"How should Tribunals evaluate the evidence?"

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by the Hon Justice James Douglas

A Judge of the Supreme Court of Queensland

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The famous American Supreme Court judge and legal scholar, Oliver Wendell Holmes Jr, described the process that he felt lay behind the development of the common law:

> "It is something to show that the consistency of a system requires a particular result, but it is not all. The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men have had a good deal more to do than the syllogism in determining the rules by which men should be governed."[1]

That tension between logic and experience is also reflected on a daily basis in the evaluation of evidence by judges, juries and tribunals.

For example, experience suggests that, normally, a judge is in a better position than an appellate court to determine credibility from the demeanour of witnesses and the consistency of their evidence with other proven facts.[2] But logic requires that the word of a plausible witness not be accepted in the face of other incontrovertible evidence.[3] How then do we go about the task of analysing evidence to distinguish the plausible from the true? The processes likely to be adopted by both judges and lay tribunal members will be similar. The resources available to them may not always be so.

[1] O W Holmes Jr, *The Common Law* (1881) p. 1
[2] *Devries v Australian National Railways Commission* (1993) 177 CLR 472, 479.
[3] *Fox v Percy* 2003) 197 ALR 201, 209-210 at [30].

Evaluation

Where, as is normal, tribunals are required to give reasons for their decisions, there will be many similarities between the judicial and the quasi-judicial approach to the evidence. Fact finding should be made transparent by clear reference to the relevant evidence, analysed "against a narrator's view of the case as a whole … commonly known as the 'story model' of decision making". Such an approach organises, interprets and evaluates evidence against a narrative construction of the events supplied by the parties and from the knowledge and experience of the decision maker.[4] MacKenna J described the process in a paper delivered at University College Dublin in 1973:

> "This is how I go about the business of finding facts. I start from the undisputed facts which both sides accept. I add to them such other facts as seem very likely to be true, as, for example, those recorded in contemporary documents or spoken to by independent witnesses like the policeman giving evidence in a running down case about the marks on the road. I judge a witness to be unreliable if his evidence is, in any serious respect, inconsistent with these undisputed or indisputable facts, or of course if he contradicts himself on important points. I rely as little as possible on such deceptive matters as his demeanour. When I have done my best to separate the true from the false by these more or less objective tests, I say which story seems to be the more probable, the plaintiff's or the defendant's?"[5]

As his Honour makes clear, that form of evaluating evidence looks for the logically plausible story based on objectively verifiable information. When forming conclusions about truthfulness and reliability of witnesses, a decision maker's unsupported intuitive reactions relying on an assessment of demeanour should yield to the demands of the logically coherent narrative.

[4] See Waye, *Judicial Fact-finding: Trial by Judge alone in Serious Criminal Cases* (2003) 27 Melbourne University Law Review 423, 443-444.
[5] *Irish Jurist* vol. IX, New Series, p. 1 quoted in JPO Barry, *The Methodology of Judging* (1994) 1 JCULR 135, 140-141.

The very experienced Sydney barrister, Chester Porter QC, made the point, when he said: "The best witness I ever saw, whose demeanour was 100 per cent perfect, was Australia's top con man."[6] This seems obvious when one thinks about it. "Most liars can fool most people most of the time."[7]

The consequences for witnesses of adverse findings about their credibility should also be kept in mind. If they are made on limited evidence and the chances for the decision maker to assess their behaviour properly have been few, there is the potential for real unfairness. If the issue before you can be determined reliably without making "findings which will be extremely hurtful to one or other of the contending sides, and which depend on estimates of credibility that have to be formed on a very limited view of the persons whose credit is in question" you will be better advised not to make them.[8]

Close observation of the demeanour of a witness confronted by a skilful, well prepared cross-examiner is still, however, one of the best aids to reliable decision making. If the witness cannot cope with the coherent narrative advanced by his opponent and is seen to vary his story to try to avoid inconvenient questions there must be real doubt about his truthfulness. That is why the High Court said in *Devries v Australian National Railways Commission*:[9]

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[6] New South Wales *Bar News* Spring 1999, p. 20.
[7] Elkman, *Telling Lies* 1992, Norton, New York, cited by Giles J in *The Assessment of Reliability and Credibility* (1996) 2 TJR 281, 285-286.
[8] *R v Amad* [1962] VR 545, 550.
[9] (1993) 177 CLR 472, 479.

> "[A] finding of fact by a trial judge, based on the credibility of a witness, is not to be set aside because an appellate court thinks that the probabilities of the case are against -- even strongly against -- that finding of fact. If the trial judge's finding depends to any substantial degree on the credibility of the witness, the finding must stand unless it can be shown that the trial judge 'has failed to use or has palpably misused his advantage' or has acted on evidence which was 'inconsistent with facts incontrovertibly established by the evidence' or which was 'glaringly improbable'."

Even so there has been a developing view in the reported cases that is sceptical about reliance simply on observations of a witness's demeanour. Samuels JA said in *Trawl Industries v Effem Foods Pty Ltd* (1992) 27 NSWLR 326, 348:

> "The cases seem to treat as axiomatic the proposition that a trial judge can reliably assess the credibility of a witness simply on the basis of his or her demeanour in the witness box. But it should not be taken for granted. Indeed, recent scientific studies cast doubt on the correctness of this view: see L Re, "Oral v Written Evidence: The Myth of the 'Impressive Witness'" (1983) 57 ALJ 679; Australian Law Reform Commission, *Evidence* (ALRC 26) (1985), Canberra, AGPS, vol 1 at 452 and following. One might well agree with Lord Atkin in *Société d'Avances Commerciales (Société Anonyme Egyptienne) v Merchants' Marine Insurance Co (The "Palitana')* (1924) 20 L1 L Rep 140 at 142 that "an ounce of intrinsic merit or demerit in the evidence, that is to say, the comparison of evidence with known facts, is worth pounds of demeanour": see also *Hecron Ltd v Cousins* (Court of Appeal, 20 December 1990, unreported) per Kirby P. Nevertheless, I think it too late in the day to deny the truth of the axiom which forms the basis of a considerable body of jurisprudence. It may be a fiction, but it has the sanction of long-established authority."

That passage was referred to recently by the High Court in *Fox v Percy*[10] where Gleeson CJ, Gummow and Kirby JJ went on to say:

> "Considerations such as these have encouraged judges, both at trial and on appeal, to limit their reliance on the appearances of witnesses and to reason to their conclusions, as far as possible, on the basis of contemporary materials, objectively established facts and the apparent logic of events. This does not eliminate the established principles about witness credibility; but it tends to reduce the occasions where those principles are seen as critical."

[10] (2003) 197 ALR 201, 209-210 at [30].

As was the case in that decision, where there are incontrovertible facts at odds with the evidence of an apparently convincing witness, logic dictates that the incontrovertible facts prevail over the appearance or demeanour of the witness.

In performing that logical exercise the fact finder brings experience and common sense to bear on the problems. Hodgson J refers to some aspects of probability theory when he says:

> "Decision-making generally involves a global assessment of a whole complex array of matters which cannot be given individual numerical expression. Such a decision depends very much more on commonsense, experience of the world, and beliefs as to how people generally behave (folk psychology), than on mathematical computations; and concentration on mathematical probabilities could prejudice this commonsense process."[11]

But more refined techniques can have their place. In assessing the probabilities of whether an event or events occurred it is still useful to have an acquaintance with basic ideas of probability theory. The use of DNA evidence has highlighted the issue particularly with what has been called the prosecutor's fallacy. It was discussed in England in *Doheny and Adams*[12]:

> "It is easy, if one eschews rigorous analysis, to draw the following conclusion:
>
> (1) Only one person in a million will have a DNA profile that matches that of the crime stain.
>
> (2) The defendant has a DNA profile that matches the crime stain.

[11] Hodgson, *The Scales of Justice: Probability and Proof in Legal Fact-finding* (1995) 69 ALJ 731, 736. See also his Honour's article: *A Lawyer Looks at Bayes' Theorem* (2002) 76 ALJ 109.
[12] (1997) 1 Cr App R 369 at 372–373. See the useful discussion of this and other local decisions on the topic by Goldring, *An Introduction to Statistical "Evidence"* (2003) 23 Aust Bar Rev 239 and Wood, *Forensic Sciences from the Judicial Perspective* (2003) 23 Aust Bar Rev 137.

(3) Ergo there is a million to one probability that the defendant left the crime stain and is guilty of the crime.

"Taking our example, the prosecutor's fallacy can be simply demonstrated. If one person in a million has a DNA profile which matches that obtained from the crime stain, then the suspect will be 1 of perhaps 26 men in the United Kingdom who share that characteristic. If no fact is known about the defendant, other than that he was in the United Kingdom at the time of the crime the DNA evidence tells us no more than that there is a statistical probability that he was the criminal of 1 in 26.

"The significance of the DNA evidence will depend critically upon what else is known about the suspect. If he has a convincing alibi at the other end of England at the time of the crime, it will appear highly improbable that he can have been responsible for the crime, despite his matching DNA profile. If, however, he was near the scene of the crime when it was committed, or has been identified as a suspect because of other evidence which suggests that he may have been responsible for the crime, the DNA evidence becomes more significant. The possibility that two of the only 26 men in the United Kingdom with the matching DNA should have been in the vicinity of the crime will seem almost incredible and a comparatively slight nexus between the defendant and the crime, independent of the DNA, is likely to suffice to present an overall picture to the jury that satisfies them of the defendant's guilt."

For most purposes in most cases, however, logic and common sense are good starting points and more accessible to lawyers and lay people than statistical analysis or the use of the refined techniques of Bayes' Theorem[13].

For example, Young J in 1997 set out 14 useful rules of thumb that assist in accepting and rejecting evidence[14]:

1. The usual is more likely to be what occurred than the unusual.

[13] See Waye, ibid p. 443 and Ligertwood, *Australian Evidence* (4th ed. 2004) 12-32, 78-101.
[14] (1997) 72 ALJ 21-23.

2. A witness whose evidence suffers from no internal inconsistency is more likely to be correct than a person whose evidence cannot be so ranked.

3. A witness whose evidence is consistent with the other witnesses is likely to be correct.

4. The witness whose evidence is consistent with the documents is more likely to be correct.

5. Do not think that you have some innate ability to spot a fraud or a liar. Try not to judge a case wholly on observations of demeanour.

6. All observation evidence needs to be examined in the light of the opportunity to observe, so that distance, position, light and amount of time available to observe are important.

7. Many witnesses will lie when the matter is vital or when they think they can escape detection.

8. Do not be misled by advocates' tricks.

9. Sometimes one unassailable piece of evidence will reveal where the true facts fall.

10. Take into account cultural or other characteristics which operate on the witness. Watch the forces that are likely to influence the witness in formulating the evidence.

11. Just because a witness says that something is not so and is shown to be a liar, does not establish that that something is so.

12. Beware of counsel gaining such sympathy for a party that one begins to see life through that party's eyes.

13. Formal rules such as *Browne v Dunn* and *Jones v Dunkel* may provide the solution. These rules are familiar to litigators but may not be to lay tribunal members. The rule in *Brown v Dunne* provides that where a party intends to contradict testimony given by a witness, it should give the witness an opportunity to comment by putting the substance of the contradictory version to the witness in cross-examination. *Jones v Dunkel* deals with the adverse inferences which may be drawn from the failure to give or call evidence.

14. One can sometimes infer the truth from the fact that a witness has not said something or that counsel has not asked the question.

If you wish to check the article setting out those rules you will see that his Honour formulated them with exceptions and then exceptions to the exceptions. I have given you simply the starting points and suggest that you go to the source for the further practical advice provided there. I cannot resist, however, giving you the illustration of the exception to the first rule. Remember it was: "The usual is more likely to be what occurred than the unusual". The exception is that the unlikely sometimes occurs. The illustration of the exception is:

> "A witness says that she saw a black man take off his head, drop it over her front fence, pick it up and walk off with the head under his arm. On investigation it was found that the evidence was true. A black medical student had borrowed a head from a laboratory and was taking it home to do research. He had the collar of his coat up to protect against the cold. He accidentally dropped the head over the fence and picked it up. With the collar of his coat up, it was difficult for any observer to see the student's real head.
>
> Again, one must remember Hercule Poirot's rule that if one eliminates the likely, the unlikely must be true."

Procedure and Evidence

So far I have spoken of general rules dealing with the evaluation of evidence applicable to most fact finders whether in a court or a tribunal. There are other issues likely to be more important in tribunals than in a court. In my experience it is likely that there will be a higher proportion of self represented parties before most tribunals and a lower incidence of pre-hearing procedures such as discovery, whether between parties or from third parties. Interrogatories will be most unlikely in tribunals. There will often be a lower proportion of experienced advocates and a lower incidence of effective cross-examination of witnesses where questions of credit are important.

To repeat what I said earlier, effective cross-examination is one of the most important tools to help any tribunal assess the reliability of a witness's story. It allows the witness's evidence to be confronted by another story from one or more different perspectives and can be used to draw out discrediting demeanour or show an absence of explanation for facts, including documents, which contradict the witness's previous evidence.[15]

Most effective cross-examination is based on good preparation and investigation of the facts before a hearing. One of the main tools of such an investigation is the proper use and analysis of discovered documents from opponents and third parties. That will help an opposing party to track down

[15] Jeremy A Blumenthel, *A Wipe of the Hands, A Lick of the Lips; the Validity of Demeanour Evidence in Assessing Witness Credibility* (1993) 72 Nebraska Law Review 1157, 1174.

relevant witnesses and contradictory evidence before a hearing. With such preparation the evaluation of evidence at a hearing becomes much easier.

Many tribunals, however, do not operate in that mode. Often the applicants will be lay people not familiar with the best methods of preparing for or conducting a hearing. The tribunal's rules may not provide the types of pre-hearing procedures of which I have spoken. The procedure is more likely to be inquisitorial and premised upon the existence of a decision already made within a department or other governmental instrumentality. Even in such bureaucracies the resources to investigate an opponent's claims may be few. The tribunal itself will not commonly be resourced or expected to make its own investigations. Mr Logan SC will have something to say about those issues in his paper.

Normally the tribunal examining an administrative decision will be armed with the documents the department had. They may include material provided to the department by an applicant but may not be accompanied by the sorts of documents that would, for example, be obtainable from discovery by a party or by third party discovery in the preparation of matters for litigation. Even though many tribunals will have the power to operate in an inquisitorial fashion most are unlikely to have enough investigative support to initiate inquiries or seek evidence beyond that presented to them by the parties.

Some of the evidence may be of expert opinions held by planners, engineers or doctors. If it is to be contradicted effectively then other experts' opinions may be needed but the parties may not be able to afford them.

In that context it seems to me that a tribunal, when evaluating evidence, would, desirably, before the commencement of the hearing, make itself alert to the logical consequences of the claims made by the parties before it and the inferences that may be drawn as to their likely conduct if their factual claims are correct. Where the tribunal members are experienced in the field being regulated they will be better equipped to know where the bodies are likely to be buried and to ask intelligent questions designed to get at the truth. It may then be possible to test the truth of the evidence by the tribunal exploring with the parties and witnesses those logical consequences and inferences. By doing so it can test whether the case presented is coherent.

In other words the tribunal may need to think laterally, like a good cross-examiner trying to explore the possible theories of a case, but express itself more discreetly when attempting to explore the evidence before it. The reasons for this need for discretion will be examined more thoroughly by Mr Logan when he speaks of decisions such as *Re Refugee Review Tribunal; ex parte H*[16] and *Re Reynolds; ex parte Pierce*[17].

Most tribunals are not bound to observe the rules of evidence applied in the courts. They are still treated as a good guide to the information the tribunal

[16] (2001) 75 ALJR 982.
[17] (2001) 116 LGERA 402.

should treat as most reliable[18]. Those rules are another tool which will assist in the reliable evaluation of evidence. If the critical information against one view of the facts would have been inadmissible in a court, then ask yourselves - is it safe to rely on it in deciding the case? Is the untested hearsay of any use? Is the opinion of a witness with no proven expertise worth anything? If you do have to evaluate opinion evidence from experts, have the facts on which the opinions are based been proven? Are the experts' theories or assumptions correct? These are not analytical steps taken simply because of the existence of rules of evidence. The rules themselves are based on how a court can inform itself properly and are consistent with the manner in which scientific opinions themselves can be formed reliably[19].

Conclusion

One of the criticisms of the common law adversarial trial model is that it is not necessarily itself a search after that elusive object, the truth. An under resourced inquisitorial model may, however, be even less likely to reveal all the relevant evidence which can throw light on disputed issues for the reasons I have discussed. Mr Paul Keating's injunction, "In the race of life always back self-interest; you know it's always trying", applies to litigation at least as much as to a horse race. Where "self-interest" on each side to a dispute can gain access to a better set of litigation tools then the result may be more reliable. In that case there is some logic in developing more flexible rules for tribunals to allow the parties to use a greater range of procedures in preparation for a hearing and in the admission of evidence, particularly where

[18] *Pochi v Minister for Immigration and Ethnic Affairs* (1979) 36 FLR 482, 492 and Preston, *Science and the Law: Evaluating Evidentiary Reliability* (2003) 23 Aust Bar Rev 263.
[19] Preston, ibid.

there are serious consequences likely for the liberty of the subject or the financial interests of the parties.

But if a tribunal finds itself in a situation where the evidence it needs to evaluate is in conflict, or the parties have not led any evidence that will conclusively establish the truth, or the witnesses all appear truthful, or, even worse, to be liars, and the tribunal is not itself in a position to pursue its own inquiries, the safest course to adopt is for the tribunal members to bring their common experience to bear on the facts before them and evaluate those facts logically to arrive at the most probable solution. So experience and logic need to work together: experience to elicit the most reliable information that logic can analyse.