

“She said! He said!”

Dealing with Conflicting Evidence



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Introduction

Context

*What is the
decision
maker's job?*

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The job in a nutshell:



Provide a fair hearing



Hear evidence and admit relevant evidence



Make findings of fact



Apply the relevant legislation to the facts



Make and write the decision

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Fact Finding

What actually happened, on a balance of probabilities?

Doesn't have to be 100% certainty.

Based on all the evidence, what more likely than not happened?

How do we decide the facts?

Agreed.

Similar.

Uncontested.

Contradictory.

How do conflicts in evidence arise?

One or more witnesses tell different stories.

One or more documents tell different stories.

The witness's evidence conflicts with the documents.

There are inconsistencies in the evidence of the individual witness.

Other possibilities?

How do you
deal with
conflicting
evidence?

Where to start?

Put the evidence in a logical order :

- By issue?
- Chronologically?

Relevance!

Relevance!

Relevance!

Relevance
first!

Assess
second!

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Consider all the evidence on each issue:

Witness testimony

Documents including e-documents

Expert opinion

Physical evidence

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Assessing Conflicting Evidence

Credibility

Reliability

Assessing Conflicting Evidence

Credibility

What makes the
evidence worthy
of belief?

Assessing Conflicting Evidence

Reliability

Is the evidence
dependable?

R. v. Thomas [2012] ONSC 6653.

Reliability – factors of perception,
memory and communication.

Credibility – sincerity and
honesty.

R. v. Thomas [2012] ONSC 6653.

Reliability of concern where:

- witnesses are young;
- witnesses testify about distant historical events;
- evidence is inconsistent, contradictory or unsupported by other reliable evidence not recorded contemporaneously;
- there was a poor opportunity to observe; or
- there are problems with perception, memory or communication.

Some basics:

Give direct evidence more weight than hearsay.

Don't make a core fact finding on the basis of hearsay.

Look at all the evidence on each factual issue.

Consider:

Demeanor

- honest, forthright, trustworthy?
- shifty, evasive, unreliable?
- confused and nervous?

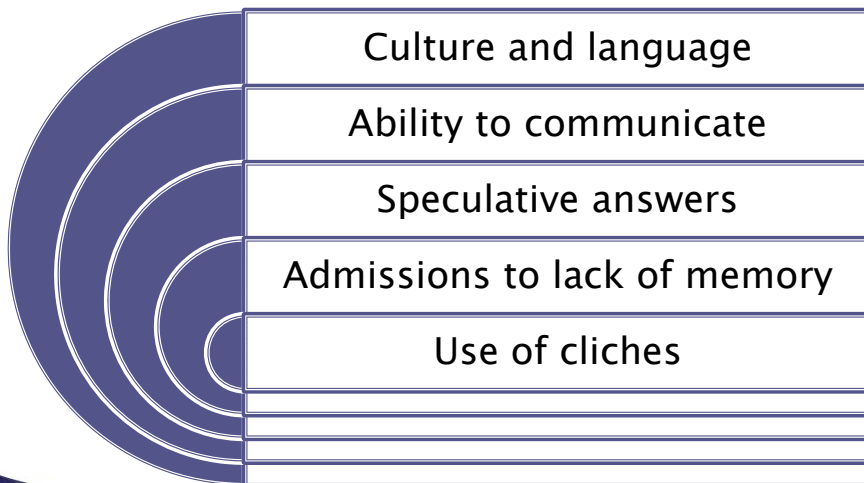
Presentation

- controlling?
- sure or unsure?
- spontaneous or rehearsed?

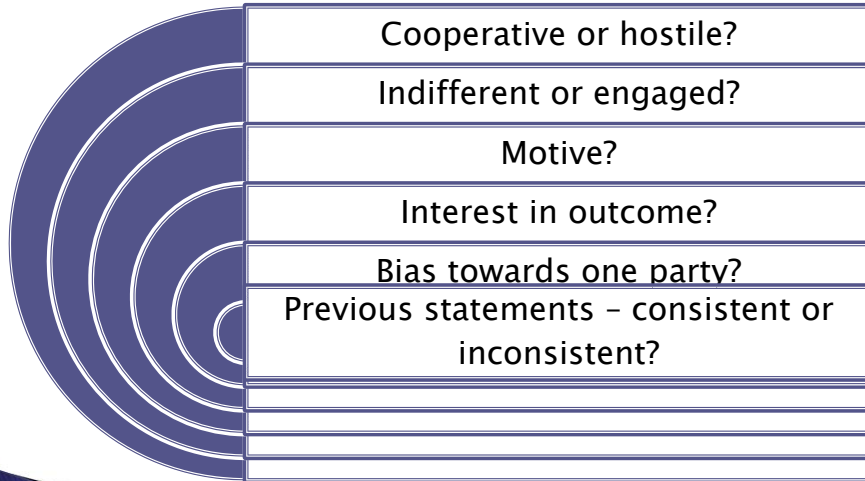
Degree of detail

- appropriate to content?

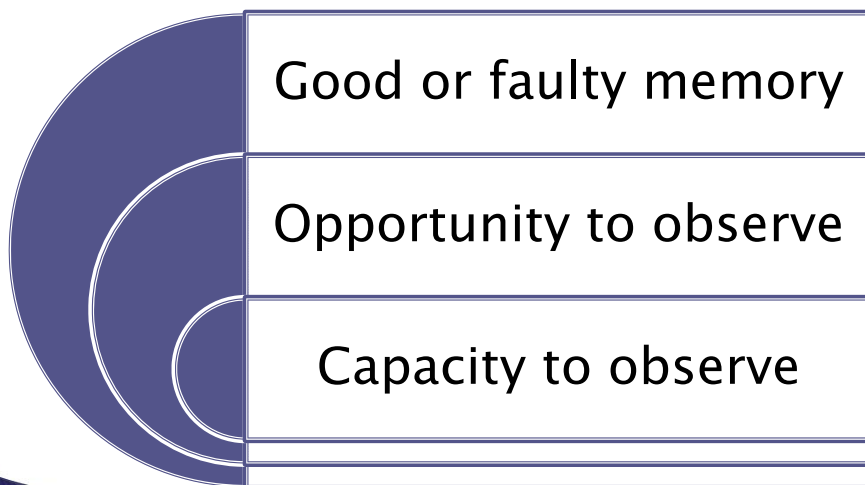
Also consider:



Also consider



More on Reliability



More on Reliability/Credibility

Does the story make sense?
Is it plausible?

Internal consistency

External consistency

Weighing the evidence:



Capture it all



What is more likely than
not?



What inferences can be
drawn?

Summary

Consider relevant evidence only.

Keep your own biases and emotions out of it.

Consider all the relevant evidence on each issue.

Provide the reasons. What were the deciding factors?



