250,000 documents would have been considered fairly large. Today, the smallest iPhone available has the capacity to hold 128 gigabytes of data; We are routinely processing 1 terabyte (ie 1024 gigabyte), claims. A current investigation encompasses 40 million reviewable documents and this is not our largest.”⁸
21. The old disclosure rules were devised and developed in an era when paper documents were predominant and had not evolved to meet the modern digital era. The rules obfuscated rather than assisted the fact-finding exercise because it was given in an unstructured way.

⁸ Sir Julian Flaux, “Disclosure in the Business and Property Courts” (2023 Combar Lecture, 18 January 2023).

The parties did not always collaborate to limit disclosure – because each side wanted to demand as much of the other side’s material as they could, hoping to find an eat me email, they could hardly object to having to give huge amounts of disclosure themselves. There was really no constraint on what they were prepared to agree.

22. The new scheme for disclosure is set out in a Practice Direction which came into effect in October 2022 and now forms part of the procedural rules made by the court to govern the conduct of proceedings.⁹ The Practice Direction includes quite extensive guidance because the intention was to create a scheme that could be read as a narrative, particularly with litigants in person in mind. The scheme deals with important aspects of disclosure such as the duties that are placed upon the parties and their advisers and the unfettered obligation to disclose “known adverse documents”.
23. The messages from the new rules are first that the court is much more involved and at a much earlier stage in the disclosure process rather than simply leaving the parties to get on with it. Disclosure is now divided into two stages. Initial disclosure requires the disclosure of documents referred to in the statement of case and during the pre-action protocol stage of the litigation. The second phase, extended disclosure can only take place if approved by the court. The rules also provide a number of Disclosure Models which can be applied as needed to the issues identified.
24. The second message from the new regime is that disclosure should be directed to the key issues in the case – and that means that the parties and the court have to identify at a much earlier stage what those key issues are and which of them require disclosure of documents. Further, if the parties agree a list of dozens of different issues, the court does not have to nod that through. Gone are the days where a judge will simply sign a consent order giving disclosure directions on the basis that if the parties are prepared to agree it, then it must be fair and reasonable.
25. Thirdly the parties are required to cooperate in a constructive way and try to agree what to do. As the Chancellor of the High Court has said, “[t]he requirement to engage is not new; what is new is that with closer Court supervision of disclosure it is no longer open to parties to ignore the obligation. It is intended that the culture should change both now and in the future.”¹⁰

⁹ Practice Direction 57AD.

¹⁰ Flaux (n 8).

26. But this is one area where science, as well as creating a fact-finding problem, is also helping with a fact-finding solution. There are firms now which specialise in using AI programmes to upload the material and search it electronically. The parties can agree, with the intervention of the court if necessary, on the date range and identified employees whose files can be searched and also the key words for which they will be searched. The programme will deduplicate the emails so that if 5 people are copied in to a particular email chain, it will not appear five times in the bundle. So those 4 million reviewable documents I referred to earlier could be reduced to 5,000 relevant documents by the use of AI.

Witness Evidence

27. Of course, not even “eat me emails” can compare with the drama of live evidence given on oath in the court room. It is a feature of the common law adversarial system – it’s one that our colleagues in much of Europe view with bafflement as they deal with almost everything on the papers. But we are really wedded to it here and I doubt that there would have been quite so many episodes of *Perry Mason* in the US, *Judge John Deed* here in the UK or *Street Legal* in Canada, if there were no court scenes to play out.

28. Oral evidence is given in two stages. First, the evidence in chief elicited from the witness by the party who is calling him or her to give evidence and then the cross examination of the witness by the opposing party.

29. For many years now examination in chief in court by the witness’ own counsel has been abandoned in favour of written witness statements. When giving directions for trial, the court will usually order witness statements to be exchanged well in advance of the hearing. The witness will usually be called to give oral evidence at trial but on going into the witness box, they will simply be asked to confirm whether what is said in their witness statement is true. It is on that evidence that the witness will then immediately be cross-examined by the other side.

30. The written witness statements are supposed to be the witness’s description of what she saw, said and heard herself. But they began quite early on to morph into heavily lawyered accounts leading to judicial grumbling in judgments about how stark the contrast often was between the articulate, reasonable persona emerging from the written statement and the actual human being in the witness box.

31. In April 2021, new witness statement rules came into effect following the recommendations of the Witness Evidence Working Group.¹¹ The new rules emphasise that the purpose of a witness statement is for the witness to say, in their own words, what the relevant evidence was. So the new rules require the witness to include a confirmation at the end of the statement:

“I understand that the purpose of this witness statement is to set out matters of fact of which I have personal knowledge. I understand that it is not my function to argue the case, either generally or on particular points, or to take the court through the documents in the case. I have not been asked or encouraged by anyone to include in this statement anything that is not my own account, to the best of my ability and recollection, of events I witnessed or matters of which I have personal knowledge.”

32. It remains to be seen how effective the discipline of signing such a confirmation will be.

Cross-examination

33. In our adversarial system, cross-examination is the engine that drives the court to discover the truth. When evidence is questioned orally in court it becomes the most reliable evidence. Philosopher, Jeremy Bentham stated that “[a]gainst erroneous or mendacious testimony, the grand security is cross examination”.¹²

34. The purpose of cross-examination is two-fold, first to press the witness to see if he will resile from the evidence that he has given in his witness statement and say something helpful to the opposing party and secondly to put the different elements of the claimant’s case to him for his comment. The barrister may know very well that Mr X has stoutly denied in his witness statement that he made a particular comment at a particular meeting but if the defendant is going to ask the court at the end of the chance to find as a fact that he did say it, the defendant must give Mr X the opportunity to respond to the allegation in the witness box. This is particularly important if the defendant is going to submit to the judge at the end of the trial that any of the evidence given by Mr X is deliberately untruthful and is being given dishonestly. There can be no mealy mouthed-ness about this. Counsel must say to the witness “I put it to you that the answer you just gave is a lie, and that you are deliberately trying to mislead the court.”

¹¹ Practice Direction 57AC.

¹² Jeremy Bentham, *Rationale of Judicial Evidence Specially Applied to English Practice* (Hunt and Clarke, 1827).

35. Cross-examination when it is done well is a most extraordinary thing to witness. When I was a barrister, I had the privilege of being led in two long trials by Sir Sydney Kentridge KC the renowned South African advocate and he was devastating. He showed that it was not about being rude or hectoring or sarcastic. He never raised his voice; he was unfailingly polite and reasonable. But I can tell you that everyone in that court room was thanking their lucky stars that it was not them sitting in that witness box.
36. Sometimes counsel get frustrated if they are not getting the helpful answers that they think they are entitled to get and sometimes they ask the same question over and over. Sometimes they do this because they know that their own lay client is sitting behind them in court and he now really, really hates the guy in the witness box and wants to see him hauled over the coals. And sometimes the guy in the witness box deserves it. It is a delicate question when and whether the judge should intervene to stop this and ask counsel to move on.
37. Sometimes the judge oversteps the mark. In the trial of a claim brought in 1957 by the widow of a coalminer who had been killed by the fall of the roof at the coal face, the judge intervened during the evidence frequently, at times conducting the examination of a witness himself, at times interrupting cross-examination to protect a witness against questions which he considered misleading. The biggest sign that something had gone seriously wrong was that both parties appealed to the Court of Appeal on the ground that there had not been a fair trial. The Court of Appeal agreed. Lord Denning gave this advice:

“the judge’s part . . . is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well.”¹³

How to tell whether the witness is telling the truth?

38. So now we come to the main question – how does the judge decide who is telling the truth? Let’s start with one important point. Whereas lay people may think that there are only two possibilities – that a person is either giving an accurate account of what happened or is

¹³ *Jones v National Coal Board* [1957] 2 Q.B.55, 64.

deliberately lying – it is clear that in many cases it is a third situation – the person thinks they are telling the truth but in fact their memory is unreliable or distorted by later events and emotions.

39. Every judge will have had occasion to draft a passage in a judgment where they conclude that the witness was a downright liar. In Mrs Justice Gloster’s judgment in *Berezovsky v Abramovich*,¹⁴ she described one witness as an “unimpressive, and inherently unreliable witness, who regarded truth as a transitory, flexible concept, which could be moulded to suit his current purposes”. In the witness box he departed from his own previous oral evidence, she said, sometimes within minutes of having given it.
40. But every judge will also have written judgments in which they conclude that the witness was honestly trying to recollect what happened and to assist the court, but the judge is unable to accept that their account really is accurate. For example, in my lengthy judgment dismissing a claim for undue influence brought by the Libyan Investment Authority against the investment bank Goldman Sachs, I described the members of the Libyan Authority’s young investment team as sincere and serious people doing their best to recollect events and explain to the court their real sense of what they thought and felt at the time. But I also found that in hindsight they had exaggerated the closeness of their relationship with the Goldman Sachs advisers and downplayed both their own level of expertise and understanding of financial instruments and also their contacts with other rival banks.¹⁵
41. When considering oral evidence and the reliability of witnesses, the comments of Mr Justice Leggatt, now one of my colleagues on the Supreme Court, on the lessons of psychological research into the nature of memory in *Gestmin v Credit Suisse*¹⁶ are pertinent and often cited. In assessing which witnesses to believe he states:

“psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. ... 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.”

¹⁴ *Berezovsky v Abramovich* [2012] EWHC 2463 (Comm) [100].

¹⁵ *The Libyan Investment Authority v Goldman Sachs International* [2016] EWHC 2530 (Ch).

¹⁶ *Gestmin v Credit Suisse* [2013] EWHC 3560 [16]–[20].

42. Much of this has now been enshrined in an Appendix to a Practice Direction in the Procedural rules.¹⁷ Accordingly, it is best practice for any trial judge to base factual findings on inferences drawn from the documentary evidence and known or probable facts before relying on witness recollection of events where possible.
43. But sometimes there is no documentary evidence – and that can itself be a pointer to where the truth lies. For example, in another trial presided over by Mr Justice Leggatt *Blue v Ashley*,¹⁸ the case turned on whether or not a binding oral contract had been concluded between the parties during a discussion at the Horse & Groom pub in New Cavendish Street in London at around 6pm on 24 January 2013. The contract alleged by the claimant, Mr Blue, was that if the share price of the company of which they were all senior managers doubled from its then value and reached £8 per share, the defendant, Mr Ashley, would pay Mr Blue £15 million. No written record was made of the alleged agreement at the time or any time thereafter. Just over a year after this discussion, the share price did hit £8 and Mr Blue claimed his money. Was there really a contract?
44. The passage in the judgment considering the existence of the contract opens by noting that it is rare in modern commercial litigation to encounter a claim, particularly a claim for millions of pounds, based on an agreement which is not only said to have been made purely by word of mouth but of which there is no contemporaneous documentary record of any kind. Most agreements or discussions which are of legal significance, even if not embodied in writing, leave some form of electronic footprint. In that case, however, such a footprint was entirely absent.
45. The judgment therefore had to describe in detail how reliable the recollections of those taking part in the discussion are likely to be bearing in mind the many pints of beer each businessman at the Horse & Groom had consumed up until the moment when the crucial words had allegedly been spoken. Perhaps not surprisingly the recollections of the witnesses were punctuated by them going to and then coming back from the Gents to rejoin the conversation. The result? The judge found that there had been that exchange that Mr Ashley would pay Mr Blue the £15 million but that it was not a binding contract because there had been no intention to create legal relations. I commend the analysis in that case as a brilliant example of fact-finding examining what inferences can be drawn from the social setting, the consumption of alcohol, Mr Ashley’s business practices, the nature and tone of

¹⁷ Appendix to Practice Direction 57AC, (Statement of Best Practice) para 1.3.

¹⁸ *Blue v Ashley* [2017] EWHC 1928.

the conversation – everyone was laughing throughout – the lack of commercial sense in the agreement, the vagueness of the offer and the fact that none of the other witnesses present thought Mr Ashley was being serious. The judgment concludes that: “[t]hey all thought it was a joke. The fact that Mr Blue has since convinced himself that the offer was a serious one, and that a legally binding agreement was made, shows only that the human capacity for wishful thinking knows few bounds.”

46. Let me now say something about the controversial subject of the demeanour of the witness. Most judges think they are good at sensing whether someone is telling the truth or not. But this is not always the case. A striking example of this was in a trial before Mr Justice Ramsey in *BSkyB Ltd v HB Enterprises Services UK Ltd*.¹⁹ The main factual witness for the defendant in that case was a Mr Joe Galloway. In his witness statement, he said that he had an MBA degree from Concordia College based in St Johns in the US Virgin Islands. It later transpired that there was not and never had been a Concordia College on the Island. Concordia College was in reality a website which sold on-line degrees to anyone who made an application and paid the required fee. The judge went on to say that the value of Mr Galloway’s qualification was demonstrated by an application which was made on the website for an MBA degree for a dog “Lulu” belonging to Mark Howard KC, counsel for the claimant. Without any difficulty Lulu was able to obtain a degree certificate in identical form to that produced by Joe Galloway. In fact, the dog actually got better marks than those given to Mr Galloway. The serious point that the judge made was that Mr Galloway was a man who could lie without any palpable change in his disposition or any outward signs of unease. He demonstrated, the judge said, an astounding ability to be dishonest.
47. The idea that a witness’s demeanour may offer important information about whether a witness is telling the truth is very strongly ingrained in the judicial process. But judges have to be careful of placing too much reliance on it. There are various reasons for this,²⁰ but let me focus on just one of them: cultural differences.
48. Judges can find guidance on this difficult topic in the Equal Treatment Bench Book – an invaluable online resource giving advice on everything from accommodating mental and physical disability in the court room to acceptable terminology for gender and ethnicity.²¹

¹⁹ *BSkyB Ltd v HB Enterprises Services UK Ltd* [2010] EWHC 86 (TCC).

²⁰ See e.g., Lord Leggatt, “Keynote address: ‘Would you believe it? The relevance of demeanour in assessing the truthfulness of witness testimony’” (At a Glance conference, 12 October 2022).

²¹ Judicial College, *Equal Treatment Bench Book* (April 2023 revision).

The discussion on demeanour, behaviour and body language alerts judges to cultural-conditioning and that judges need to be aware of this when assessing whether a witness in the witness box is telling the truth. For example, native speakers of English expect to make their most relevant point in reply to a question first, giving any needed background detail afterwards. However, speakers of South Asian languages would be accustomed to providing the background detail first as context, then coming on to make their most relevant point of reply at the end. If the judge is not aware of that, there is a risk that he will fail to grasp what a witness is saying, wrongly consider a witness to be evasive, or allow counsel to cut off a witness's answer prematurely.

49. Similarly, the meaning and appropriateness of eye contact varies from culture to culture. Lack of eye contact can appear evasive, bored or disrespectful in some cultures, but indicative of respect by others. There is a description in the book of the difficulties that someone on the autism spectrum is likely to encounter in the court process and the adjustments that should be made to proceedings to accommodate them. An autistic person may have difficulty answering hypothetical questions because they may be unable to project themselves forward to envisage how they would feel in two different posited scenarios. Sometimes an autistic person will prefer to sit close to the door of the court, or to have fans and anything making a buzzing or humming noise switched off.
50. So, demeanour ought to be used, if at all, in conjunction with other methods of assessing whether a witness is lying, such as inferences based on various kinds of inconsistency and the outcomes of cross-examination.

The burden of proof and presumptions

51. Let me now turn to the topic of the burden of proof and presumptions which help with the judge's fact-finding task. In *Stephens v Cannon*,²² the Court of Appeal was considering the decision of a Chancery judge who had been faced with two experts giving their rival opinions on the valuation of a property in dispute. The judge described how persuasive both experts had been but also how far apart the valuation figures they came up with were. He said that he was unable to decide that he preferred one view over the other. In those circumstances, the case fell to be decided on the basis of the burden of proof. He therefore adopted the valuation put forward by the defendants because the claimant had failed to prove any higher sum was correct. The claimant appealed on the grounds that this had been

²² *Stephens v Cannon* [2005] EWCA Civ 222.

an abdication of judicial responsibility in failing to reach a conclusion, somehow, as to which expert was better. The Court of Appeal agreed.

52. Sometimes, however, it really is impossible to arrive at a decision as to what happened. In *Constandas v Lysandrou*,²³ when I was sitting in the Court of Appeal, we reviewed the test for whether a judge was entitled to resort to the burden of proof when considering a disputed claim as to beneficial ownership of a property. In this case, the dispute concerned the ownership of the family home and this turned in part on who had provided the money for the down payment of £600. The problem was that the down payment was made in 1959 and was in fact half of the total price for the house, the price of the house in 1959 being £1,200. The High Court judge had held that, on the evidence available, it was impossible to arrive at any findings as to who had made the down payment. One of the parties was, she held, wholly lacking in credibility and the other party now had advanced dementia and could not give evidence. The trial judge held that the claimant had not discharged the burden of proof on him and so dismissed the claim. In the Court of Appeal, we dismissed the appeal from that judgment. The problem was not just the difficulty of choosing between two conflicting accounts of witnesses. Doing that is the primary judicial function. The problem here was rather a complete absence of evidence from which to arrive at any factual finding.

53. Interestingly, the burden of proof shifts in some cases. I referred earlier to my case about the will of Iris Wilson disinheriting her nieces. This also provided a good example of where a shifting burden of proof reflects an understanding of human nature akin to that of King Solomon. Generally, if a will looks valid and rational, it is presumed that the testator had mental capacity to make it.²⁴ The burden then shifts to the party objecting to the validity of the will to show that there is something wrong. But with some wills, there are circumstances which are said to “excite the suspicion of the court”. And, as Baron Parke, judge in the Court of Exchequer said in a case decided in 1838:

“if a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which

²³ *Constandas v Lysandrou* [2018] EWCA Civ 613.

²⁴ *Key & another v Key and others* [2010] EWHC 408 (Ch) per Briggs J.

it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased”.²⁵

54. In the case of Iris Wilson, it was Mr Phythian who had sat with Iris making a list of all her possessions and asking who she wanted to leave them to and had written down his and his wife’s names next to everything. He had then arranged for the will to be drawn up by a solicitor friend of his and arranged for it to be signed and witnessed. I said this was a clear example of a situation where the court needed to be vigilant and jealous in examining the evidence.
55. Sometimes the law relating to fact-finding is a practical response. For example, the court can take judicial notice of facts with which persons of ordinary intelligence are acquainted, whether in human affairs, including the way in which business is carried on, or human nature, or in relation to natural phenomena. A party does not need to prove that, for example, 13 April 1960 was a Wednesday or that Easter Monday will fall on 6 April in 2026. I myself agreed to take judicial notice of the fact that in 2012 Bradley Wiggins won the Tour de France when hearing a case about top of the range cycling clothing.
56. In other cases, the fact-finding process is assisted by presumptions which are imposed as a matter of policy to help a party get over a factual hurdle especially in relation to a fact that is notoriously difficult to prove. For example, evidential difficulties in establishing the measure of loss are reflected in the degree of certainty with which the law requires damages to be proved. As is stated in the leading textbook on contract law, “[w]here it is clear that the claimant has suffered substantial loss, but the evidence does not enable it to be precisely quantified, the court will assess damages as best it can on the available evidence”.²⁶
57. In anti-trust law, my area of specialism when I practised as a barrister, there is an important presumption that assists a claimant claiming loss as a result of anti-competitive conduct. Where competitors meet together to discuss prices or exchange commercially sensitive information, there is a rebuttable presumption that they actually took account of that information when later setting their own prices on the market.²⁷

²⁵ *Barry v Butlin* (1838) 2 Moore’s Privy Cases 480, 482-3.

²⁶ Hugh G. Beale *Chitty on Contracts* (34th edn, Sweet & Maxwell 2022) para 29-019.

²⁷ See *T-Mobile Netherlands* (Case 8/08) [2009] ECR I-4529 where it was held that this presumption is an integral part of substantive law and not a procedural point which means that the courts of member states are bound to apply it.

58. The court can make presumptions in favour of the claimant in other circumstances too. The point is illustrated by the old case of *Armory v Delamirie*.²⁸ The case was heard before Sir John Pratt who was the Chief Justice between 1718 and 1725. The judgment therefore dates back to 1722 and is one of my favourite cases. The report is short and I can read out the relevant parts in full. The plaintiff being a chimney sweeper's boy found a jewel and carried it to the defendant's shop (who was a goldsmith) to know what it was, and delivered it into the hands of the defendant, who under pretence of weighing it, took out the stones, and let him know it came to three halfpence. The master offered the boy the money, who refused to take it, and insisted to have the thing again; whereupon the master delivered him back the socket without the stones.

59. The case is authority for a number of propositions but the relevant one is that the chimney sweeper's boy could not of course produce the jewel to the court in order to prove how valuable it was because the defendant had kept it. The report says:

“As to the value of the jewel several of the trade were examined to prove what a jewel of the finest water that would fit the socket would be worth; and the Chief Justice directed the jury, that unless the defendant did produce the jewel, and shew it not to be of the finest water, they should presume the strongest case against him, and make the value of the best jewels the measure of their damages: which they accordingly did.”

60. So there is a factual presumption that if the defendant has put it out of the claimant's power to prove the value of the item being claimed, the fact-finder will presume that it has the highest possible value. I am not the only person to feel that this short and intriguing law report leaves so much unsaid in particular how was it that the Chief Justice came to preside over this little claim brought to the court by the little sweep. The American novelist A M Watson published a novel in 2017, *Infants of the Brush, A Chimney Sweep's Story*, based on the life of the claimant in this case.

Appeals

61. Finally let me talk a little about how facts are dealt with on appeal. If anything, my work as an appellate court judge has made me appreciate all the more the importance of fact-finding. This is because whatever point of law of general public importance (the test for bringing a case before the Supreme Court) arises, it can only arise and be decided against the backdrop of the factual matrix decided at trial. What actually happened, the actual truth

²⁸ *Armory v Delamirie* [1722] EWHC J94.

about what was said or done, may or may not be what the judge found. But that truth falls away as an irrelevance – what counts as the truth for the rest of the life of the case whether that be short or long, is what findings of fact the judge made.

62. Appeal court judgments are full of statements about the reticence that appellate judges should show before interfering with the factual findings made by the trial judge, particularly where that judge had heard live witness evidence. Accordingly, the test for overturning findings of fact on appeal is a strict one. Lewison LJ explained in *Fage v Chobani* in 2014 that the reason why appeal courts should not interfere is because in making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him whereas an appellate court will only be island-hopping from one little snippet of evidence to another.²⁹
63. That ‘island hopping’ image has proved very popular and is much cited in later judgments and during hearings. Another useful image comes from the speech of Lord Hoffmann in *Biogen Inv v Medeva plc* where he says that what ends up being written in the judgment is surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification, and nuance.³⁰ Those things cannot be fully expressed in the judgment, but they will have played an important part in the judge’s overall evaluation and the conclusions he or she has arrived at as to what in fact happened.
64. A similar point is made by former Ontario judge Robert J. Sharpe in his book *Good judgment: making judicial decisions*.³¹ He says that trial judges are in the trenches – they live with the case for the duration of the trial often days or weeks. By dealing with the dispute hands on, they gain an intimate understanding of the case, a first-hand perspective which is impossible to replicate on appeal. A further reason for appellate deference is to promote the integrity of the trial process. Allowing appeal courts to review all trial decisions would undermine public confidence with the trial becoming nothing more than the first crack with the disappointed party having a second crack in the court of appeal.
65. In order for an appeal on facts to be successful, the appellant must show that the trial judge’s conclusions on primary facts were plainly wrong. That is no reasonable judge could have reached them. The appeal court must assume that the trial judge took the whole of the

²⁹ *Fage UK Ltd and Another v Chobani UK Ltd and Another* [2014] EWCA Civ 5.

³⁰ *Biogen Inv v Medeva plc* [1996] UKHL 18.

³¹ Robert J. Sharpe, *Good Judgment: making judicial decisions* (University of Toronto Press 2018) 210–211.

evidence into consideration – just because the judge does not mention any evidence a court cannot infer that it was overlooked by the trial judge.

Conclusion

66. Fact-finding is critical to the judicial process. Developments in technology and the need for greater efficiency in court proceedings mean that the mass of evidence that a judge has to weigh grows in complexity and facts continue to be hotly contested. Reforms in the fact-finding process look to respond to these changes. Having started with a quotation from Oscar Wilde, let me close with a quote from that master fact-finding sleuth Hercule Poirot in Agatha Christie's *The Murder of Roger Ackroyd*: "The truth, however ugly in itself, is always curious and beautiful to seekers after it."