Chapter 10

TRUTH AND LIES

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I.

My dear friends, mes chers amis, félicitations et un grand merci à Claude Foisy, notre ami et collègue, et aux membres de son équipe, nos hôtes dans cette magnifique ville qu'est Montréal. Those of you who are as familiar with the language of Molière as that of Shakespeare will have heard me express our thanks to our friend and colleague Claude H. Foisy and his team, our hosts in this magnificent city, often called the Paris of North America. And no, I did not open my remarks in French to show off that I was bilingual. If I had wanted to do that I would have spoken in Yiddish. But that is for another time and another place and for another, alas, dwindling generation.

II.

For reasons which will soon become apparent, I begin with two comments, one attributed to G.K. Chesterton, and the other to George Orwell. First, Chesterton, and I quote: "I am the man who with the utmost daring, discovered what has been discovered before." And, second, George Orwell, who had this to say: "Ours is one of those times when it is the duty of an intelligent man to repeat the obvious."

That being said, I approach credibility from a forensic perspective, and with a little bit of history. As we know, the evolution of common law procedure and evidence springs from the systematic attempt to control lying. The common law began with the pre-

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sumption, based upon the experience of judges and lawyers, and of people in general, that lying is a commonplace act, and that when it comes to a dispute between parties, whatever the nature of the dispute, there is always a great risk that the truth will not be told. From there the common law has wended its way through jurisprudence and statutory codification to where we are today.

Long, long ago, we relied on the theory that the fear of eternal damnation, or the sharp eyes of a judge and 12 jurors, would strike terror in the heart of the liar. Now, we try to pin down the lies, if not the liar, by what we think are more modern scientific techniques. For my part, I have greater faith in the persistence of lying than in the ability of social scientists to put an end to it, and I have come to regard the trial process itself as the best and the only real test of truth available to us in a democratic society. That being said, do I need to tell you that liars and cheaters, if they are very good at the job of lying, frequently can and do prosper, and that the very best of them will look the court straight in the eye, never fidget, and, with the utmost sincerity, spin a tale of enchanting verisimilitude, based upon a tissue of lies?

Therefore our task, as I see it, is not so much the business of unmasking liars, as it is the reconstruction of as much of the truth as it is possible to do. This is a much more complicated and subtle undertaking. Testimony may be credible, but not true; it may be truly believed by the witness, but utterly wrong; it may be partly true but, wittingly or unwittingly incomplete, leaving out a crucial element, which, if known, would radically alter the judge's view of the case.

The time has long passed since the common law prohibited a litigant or an accused from testifying on his own behalf because he was considered to be incompetent to tell the truth. Nor do we any longer require complainants in sexual assault cases to have independent corroboration of their testimony before conviction is possible. On the other hand, we still have the burden of proof that must be met before a plaintiff can carry the day; we still exclude witnesses from the hearing room before they have testified; and, of course, we are still very much preoccupied by that favourite unnatural child of evidence law, the hearsay rule, whose multiple exceptions are intended to enlighten, but alas, too often confuse.

While we once surrounded the trial process with a thicket of elaborate rules, regulating who could testify and what could be said, we have now cleared out much of the underbrush and

replaced it with the theory that all relevant evidence should be produced. We have moved very far from the time when Chief Baron Eyre, stating the law, said in 1680:

> [T]he presumption . . . is, that no man would declare anything against himself, unless it were true; but that every man, if he was in a difficulty, or in the view to any difficulty, would make declarations for himself.[1]

But have we really moved very far? The problem of credibility is still there, front and centre, and the weight to be given to a piece of evidence or to a witness's testimony still bedevils us. How then do we proceed to come to an understanding of any case, so as to be able to render a decision that satisfies us?

I start with Plato, or rather, Plato's subterranean cavern, where men are forced to dwell fettered, so that they can see nothing but a kind of shadow puppet show, cast onto the walls of their prison.[2] Judges and arbitrators are in very much the same position as Plato's chained men. Witnesses come before them and hold up images of things as they would have the decisionmaker see them. How does the decisionmaker go about making sense of this shadow world? How does he, indeed?

III.

"Lies, damned lies, statistics." Who does not laugh when we hear Mark Twain's famous aphorism? In fact, Twain attributed the comment to Disraeli, without saying where he had found it, and modern scholarship has not been able to find it either. But what did Twain really mean when he cited Disraeli, or when he made it up, if you prefer? He meant to be funny, of course, and he is. And yet, in my view, there is much more to it than that. Like almost everything that Twain wrote, it is a moral tale. A lie is bad; a damned lie is worse; and statistics are the worst.

Let me explain. A lie, your ordinary garden variety, run-of-the-mill lie, a simple untruth, is bad because it betrays trust; it betrays the trust that we need and rely upon in order to maintain a civilized relationship with others. It saps the confidence and the belief that our neighbour will not betray us. Everyday examples abound, and you know them as well as I do. Here are a few:

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[1] *R. v. Hardy* (1794), 24 State Tr. 1090, 1093.
[2] The Republic, Book VII, 514, a, b.

1. “The cheque is in the mail”;
2. “He hit me first”;
3. “I wasn’t there, I was home asleep”;
4. “It wasn’t my fault”;
5. Cynics might add the ultimate example, “I’m from the Government, and I’m here to help you.”

A damned lie is worse because it not only claims to be the truth, but is artfully couched in terms that blend truth and fiction, so as to mislead you into believing that the false is true. That is why I suggest that Twain used the word damned, not as an expletive, or even to mean bigger, but as an immoral act worthy of greater condemnation in the eyes of man. It is worse than your ordinary lie because it is more subtle, more dangerous, and unless one is ever vigilant, more likely to be accepted and to deceive.

Here, too, examples abound. This is one of my favourites. A friend of mine, a woman of a certain age, as the French say, is still very beautiful, and looks much younger than her years. When people express astonishment that she could be the mother of John who recently celebrated his 50th birthday, her inevitable response is, “Well, you know that John is my husband’s son by his first marriage.” Now this, of course, is perfectly true. What she fails to say is that her husband was only married once and to her, and, indeed, not only is he her first husband, she is his first wife, and John is the fruit of their marriage.

Another example is that of the man whose grandfather is said to have met his end when a platform collapsed beneath him during a public ceremony at the turn of the century. The truth of the matter is that the man’s grandfather had been hanged as a horse thief.

If you are of a literary bent, you may recall what William Blake said on the subject, “A truth that’s told with bad intent beats all the lies you can invent.”[3]

I need hardly tell you that neither of these examples will stand up to rigorous cross-examination, as I used to tell my students when I was teaching The Art of Advocacy. The fact remains, however, that for one reason or another, perhaps because of the demeanour or reputation of the witness, there may be no cross-examination at all on this point. As a result, the version is taken at face value and believed. This is not necessarily a criticism of lawyers or, for that

[3] Blake, *Proverbs,* line 95.

matter, of the presiding judge or arbitrator; it is a normal reflection of the human experience. We all know that the best lies (best, because they are most likely to succeed) or the worst lies (worst, because they outrage our sense of morality) are those that contain within them a kernel or germ of truth.

Which brings me to statistics, and why I think Twain was making a profound observation when he referred to them as the worst and perhaps the greatest of lies. Why is this so? Simply because we have been led to believe and to expect that statistics are *infallible* and cannot be wrong. Note the moral aspect of the word infallible as an authority that is *omniscient* and beyond question. After all, we are told, the facts that form the basis of all statistics are neutral (or in any event assumed to be neutral). They are culled (we are told) from independent sources by independent researchers and, therefore, are beyond question and must be true. Unfortunately, that is not always the case. Indeed, it is very often not the case, but I will spare you the obvious examples.

I just want to remind you that in the same way that the devil can quote scriptures for his purpose (and here I come back to original sources, the underlying morality of Twain's aphorism), we find experts every day of the week quoting the same statistics to support opposite and conflicting conclusions. So much for statistics and, by ricochet, the evidence of expert witnesses. That is a subject in itself, one better left to another time and another occasion!

IV.

Who amongst us does not know the classic and time-honoured rules for assessing or determining credibility: the witness' demeanour, conduct, behaviour in the box, attitudes, speech, body language, vocal pitch, hesitations, repetitions, lowered gaze, oft-mopped brow, shaking hands, rigid body, voice that becomes inaudible and trails off with the unfinished sentence, defensive attitude, or belligerent tone, and so on, and so on, and so on? Case law is clear on the subject: the credibility of a witness is always in evidence.[4] But in the end, what does it all mean? It means that either you believe witnesses or you don't, or you believe them up to a point, and not beyond, or you think that maybe they are lying, but you are not sure. In the end, is it simply a gut feeling or

[4]See, for a sampling of cases, Wigmore, A Treatise on the Anglo-American Systems of Evidence at Trials at Common Law (1940) §946.

something more. Is it a reflection of your own experience, your own strengths and weaknesses, your own prejudices? After all, everything we see and everything we hear, and everything we learn is—trite as it is to say it—filtered through our own baggage that we bring to the trial.

Does your baggage contain the belief that people are inherently good or are inherently bad? Is your response to the evidence indirectly a reflection of your own weaknesses or your own strengths? This we know, and no one has said it better than Benjamin N. Cardozo:

> There is in each of us a stream or tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them—inherited instincts, traditional beliefs, acquired convictions; and the result is an outlook on life, a conception of social needs . . . . In this mental background every problem finds its setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own.[5]

V.

All and all, therefore, if one wants to be objective and that, of course, is what one strives to be, one is left somewhat discouraged, if not actually depressed. But take heart, I have good news for you. It was ever thus and will not change, despite the books, the videos, the learned articles, the lectures, and the seminars, including the one which brings us together today.

For what the judge and the arbitrators are called upon to do is not a mystery, though it is in part an art and a skill to be learned. It is the expression and reflection of our understanding of the human condition in general, and of the law and its traditions, in particular. Oliver Wendell Holmes's statement, in 1881, "The life of the law has not been logic: it has been experience,"[6] is an expression in general terms of all the rules that have grown up and evolved in the common law in regard to the judicial process. To be more specific, the rules governing the admissibility of evidence and the credibility of witnesses reflect experience, and not necessarily logic.

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[5] Cardozo, The Nature of the Judicial Process (New Haven: Yale Univ. Press, 1921), at 12–13, 167.

[6] Holmes, The Common Law (Little, Brown & Co., 1881), ed. Howe (Little, Brown & Co., 1963), at 5.

Some 40 years later, when dealing with the interpretation of language and the application of a statute, Holmes reiterated his preference for the empirical over the abstract, "Upon this point a page of history," he opined, "is worth a volume of logic."[7] Statutory interpretation and the interpretation of the law in general are to be treated on their "practical and historical ground."[8]

But beware that your own experience does not lead you astray in your search for truth. Here I enter the minefield of personal attitudes, prejudices, biases, and predispositions. Rarely, if ever, are these innate; rather, they are learned and oft unspoken, indeed, oft times unconscious and unknown. The obvious ones, of course, are race, religion, colour, gender, sexual orientation, and others that need no enumeration here.

But there are other biases far more subtle and far more sinister that invade our beings and colour our vision of what we see and of what we hear. Let me give you an example: If the witness begins every sentence with the words, "To tell you the truth," . . . is it because he is nervous, eager to please and convince, afraid that he might not be believed; or is it, recalling Pooh-Bah's immortal phrase, "merely corroborative detail, intended to give artistic verisimilitude to an otherwise bald and unconvincing narrative"?[9] And pursuing our literary quest further, is it because, weaned on Shakespeare, we remember Gertrude's comment to Hamlet on the behaviour of the player Queen, "The lady doth protest too much, methinks."[10]

Now, Gilbert and Sullivan and Shakespeare aside, do you believe this witness, or do you not? Well, it depends upon your Uncle Jake. Who is Uncle Jake? My Uncle Jake, who always started a sentence, "To tell you the truth," was known in our family as a person who was somewhat casual with the truth. On the other hand, if your Uncle Jake were an honest, upright citizen, but insecure and fearful that he might offend anyone who held a different view, how would you react?

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[7] *New York Trust Co. v. Eisner,* 256 U.S. 345, 349 (1921), where Holmes held that the imposition of a federal succession duty was a valid exercise of power under the U.S. Constitution.

[8] *Id.*

[9] Gilbert & Sullivan, *The Mikado,* act II.

[10] *Hamlet,* act III, scene 2, line 223.

So much for the obvious. But what of the things that you can and should learn? What are the things you do not know, not having learned them, and which are thereby traps that lead you astray when assessing credibility? What of personality defects, cultural traits, and behaviour patterns not in your usual field of vision? If the witness, for example, keeps his eyes downcast, is it because he is shifty, afraid to look you in the eye, and therefore unreliable and probably lying, or is it because he is nervous or fearful, perhaps overawed by the majesty of the courtroom or the hearing room? Or, more important, does the witness come from a culture where it is disrespectful and offensive to look directly at a person in authority when responding to questions?

This is just one example of the many things that we can learn and must learn and that are not in our own experience. These are the things to which we should address our attention, lest our failure to have learned them mislead us in our quest for the truth. The baggage that we bring, the experience that we have, the things we have learned that help us in our task, may be the very things that we have to unlearn. In doing so, we take on new baggage that will enrich our experience. Such baggage will give us the insight needed to better understand and assess witness credibility in a more truly objective fashion. In brief, one must learn not only what one does not know, but one must learn to unlearn what we now know to be wrong. Here lie both hope and comfort. For in pursuit of this goal, we judges and arbitrators, imperfect as we are, living in an imperfect world, trying to cope with an imperfect system, may improve it somewhat, even if we know that we can never make it perfect.

VI.

How does one define credibility? For that matter how does one recognize the truth when it finally emerges or begins to emerge? Why, and how, after all is said and done, do we end up with a gut feeling that the witness is, or is not, telling the truth? Is the gut feeling reliable, and, if so, why? A judge is reputed to have said, “I cannot tell you what pornography is, but I know it when I see it.” Is it enough for a trial judge or an arbitrator to say, “I cannot tell you what a lie is, but I can recognize it when I hear it.”? Quebec lawyers old enough to have tried automobile cases will tell you that

a head-on collision is defined as an accident between two stationary vehicles, each parked at the curb on opposite sides of the street.

The problem is further compounded when witnesses may not be telling the truth, yet are under the honest but mistaken belief that they are. As judges, we may well believe them, in the same way that the umpire in a baseball game calls a strike when, in fact, it's a ball. It's only when we see the instant replay on television that we know the umpire has made a mistake; but then, alas, it's too late.

So, to repeat the obvious once more, one must be wary of the barefaced liar, but one must be equally wary of the witness who tells the truth, but doesn't tell it all. The key to assessing credibility is not so much what the witness said, but what was left unsaid and the conclusion to which you were therefore misdirected.

Further literary illustrations on this point abound. Here is how Disraeli dealt with the subject when he received an unsolicited book from an undistinguished author. "My dear sir," he wrote, "Thank you for your book. I shall waste no time reading it." Then, too, there is the classic letter or reference that an employer gave to his incompetent employee whom he had just let go: "This will introduce Mr. X, who has been in my employ for the past six months, to his entire satisfaction. If you can get him to work for you, you will be fortunate indeed."

Cases of misdirection call for the highest degree of advocacy skills on the part of counsel during cross-examination, in order to elicit from witnesses the evidence they have failed to disclose in an attempt to deceive. Here the arbitrator must be alert not to accept easily, and at face value, the direction witnesses or counsel are attempting to impose, but instead remain open to the pattern that the whole of the trial process will exhibit.

We have come to the heart of the matter. If you are looking, as we once did in medicine, for a magic bullet that will direct you infallibly to the truth, there is none. The magic bullet is the trial itself. If well ordered, the trial will bring its best result through the process of confrontation. Confrontation does not mean angry argument between counsel or witnesses, but the testing of different and distinct theories of the case. Confrontation defines, refines, and crystallizes the issues. When you have put your finger on the real issues, then and only then are you on the way to determining whether a witness is telling the truth or hiding a crucial element of the case. Until then, you are one of Plato's fettered men in his subterranean cavern. That is why, among other reasons, the U.S. Constitution has enshrined the right of confrontation in the Sixth

Amendment. In the absence of a fully developed review of the facts and the evidence, there is no real opportunity for a judge, jury, or arbitrator to reach a rational decision.[11]

So, what do you do if the answers given by the witness seem to elude your understanding of the real issues in the case? You question him yourself, even though you risk being labeled an activist, or, following the traditional route, you simply ask counsel to examine the witness further on the specific points that interest you. The direct, barefaced lie or misstatement of fact is easy to expose because, containing no truth within it, it is really contradicted by the weight of better evidence. Once exposed, it is set aside, disregarded, or discounted, and that is the end of the matter.

Equally easy to deal with, but with the opposite and unfortunate, though unknown, result, is the barefaced lie that stands uncontradicted and undetected. One simply has to take it at face value, and if it constitutes the preponderance of proof, it is sufficient to sustain the action or complaint in civil matters. The corollary, of course, is that where you are faced with two equally credible, or two equally incredible versions of the facts, then you must rely upon the classic rule of the burden of proof in civil matters, and determine whether or not that burden has been discharged in the circumstances.

The lie by misdirection poses the greatest challenge. Supported as it is by elements of truth, it blends in with other, more credible sources of proof and requires a meticulous control of the facts in order to expose it. But how in our search for truth do we ferret out the lies? Generally speaking, witness credibility is impaired when what they say appears inconsistent with a reasonable view of the evidence taken as a whole. We must ask ourselves if the facts as stated are consistent with conduct and behaviour that was reasonable and appropriate in the circumstances. If not, they are open to question. In simple terms, we must ask ourselves whether the witness's story makes sense, not only to us, but also to "a reasonably

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[11]Constitution of the United States: AMENDMENT VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense.

informed member of the public" (to borrow the language used by the Supreme Court of Canada in another but similar context).[12]

In short, there is a line between fact and fancy, between truth and falsehood, which witnesses cannot cross if they are to be believed. It is the same line that society gives us to distinguish between the lawful and the unlawful, between the appropriate and the inappropriate, and between community standards that are acceptable and those that are not. I can give you no rule that tells you where the line should be drawn; there is no general rule to that effect. Indeed, even if it were possible (which I doubt), it would be undesirable to have one. Each case depends upon its own particular circumstances. Therefore, the line moves as required to suit each distinct occasion.

VII.

The Chief Justice of Canada has said that whenever the Supreme Court confirms the conviction of an accused, he does not sleep well that night. This is not because he fears that his Court was mistaken in law. Rather, it is because of the ever-present danger that in the courts below, particularly at the trial level, the jury or the trial judge may have believed that liars were telling the truth, and that witnesses who were telling the truth were not.

Which brings me to the test questions for today, which I have made up to see if you have been dozing off between the jokes. Imagine the case of a man accused of murder who protests his innocence from the very first moment, to the police, to his family, to his lawyer, and indeed to anyone else who will listen. He goes to trial and is convicted. The evidence against him is circumstantial and based in large measure upon his behavior after the murder, as related at trial by his companions. His lawyer, an able and experienced trial counsel, decides against putting him on the stand, and the accused stands silent, as is his right. He is found guilty and sentenced to life imprisonment. His appeal to the Court of Appeals is dismissed and leave to appeal to the Supreme Court is refused. Fifteen years later, while still serving his sentence, his companions recant their testimony and newly tested DNA evidence exonerates him completely.

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[12] *MacDonald Estate v. Martin,* 3 S.C.R. 1235, 1260 (1990).

Here, now, are the questions I have for your consideration.

1. You are the lawyer for the accused. Do you believe your client to be innocent when he says that he is innocent? If not, why not? Does the fact that he has a record as a juvenile delinquent in unrelated matters affect your belief?
2. You are the judge or a juror. Would you believe the accused if he gave evidence at the trial saying he was innocent, even though he admitted his past juvenile criminal record, unrelated to the case? If not, why not?
3. And, finally, you are the lawyer, the judge, or a juror. Would you believe the witnesses, his companions, who lied at the trial? If not, why not?

So, how do you find? I guess the answer is, "It depends." It depends on the circumstances; it depends on the evidence as a whole; it depends on everything that we have been talking about in our time together today. Truth is tested in the laboratory of human experience, refined in the crucible of the trial process, and then weighed in the balance of existing community standards. All this done, then and only then, can one say where truth lies; and even then one can only hope that one is right.

VIII.

We have now come to the end of the line. I close with a word of comfort. In moments of doubt or anxiety, try to remember, as I said early on, that we live in an imperfect world, with imperfect people in an imperfect system. The wonder, therefore, is not that sometimes we get it wrong; the wonder is how often we get it right.

With these words I leave you, My Dear, Imperfect Friends.