WEIGHING *the* EVIDENCE

Before being able to find facts, apply the law to them and arrive at a decision, a tribunal must obtain and assess the relevant evidence. KENNY MULLAN (left) *and* ASHLEY WILTON *describe how.*

This article is intended to give some guidance in obtaining and assessing relevant evidence, a task central to the role of a tribunal. In order to find facts from the evidence, a tribunal must:

- Identify and elicit relevant evidence.
- Weigh and assess that evidence.
- Make findings of fact based on that assessment.

Nature and weight

Evidence takes a variety of different forms, many of them obvious. Others may not be so palpable, but remain forms of evidence nonetheless (e.g. videos).

The rules of most tribunals provide that a tribunal may allow evidence of any fact to be given in any manner it may think fit and must not refuse evidence only on the ground that it would be inadmissible in a court of law. The only issue for a tribunal is not the admissibility of the evidence, but whether it would be relevant or helpful in deciding the matter in issue.

One type of evidence that is often presented to a tribunal is evidence of what a party or witness has been told by someone else who is not present at the hearing to give their own evidence. Again, it may be an oral account of a document not before the tribunal. Evidence of this nature is referred to as 'hearsay evidence'. As tribunals are not bound by the strict rules of evidence, they can admit hearsay evidence.

An appellant's own direct evidence need not always be supported or corroborated by other evidence before being accepted and a tribunal is at liberty to accept an appellant's uncorroborated testimony, but must weigh that evidence to ensure that it is consistent, not inherently improbable nor clearly absurd.

Before admitting any evidence, a tribunal must determine its probative value, and then assess its weight or value.

Burden of proof

One of the parties to the appeal will always have to assume an onus to prove their case to the satisfaction of the tribunal. It has often been said that '(s)he who asserts must prove'. In evidential terms, this is what is known as the 'burden of proof'.

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It is essential that tribunals remind themselves of the relevance and significance of the burden of proof for two reasons. First, if the burden of proof is not discharged by the party on whom the burden rests, the appeal must fail. Secondly, the burden of proof does not always remain static during proceedings but may shift according to the issues raised by the appeal.

Standard of proof

Tribunal members are well aware of the standard to which a party must prove his or her case, which is identical to that adopted by the ordinary civil courts, i.e. 'on the balance of probabilities'. That equates to a standard of 'more likely than not'. The standard is not that required by the criminal courts ('beyond all reasonable doubt') which is necessarily higher.

Obtaining further evidence

During proceedings, consideration may be given to adjourning to obtain more evidence. Tribunals should consider the issue critically, asking first whether the evidence is necessary (the burden of proof is an issue here), and if so whether it is likely to assist in determining the matter when the case comes back. Only if the evidence is material should an adjournment be entertained. There is a lot to be said for going by the evidence available on the day, taking account of the opportunity the parties have had to obtain the evidence, the need to avoid delays to others and the burden of proof.

A conflict of evidence between parties will not necessarily be resolved by seeking further evidence. Also, do not confuse the volume of evidence offered by each side with its value! Evaluating the available evidence to resolve the conflict by preferring the evidence of one person to another is often more appropriate.

Consider too whether there is a reasonable prospect of obtaining the evidence. It should not be assumed that because a tribunal gives a direction as to evidence, it will be supplied. Some thought should also be given to how long the delay might be in obtaining evidence. Consideration should also be given to the person who will take responsibility for obtaining and preparing the evidence. Finally, consider who will pay for the evidence.

Evidence on oath

In some tribunals, the oath (or affirmation) is always administered as a matter of course. In others, the normal procedure is not to administer the oath unless there is a crucial issue of evidence turning on credibility or, second, where there is a need to emphasise gravity. A third group of tribunals has no power to take evidence on oath, but may emphasise to the parties before them the need to tell the truth.

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Summoning witnesses

A party to the proceedings may call witnesses and ask for a witness summons to be issued to compel attendance. The rules of some tribunals provide that a witness summons shall be issued on the application of a party to the appeal. The rules of other tribunals may give the tribunal a discretion whether to issue a witness summons and in these cases it will be for the chair to decide whether or not to issue a summons.

Often a party will insist that the author of a report attends where the content of that report is adverse to them. A refusal to issue a summons in such a case is not a denial of natural justice. The correct approach is to ask whether the direct evidence of the potential witness would be relevant and of assistance in finding the facts in issue.

Expert evidence

Expert opinions need to be treated with respect rather than awe. While such opinions should be given due weight (which may well be considerable), the tribunal may, on the basis of other preferred evidence or taking account of the tribunal members' own knowledge, reject expert opinion. In recording the full statement of reasons, the reason for rejecting such evidence should be clearly stated.

Where tribunal members contribute expertise in evaluating evidence to reach findings of fact, such expertise must be put to the parties during the hearing and not introduced privately during deliberations to avoid denying the parties a chance to comment on what is, effectively, expert opinion.

Managing people

Representatives, friends and family

Those accompanying the appellant into the hearing may be representatives, witnesses or friends and family simply attending to give moral support. It is very important to

establish early in the proceedings the capacity in which persons attend and to be wary of confusion of roles. For example, the representative may well slip into the role of a witness offering hearsay evidence. The supporter may wish to speak and, again, care is needed to determine the significance of any statement by such a person who may or may not be speaking of his or her own knowledge.

The general advice is to facilitate but elucidate and control contributions from such parties. In this way, confusion of roles is avoided and the parties are more likely than not to feel that all that has been said on their behalf that needs to be said: the goal of fair hearing is more likely than not achieved.

Witnesses

Where the witness attends, the opportunity exists to obtain direct evidence on matters of dispute and interpretation. Your task is to elicit answers without leading the witness (as to which, see Phillip Brown's article in this issue).

In all cases, care should be taken to ascertain the scope of the proposed evidence before deciding whether or not to hear it. Remember that once a witness starts to give evidence, care is needed before attempting to curtail it. It is better to have agreed the scope of evidence before the witness starts.

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The questioning of witnesses must be done carefully to avoid leading questions and an aggressive stance. It is crucial to avoid leading questions, which are those tending to suggest a specific answer.

For example 'Tell us of your difficulties in climbing the stairs' is a leading question which suggests the answer: that it is difficult for the appellant to climb stairs. It is better to find out whether the appellant has stairs, and needs to climb the stairs and then ask how the stairs are managed.

Aggressive and over-confrontational questioning normally reflects more on the questioner than the witness and should be avoided, as should comments revealing judgment on the evidence during the giving of evidence. Such comments may be interpreted as prejudicial. All of these matters are traps that may hinder a fair and efficient hearing, or the appearance of such, and will be used as a source of grievance by parties, leading to appeals or complaints.

Finding facts

General

In previewing the case, the tribunal should be looking for omissions, conflicts and ambiguities in documentary evidence so that it can determine the margin of dispute and judge the relevance or materiality of evidence.

As seen earlier, the issue for the tribunal is not admissibility but the relevance (in assisting in the determination of the case) and weight of evidence. Direct evidence (that based on a person's own knowledge) may be tested and for that reason is generally afforded significant weight.

Hearsay evidence is second-hand and therefore cannot be tested by questioning. It is for this reason that hearsay should be given less weight and treated with caution. A particular problem relates to anonymous hearsay evidence, which raises a serious question as to reliability, and should not be relied upon as it cannot be tested.

Assertions and submissions

Assertions of fact are not items of evidence and should not be relied upon in the absence of other evidence. However, if the other party concedes or agrees matters of fact set out in the submission, proof is not necessarily needed for such matters.

Drawing inferences

Inferences of fact may legitimately be drawn from primary findings of fact in certain circumstances, e.g. the

absence of a document usually available to a party to prove a contested matter.

Conflicts of evidence

Routinely, a tribunal is forced to choose between conflicting evidence. A systematic approach to this may be adopted. First ask whether the evidence offered on each side is credible or reliable. If evidence is not credible, it is not accepted as true and therefore may be rejected.

In many cases, however, the conflict is determined by applying the standard of proof. In other words, the tribunal concludes that, on the balance of probabilities, the factual account of one party is more likely than not to be the truth.

Finally, if the evidence on either side cannot be dealt with safely by the credibility or probability approach, because the evidence is such that no preference can be taken, the burden of proof will determine the matter and the tribunal will find that the party on whom the burden rests has failed to prove the necessary facts to discharge the burden.

The mere fact that information is reproduced on paper does not increase its reliability as evidence

Documentary evidence

Before any tribunal hearing commences, a number of documents will have been made available to the tribunal, and the issue will be the weight to be given to particular documentary evidence.

Often the author of a document is not present and cannot be questioned and this can make a document less reliable and only acceptable in very restricted circumstances. But the major issues are those of relevance and reliability. The tribunal should consider the age, detail and accuracy of the document.

Whether the document is an original contemporary document or is one that was created for the purpose of the appeal hearing is also relevant in assessing reliability. In addition, it is important to identify the author, the qualifications of the author and the extent of the author's actual knowledge of the subject treated in the document. Finally, the tribunal will, of course, wish to be satisfied as to the genuineness of the document. The provenance of documents is of considerable importance in weighing the evidential value of the document. Those that are undated, unsigned, or whose authorship is otherwise unidentified should be given little weight in the absence of an explanation as to why they are in that condition.

It is misleading to assume that information in a document is more reliable or important than other kinds of evidence. The mere fact that information is reproduced on paper does not increase its reliability as evidence.

Errors of law

In principle, no error of law arises where a tribunal prefers evidence. However, there is an error of law if:

- The decision is based on no relevant evidence, or
- The evidence is relevant but is not weighed in accordance with common sense, or
- The tribunal does not adequately explain the reason for preferring evidence.

A very common problem is the obvious but easily overlooked requirement for the tribunal to deal with all of the evidence relied on by the parties and relating to the issue in dispute. Failure to evaluate evidence relied on by either party will be an error of law. The tribunal must resist reaching sweeping conclusions that 'the tribunal was satisfied on the evidence that…' Instead, specific findings of primary fact must be made on the factual issues relevant to the dispute.

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