

## ST JOHN'S FAMILY FORUM

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### Credibility versus demeanour – the impact of remote court hearings.

At the last SJC Family Forum I briefly mentioned the divide opening up between the Judges who see the ability to observe witnesses directly as an advantage, against those who don't.

I conducted a highly scientific poll on Twitter which gained 46 votes and very clearly came down in favour of considering it essential or important to observe such reactions directly – 78%. Many appellate courts have directed themselves to remember the disadvantage under which they labour, as they did not have the benefit of seeing and hearing the witnesses give evidence.

I seem to be in a minority who thinks that watching a witness give evidence, or reaction to other evidence has limited evidential value - or even worse can lead to prejudice and assumptions about people and their behaviour, which threatens their Article 6 rights. I take comfort that my scepticism is shared by Mostyn J, who quoted approving Lord Bingham in his December 2014 address to Bristol University School of Law – *The Craft of Judging and Legal Reasoning*.

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

I agree that no video platform can give the Judge the benefit of the view from the Bench of the whole court room. So if it is right that the ability to see and hear witnesses is so crucial to an assessment of their credibility, this is a very powerful argument against remote hearings in some cases and therefore an issue worthy of consideration – as we seem to be faced with remote or hybrid hearings for some time to come.

Best evidence is contemporaneous documents.

In an adversarial system, assessing witness credibility is an important and relevant topic. Given the fallibility of memory and the ease with which we can lie to ourselves, many Judges comment that the best way of testing witness credibility is to test witnesses against objective facts which are independent of their testimony.

Lord Pearce commented in *Onassis v Vergottis* [1968] 2 Lloyd's Rep 403 at p 431: *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.*

But often in family cases, based around emotional relationships over time, we lack such corroboration. The assessment may then be more keenly focused on how the party gives evidence or reacts to the evidence of others.

Credibility and demeanour are NOT the same thing

But demeanour and credibility are two very different things – ‘demeanour’ is concerned with whether or not you look the part. Credibility is about whether or not your narrative stacks up against reality – from the Latin ‘credere’ ‘to believe’. The case of *Excelerate Technology v Cumberbatch* [2015] provides I think a better test than asking yourself if someone merely looks the part of an honest witness. This case suggested considering the following issues.

- *Is the witness a truthful or untruthful person?*
- *If truthful, is he telling something less than the truth on this issue?*
- *If untruthful is he telling the truth on this issue? Not all liars lie all the time and motivations for lying can vary; see the Lucas direction.*
- *If truthful and telling the truth as he sees it, can his memory be relied upon?*
- *Is what is asserted so improbable that it is on balance more likely than not he was mistaken in his recollection?*

*J A Local Authority v The Mother & Ors* [2020] EWHC 1233 (Fam) (15 May 2020)

What’s interesting is that Williams J appears to be endorsing a link between credibility and demeanour.

Para 42: *I should observe that the advantages of physical attendance of a party at court are not confined to the perceived, but perhaps in reality limited, advantage to the judge of being able to look the witness in the eye and assess their demeanour and thus credibility.*

Facts of *J A Local Authority*

A 3 year old girl died in hospital of cocaine ingestion. How she came to have ingested it, and which adult out of her parents and grandparent were culpable remained a matter of controversy and required a finding of fact hearing. This took place 11 months after her four siblings had been taken into foster care - a situation that all agreed was causing the children harm. Further delay was an unpleasant prospect but the outcome of the fact finding would be very significant.

The court adjourned its fact finding after hearing evidence remotely from 7 experts to consider how to proceed.

The Guardian argued that this was an exceptional case that required an ‘in person’ hearing in June, which could hopefully mean a final hearing in September. The mother wanted an adjournment of the fact finding until September as her QC could not attend in person in June as she was shielding

from COVID 19. However, if the finding of fact was adjourned off until September that was likely to mean a final hearing towards the end of 2020. The Judge eventually determined that the hearing would proceed in late June in person save that the mother's QC would have to appear by video link. Williams J recognised that in the 'vast majority' of cases' the credibility of the witness relies 'principally upon the evaluation of the content of their evidence rather than the evaluation of their demeanour'.

This however was NOT one of those cases. A remote hearing would not be acceptable as he set out at para 64(ii):

*The absence of very much contemporary documentary evidence, digital fingerprints, or other corroborative evidence places a considerable focus on and premium on the oral evidence of the parties. Whilst it can be tested remotely, where it is of such importance and where there is the lack of other evidence against which to measure it. The giving of evidence in a court setting in the presence of the judge in my view has an advantage both to the party and to the court. This arises not only from the evidence actually given but also from the interplay between the party and their team and the dynamic that may be observed as between the parties. Thus, on the particular factors which are present in this case I consider that giving evidence in person has a material advantage over remote evidence giving. If giving evidence in person can be facilitated within a reasonable time period that should be facilitated in order to deliver a fair hearing.*

It's an interesting and thorough analysis and a good way of looking at how courts are applying the general principles set out by the Court of Appeal.

But the question remains for me - just how 'fair' ARE these hearings when we don't have corroborative evidence and rely instead on 'demeanour' to inform our assessment of credibility and which risk *making judgments which at best have no rational basis and at worst reflect conscious or unconscious biases and prejudices. (see Leggatt LJ below)*

For example, I would like to know more clearly what is meant by

- 'the interplay between the party and their team'
- 'the dynamic that may be observed between the parties'

And how this evidence of demeanour, translates into an assessment of credibility. Remember:

*Research has consistently shown that people's ability to detect lies is no more accurate than chance, or flipping a coin. This finding holds across all types of people – students, psychologists, judges, job interviewers and law enforcement personnel (Personality and Social Psychology Review*

Extract from judgment of Williams J:

Most recently Mrs Justice Lieven has given judgment in *A Local Authority -v-M and F* [2020] EWHC 1086 (Fam) in which she decided to hear the parties and other lay witnesses entirely remotely in a care case concerning how a young baby who had suffered very extensive injuries had died and whether the mother or father was responsible. As in this case the medical cause of the death of the

child appears to have been in issue as well as the possible perpetrator if non-accidental injury was established. In that she said

*"[23] One important factor in a decision whether to proceed, particularly in a fact finding case, is the question of whether the judge will be in a less good position to judge whether or not the witnesses are telling the truth if the case is conducted remotely. This was clearly an issue of particular concern to the President in Re P at [26] where he refers to the benefits of seeing the witness in court. The issue of the weight that a judge should give to the demeanour of witnesses is an intensely complex one and has been the subject of considerable judicial debate. ....*

40. She referred to observations made by Leggatt LJ in R (on the application of SS (Sri Lanka) v Secretary of State for the Home Department [2018 EWCA Civ 1391](#), the concluding paragraph of which reads

*'41. No doubt it is impossible, and perhaps undesirable, to ignore altogether the impression created by the demeanour of a witness giving evidence. But to attach any significant weight to such impressions in assessing credibility risks making judgments which at best have no rational basis and at worst reflect conscious or unconscious biases and prejudices. One of the most important qualities expected of a judge is that they will strive to avoid being influenced by personal biases and prejudices in their decision-making. That requires eschewing judgments based on the appearance of a witness or on their tone, manner or other aspects of their behaviour in answering questions. Rather than attempting to assess whether testimony is truthful from the manner in which it is given, the only objective and reliable approach is to focus on the content of the testimony and to consider whether it is consistent with other evidence (including evidence of what the witness has said on other occasions) and with known or probable facts.*

41. She went on to record.

*[24] Mr Goodwin and Mr Verdan also referred me to the fact that it is by now fairly common in Family and Criminal courts for lay witnesses of fact to give evidence remotely by video link where those witnesses are considered to be vulnerable. The procedure for doing so is dealt with extensively in PD3AA. It therefore must follow that the giving of evidence in this way does not undermine the fairness of the process either for the individuals concerned or other parties. I do however inject a note of caution here. If it were a case that a vulnerable witness were likely to be subject to complex cross examination, perhaps with references to a large number of documents, it is highly likely that they would have the assistance of an intermediary to assist them in managing the process. Therefore, the fact that evidence is given remotely is not itself sufficient to necessarily protect that witness.*

*[25] There is also a balance to be struck. One of the reasons that vulnerable witnesses often give evidence remotely is to protect them from the stresses of the courtroom. It may therefore be that a compromise is made for that category of witness, in order to balance fair process with the interest of the individual. However, as Mr Goodwin argued, it may also be the case that the vulnerable witness is more likely to give truthful and complete evidence if allowed to give it remotely, rather than in the witness box. So the benefit is not simply to the witness, but also potentially to the judicial process.*

42. I should observe that the advantages of physical attendance of a party at court are not confined to the perceived, but perhaps in reality limited, advantage to

the judge of being able to look the witness in the eye and assess their demeanour and thus credibility. In common with the views expressed by Leggatt LJ and the distinguished judges he referred to, it seems to me that the credibility of a witness and the truthfulness of their account in the vast majority of cases is reliant principally upon the evaluation of the content of their evidence rather than the evaluation of their demeanour. That is not to say there may not be rare cases where demeanour may be of some importance, particularly where there is no or little contemporaneous or other evidence which bears upon their account. In the 21<sup>st</sup>-century where most individuals leave digital fingerprints in the form of messages, photographs, emails, call records and suchlike it is now a rare case where a judge is left without any contemporaneous evidence from the witness himself. Most witnesses will now have recorded their evidence in written or recorded form on one or more occasions prior to giving it in court. In many cases there will be evidence from other sources whether they be the authorities or individuals who may be able to draw on digital or other records. Thus, the evaluation of the credibility of a witness' account will usually take place against a backdrop where consistency can be judged against earlier accounts, against contemporaneous evidence and against the evidence of others. It is also now well recognised that memory is a fallible instrument. Thus in judging demeanour how does one distinguish between the confident liar, the confident but genuinely mistaken witness and the confident truth teller or alternatively the hesitant and anxious truth teller, the hesitant and anxious but genuinely mistaken witness and the hesitant and anxious liar?

43. However, the advantages of in-person attendance before the judge are not limited only to the perceived, but often overrated advantages in terms of assessing credibility. That is largely a judge oriented perspective although a party may in some circumstances feel they are better able to tell their story face-to-face in the formal setting of a court. For many though, including but not limited to vulnerable witnesses whether adults or children, the giving of evidence in a court setting in the presence of a judge and of cross-examining lawyers and perhaps in the presence of other individuals who provoke strong feelings whether of fear or otherwise can undermine their ability to give their best evidence. From a party's perspective though (as referred to by the President in Re P #28) there may very well be advantages to in-person attendance between a party and his legal team in advance of the hearing in order to ensure that clear instructions have been given and understood on the facts and on the approach. There may well be advantages to a party to in-person attendance in being able to see other witnesses give evidence and to provide immediate instructions to counsel in the middle of cross examination. There may be concomitant advantages to the judge in observing the reaction of parties' to the evidence of others (as the President identified in FII cases) and to how their legal teams are instructed to respond. The appellate court's reluctance to interfere in fact-finding decisions is not confined purely to the perceived advantage that the judge at first instance had in assessing credibility from demeanour but rather the advantage that a first instance judge may derive from the entirety of the in court process which includes observation of the parties behaviour throughout the process but is far wider than that and

takes in all that cannot be included in a judgment as the case develops from the judges' reading of the papers through to opening, hearing of evidence, closing and everything that accompanies the process.