

# Spotting the liar in the witness box – How valuable is demeanour evidence really? (2)\*

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## 1 INTRODUCTION

In the previous part of this contribution I discussed the history of so-called “demeanour evidence” and its current role in the law of evidence. I furthermore examined the extensive empirical evidence that shows that demeanour – as a means of accurate and reliable credibility assessment and decision-making in litigation – essentially is worthless. Human lie detection is fraught with difficulty. It is predicated upon a multitude of misconceptions about how liars behave, including specific verbal and nonverbal cues commonly believed to indicate dishonesty.

Below I continue with an analysis of the social science research data on veracity judgments based on demeanour in order to attempt to answer the question: Why are human beings such poor lie detectors? Next I expound upon the reasons why lie detection in court might actually be more difficult than in a laboratory setting. I then explore the potential impact of empirical findings upon the principle of appellate deference to credibility findings of first instance. I conclude by addressing the question regarding the appropriate response of the legal system in the face of the overwhelming research data on the lack of reliability of so-called “demeanour evidence”.

## 2 WHY ARE HUMAN BEINGS SUCH POOR LIE DETECTORS?

The fundamental cause of human beings’ abysmal performance in detecting truth from falsehood is the fact that they attend to the wrong cues or interpret behavioural cues incorrectly.<sup>1</sup> As the journalist David Simon described:<sup>2</sup>

“Nervousness, fear, confusion, hostility, a story that changes or contradicts itself – all are signs that the man in the interrogation room is lying . . . Unfortunately, these are also signs of a human being in a state of high stress.”

Certain signs of perceived deception, especially those involving the face, are also simply signs of nervousness and distress.<sup>3</sup> It is almost impossible to distinguish

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\* See 2018 *THRHR* 437 for Part 1.

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1 Pager “Blind justice, coloured truths and the veil of ignorance” 2005 *Williamette LR* 386.

2 Simon *Homicide: A year on the killing streets* (1991) 52.

3 Rand “The demeanor gap: Race, lie detection, and the jury” 2000 *Connecticut LR* 13.

Unlike with lying, there are recognisable, fairly obvious signs of stress or anxiety, such as

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between a person who experiences stress because she is guilty and on the verge of being exposed, and someone who experiences stress because she is innocent and stands falsely accused.<sup>4</sup>

The link between stress cues and lying involves a problematic medial inference. Stress cues are cues only to an emotional state, but are posited to be associated with lying. Yet, *most* witnesses – truthful or lying – are likely to be nervous at trial.<sup>5</sup> Stress cues exhibited in court might very well only signal the gravity of the situation, and not any deception on the part of the witness.<sup>6</sup> Stone declares that it would be “an affront to common sense” to conclude from anxious behavioural cues alone that the witness might be lying, just as it would be equally absurd to assume that a witness who seems calm must be telling the truth.<sup>7</sup>

Yet, researchers have consistently found that observers attach meaning and significance to these behavioural cues of nervousness or anxiety even when the message is truthful.<sup>8</sup> The mistaken interpretation of interrogation stress as deceit is so prevalent in the psychological literature that the phenomenon has come to be called “Othello’s error” because it is excellently illustrated by Othello’s mistaken interpretation of Desdemona’s distress and despair in response to his accusation of infidelity.<sup>9</sup>

Moreover, all *perceived* indicators of deception are based on visual cues, particularly facial cues, while most of the *actual* indicators are auditory.<sup>10</sup> Humans

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pallor, perspiration, trembling or a quivering voice: Stone “Instant lie detection? Demeanour and credibility in criminal trials” 1991 *Criminal LR* 826.

4 Kassin “Human judges of truth, deception and credibility: Confident but erroneous” 2002 *Cardozo LR* 812. See also LeVan “Nonverbal communication in the courtroom: Attorney beware” 1984 *Law & Psychology Review* 87.

5 Sanchirico “Evidence, procedure, and upside of cognitive error” 2004 *Stanford LR* 312. The reasons why a truthful witness might be anxious are legion. Some witnesses are naturally anxious in their everyday lives; many witnesses feel intimidated by the prospect of having to testify in court, and their anxiety is only amplified by the number of people in court and the personalities of the trial lawyers and the fact-finder; some fear humiliation by a cross-examiner who might attack their powers of observation, memory or integrity; honest witnesses are often anxious because they fear that the fact-finder will not believe their truthful testimony; if the subject of the interrogation is distressing or embarrassing, it might upset some witnesses; conscientious or obsessive witnesses might be concerned about their potential responsibility for the consequences of the court’s judgment; the possible outcome – acquittal or conviction – might naturally arouse anxiety in the accused or her family, regardless of whether they are telling the truth; or a witness might fear reprisals for her testimony (ie, an honest witness might be anxious *because* her evidence is truthful). See Stone 1991 *Criminal LR* 826.

6 Sanchirico 2004 *Stanford LR* 312.

7 Stone 1991 *Criminal LR* 826. As with anxiety, there are numerous reasons why a witness might appear relaxed. Witnesses who are in fact lying often are, or appear to be, relaxed and confident. Some people are able to remain unperturbed in stressful situations that would devastate others. If the witness is indifferent to the subject of the testimony, the possible consequences of the judgment, or her responsibility for them, that witness might be at ease when she lies. A relaxed demeanour might of course also be simulated in the experienced liar who has good natural control over especially her facial behavioural cues and who has experience in court. Even where signs of relaxation exist and are detectable, to equate them naturally with sincerity is both unjustified and dangerous. *Idem* 827.

8 Rand 2000 *Connecticut LR* 13.

9 Fisher “The demeanour fallacy” 2014 *New Zealand LR* 578; Pager 2005 *Williamette LR* 384.

10 Pager 2005 *Williamette LR* 391.

are predominantly visual creatures.<sup>11</sup> The deception researcher Bella DePaulo refers to this as “video primacy”<sup>12</sup> – the human tendency to focus almost exclusively on the face (eye contact and other changes in facial expressions), to the exclusion of all other channels of deception – body, speech patterns, tone of voice and content.<sup>13</sup> Unfortunately, because of facial predominance in both expression and interpretation, the face is exquisitely controllable for self-presentation purposes, and it thus hides or reveals the most information.<sup>14</sup> This is why one person can lie while looking another straight in the eye and flashing a smile. In Charles Dickens’s words:<sup>15</sup>

“I have known a vast quantity of nonsense talked about bad men not looking you in the face. Don’t trust the conventional idea. Dishonesty will state honesty out of countenance, any day of the week, if there is anything to be got by it.”

Studies have confirmed that observers over-rely on visual cues to their own detriment. Visual information actually *diminishes* accuracy.<sup>16</sup> In one experiment, subjects who observed a suspect interview were 58% accurate in distinguishing between those suspects who were truthful and those who were deceitful, whereas those who only listened to the same interviews or simply reviewed a transcript were 77% accurate.<sup>17</sup> The authors of the study concluded that the visual cues from the interview (ie, facial expressions, gestures and mannerisms) served primarily as distractors, lowering the proportion of accurate judgments.<sup>18</sup>

11 Eighty percent of information that the human brain receives is through the eyes. Ekman “Lying and nonverbal behavior: Theoretical issues and new findings” 1988 *J of Nonverbal Behavior* 175.

12 DePaulo *et al* “Decoding discrepant nonverbal cues” 1978 *J of Personality & Social Psychology* 320.

13 In 1969 Paul Ekman and Wallace Friesen, pioneers in the field of deception research, proposed a channel theory of deception that in ensuing years has been widely validated and accepted. In essence, they theorised that a person communicated information through the face, body, speech patterns, tone of voice, and content. When a witness is lying, cues to her deception are inadvertently “leaked” through one or more of these channels, despite her attempts to appear honest. The lying witness is one who “is probably unable to control all channels simultaneously and who probably controls some better than others”: Ekman and Friesen “Nonverbal leakage and clues to deception” 1969 *Psychiatry* 88.

14 Kassin 2002 *Cardozo LR* 810; Blumenthal “A wipe of the hands, a lick of the lips: The validity of demeanour evidence in assessing witness credibility” 1993 *Nebraska LR* 1190. Littlepage and Pineault found it “of interest . . . that facial shots of dishonest statements would evoke low accuracy but high confidence”, a result that “seem[s] to indicate the success of facial impression management”. Littlepage and Peneault “Detection of deceptive factual statements from the body and the face” 1979 *Personality & Social Psychology Bulletin* 328.

15 Dickens *Hunted down* (1996) 176.

16 Hocking *et al* “Detecting deceptive communication from verbal, visual, and paralinguistic cues” 1979 *Human Communication Research* 42–43; Zuckerman *et al* “Verbal and nonverbal communication of deception” in Berkowitz (ed) *Advances in experimental social psychology* (1981) 27. Psychologists Littlepage and Peneault concluded that “facial shots of dishonest statements would evoke low accuracy but high confidence”: 1979 *Personality & Social Psychology Bulletin* 328.

17 Maier and Thurber “Accuracy of judgments of deception when an interview is watched, heard, and read” 1968 *Personnel Psychology* 23. In another study, observers exposed only to a witness’s voice performed almost twice as well as those who were exposed to visual cues. Hocking *et al* 1979 *Human Communication Research* 43.

18 Maier and Thurber 1968 *Personnel Psychology* 23.

People are in fact considerably better judges of truth and falsehood if they shut their eyes and listen, because the behavioural cues that most steadfastly betray deception are those that leak from the voice – paralinguistic cues, such as pauses, hesitations and changes in pitch.<sup>19</sup>

However, by far the best determinant of the truth of testimony is not a witness's demeanour (visual or auditory behavioural cues) at all, but the actual content of the testimony.<sup>20</sup> “The surprising finding”, Zuckerman *et al* concluded, “is the power (ie the accuracy) of the word, either written or spoken”.<sup>21</sup> Whereas “facial cues seem to be faking cues” which may hinder rather than assist in lie detection, “success at deceiving and success at detecting deceit are both mediated largely by adeptness at constructing and interpreting verbal nuances”.<sup>22</sup>

Factors – all of which would be readily discernible by an appellate judge reading a transcript of the testimony – such as self-contradiction, inherent plausibility or the lack thereof, omissions and imprecisions, verification of facts testified to by other witnesses and exhibits, bias or motive on the part of the witness, and limitations of recall are among the most important indications of witness credibility.<sup>23</sup>

Moreover, truthful testimony of real experiences is based on perceptual processes, whereas deceitful testimony often is the product of a witness's imagination. When compared with invented testimony, truthful testimony is more likely to include perceptual details (sight, sound, taste), contextual details (where, when) and affective detail (emotion).<sup>24</sup> The liar, by contrast, provides more factual detail, frequently repeating those details, exaggerates the overall vividness of her memory, and is less likely to report not remembering a fact when asked.<sup>25</sup>

In sum, the empirical research authoritatively demonstrates that the verbal and nonverbal features associated with deception are contrary to expectation, and are typically misinterpreted or go undetected.<sup>26</sup>

### 3 EFFECT OF RACE ON DECEPTION CUES

As the behavioural science research demonstrates, the average fact-finder deciding issues of credibility based upon demeanour evidence is not likely to fare

19 Kassin 2002 *Cardozo LR* 810. We are less aware of our tone of voice that would be expected, a phenomenon explaining in part our negative reactions to tape recordings of our own voices. Zuckerman *et al* 1981 *Advances in Experimental Social Psychology* 5.

20 Pager 2005 *Williamette LR* 386. “[N]onverbal information was not useful to subjects in detecting deception, whereas verbal content did provide a basis for significantly better-than-chance judgments.” Wellborn “Demeanour” 1990–1991 *Cornell LR* 1085.

21 Zuckerman *et al* 1981 *Advances in Experimental Social Psychology* 27.

22 *Idem* 39.

23 Uviller “Credence, character, and the rules of evidence: Seeing through the liar’s tale” 1993 *Duke LJ* 782–784.

24 Vrij *et al* “Stereotypical verbal and nonverbal responses while deceiving others” 2001 *Personality & Social Psychology Bulletin* 900.

25 Porter and Yuville “The language of deceit: An investigation of the verbal clues to deception in the interrogation context” 1996 *Law & Human Behavior* 451. Minzner states that “[w]hile liars do not give off demeanour cues, they do tell stories that are less logical, less consistent, and contain fewer details than those of truth-tellers”: “Detecting lies using demeanour, bias, and context” 2008 *Cardozo LR* 2569.

26 Andrewartha “Lie detection in litigation: Science or prejudice” 2008 *Psychiatry, Psychology and Law* 88.

much better than chance at detecting deception in witnesses' testimony. That is mainly because witnesses are able to control certain behavioural cues, namely those that they know fact-finders are likely to be particularly attuned to.

The Constitutional Court in the *SARFU* case underscored another factor that further complicates the already confounding deception dynamic:<sup>27</sup>

"A further and closely related danger is the implicit assumption . . . that all triers of fact have the ability to interpret correctly the behaviour of a witness notwithstanding that the witness may be of a different culture, class, race or gender and someone whose life experience differs fundamentally from that of the trier of fact."

It does not require much imagination to think of instances in which truthful witnesses might be at the mercy of numerous societal and cultural stereotypes. For example, although all attending behaviours vary cross-culturally, eye contact may vary more than other nonverbal behaviours.<sup>28</sup> In most Western cultures it is generally considered appropriate to look at a person when speaking to them. In many Asian and African cultures, by contrast, it is a sign of disrespect for an individual of a lower status to make direct, prolonged eye contact with elders or people of a higher status.<sup>29</sup> Thus, an African or Asian witness might view gaze maintenance with the fact-finder or examining trial lawyer as a sign of brazenness, or an indication that the witness is attempting to boldly challenge the fact-finder, and thus as a cue to the witness's deceit. The witness, conscious of this behavioural cue and in accordance with her cultural background, is careful to avoid making too much eye contact. But the Western fact-finder, operating under a different set of cultural deception cues, perceives the witness as being deceptive.<sup>30</sup>

In the Australian context, Giles observes that, contrary to what might be considered "typical" Western demeanour, Aboriginal speech habits involve silences, indirect answers and negative answers that might incorrectly be understood as evasion, confusion or guilt. Aboriginal culture promotes gratuitous concurrence.<sup>31</sup> People of Asian heritage show similar cultural courtesies. They might agree to various propositions without genuinely accepting or understanding the question asked, and engage in embarrassed laughter. These traits are exacerbated during examination-in-chief and cross-examination, particularly during questioning on sensitive issues.<sup>32</sup>

In a ground-breaking study of cross-cultural lie detection, Charles Bond discovered that there was a significant breakdown in lie-detection accuracy across

27 2000 1 SA 339 (CC) para 79.

28 Barkai "Nonverbal communication from the other side: Speaking body language" 1990 *San Diego LR* 116.

29 *Idem* 116–117. An obvious cultural conflict could come into play during criminal sentencing. A fact-finder might expect an accused to look at her when given the opportunity to speak prior to sentencing. She might interpret a failure on the part of accused to look at her while speaking to be a sign of disrespect. It is also quite possible, however, that the accused might be from a culture in which it is considered a sign of disrespect to look at someone of a higher status, especially when the accused is about to be disciplined. *Idem* 117.

30 Rand 2000 *Connecticut LR* 18.

31 Giles "The assessment of reliability and credibility" 1996 *The Judicial R* 292.

32 Andrewartha 2008 *Psychiatry, Psychology and Law* 91.

cultures, most likely as a result of the incorrect use of deception cues.<sup>33</sup> The study involved a comparison of students at Texas Christian University in the United States and Yarmouk University in Jordan. It attempted to determine whether observers from one culture would be able to detect deceit in speakers of another culture.<sup>34</sup>

The mono-cultural findings – American subjects judging American speakers and Jordanian subjects judging Jordanian speakers – were, as expected, consistent with the normal deception dynamic, in which subjects were accurate approximately at chance levels or slightly above.<sup>35</sup> However, the most salient finding of the study was that cross-cultural lie detection was significantly less accurate than mono-cultural detection – below chance levels for both Americans and Jordanians.<sup>36</sup>

Another complicating factor in cross-racial lie detecting is unconscious racial stereotyping (also referred to as implicit racial bias).<sup>37</sup> Social science research has shown that the effects of racial stereotypes are so strong that they can influence the decision-making of even the most well-meaning and consciously progressive individuals. This is not conscious racism, but the effect of social conditioning and stereotyping that unconsciously and automatically forces the observer to see events in a particular fashion.<sup>38</sup> In the American context, Turner elaborates:<sup>39</sup>

“If whites are predisposed to regard blacks as more threatening, unfriendly, and culpable, their bias can affect information processing at every level of decision making. This effect is unknown to the [fact-finder] because she has every reason to believe that the ease with which her story forms is due to the strength of the trial evidence.”

#### 4 WHY LIE DETECTING IN COURT IS MORE DIFFICULT THAN IN THE LABORATORY

Psychologists are appropriately concerned about whether laboratory conditions sufficiently relate to “real life”, meaning the unstructured, spontaneous interactions of daily life in which deception commonly occurs.<sup>40</sup> However, courtrooms have more in common with laboratories than they do with “real life”. Courtroom testimony, similar to subjects’ interviews in the experimental setting,

33 Bond *et al* “Lie detection across cultures” 1990 *J of Nonverbal Behavior* 191.

34 *Idem* 192–194.

35 Americans had an accuracy rate of 54.90% and Jordanians of 57.18%. *Idem* 195.

36 49.99% for Americans judging Jordanian subjects, and 48.75% for Jordanians judging Americans. *Ibid.*

37 See generally Gravett “The myth of objectivity: Implicit racial bias and the law (part 1)” (2017) *PELJ* 1–25; Gravett “The myth of objectivity: Implicit racial bias and the law (part 2)” (2017) *PELJ* 1–25.

38 Rand 2000 *Connecticut LR* 41.

39 Turner “What’s the story? An analysis of juror discrimination and a plea for affirmative jury selection” 1996 *American Criminal LR* 301. The social psychologist Patricia Devine has shown that individual responses to stereotypes and the cognitive processing that is activated as a result of the stereotype are automatic and do not require conscious effort. Even for “low prejudice individuals” – people who reject the stereotypes as appropriate bases for evaluating and processing information – the activation is automatic. Devine “Stereotypes and prejudice: Their automatic and controlled components” 1989 *J of Personality & Social Psychology* 8.

40 Zuckerman *et al* 1981 *Advances in Experimental Social Psychology* 39–40.

is “non-spontaneous, highly structured, self-conscious and public”.<sup>41</sup> Respondents and subjects in the experiments are strangers who are assigned task-oriented roles analogous to that of witnesses and fact-finders at trial.<sup>42</sup>

Notwithstanding these similarities, there are several reasons for believing that credibility determinations based on demeanour in court are significantly more difficult than in the laboratory setting.<sup>43</sup> Firstly, in actual trial testimony, witnesses – whether truthful or deceitful – likely put considerably more effort into rehearsing and polishing their testimony, and being well groomed for a convincing performance, than would subjects in an experimental setting.<sup>44</sup> Actual witnesses’ perceived credibility is often greatly enhanced by extensive consultation with, and thorough preparation by, the trial attorney calling that witness.<sup>45</sup> Such rehearsal of actual courtroom testimony is likely to reduce the fact-finder’s ability to distinguish truth from falsehood based upon a witness’ demeanour.<sup>46</sup> Most often the picture is one of a complete stranger to the fact-finder, who is subjected to:<sup>47</sup>

“[F]riendly and overtly hostile interrogation in turn while being interrupted from time to time and instructed in what must seem a peculiarly artificial manner. Ordinary, comfortable locutions appear out of place. Control of the narrative is taken away from the narrator. Nothing is conducive to spontaneity.”

Secondly, because the accepted supposition is that a particular type of demeanour implies deception, trial attorneys attempt to provoke such behaviour in opposing witnesses. For example, they might ask particular types of questions to deliberately elicit behavioural cues of nervousness or discomfort in the witness.<sup>48</sup> Trial lawyers capitalise on the prevalent assumptions about demeanour by focusing on aspects of behaviour that are popularly *perceived* as accurate indicators of deception.<sup>49</sup>

Thirdly, testifying at trial is a much more anxiety-provoking undertaking than telling a story in the research context.<sup>50</sup> Courtrooms can be quite confrontational, artificial and unfamiliar to most lay witnesses.<sup>51</sup> The courtroom is a setting for high-motivation deception, that is to say, lies told in court might have significant consequences.<sup>52</sup> The high stakes of the trial raises the general level of anxiety of

41 Wellborn 1990–1991 *Cornell LR* 1079.

42 *Ibid.*

43 In fact, the existing psychological literature indicates that nonverbal cues do not enhance the accuracy of credibility determinations under trial conditions. For example, one early study that re-created substantially all the conditions of trial found that demeanour had negative effects on subjects’ ability to determine sincerity. Marston “Studies in testimony” 1924 *J of Criminal L and Criminology* 22–26.

44 Pager 2005 *Williamette LR* 383.

45 *Ibid.*

46 The interrogation of witnesses, whether in examination-in-chief or cross-examination, is usually tightly controlled. Witnesses are generally therefore not allowed to exhibit their individuality, personality or spontaneity. Stone 1991 *Criminal LR* 825.

47 Uviller 1993 *Duke LJ* 780.

48 Blumenthal 1993 *Nebraska LR* 1170.

49 *Idem* 1170–1171.

50 Pager 2005 *Williamette LR* 383.

51 Andrewartha 2008 *Psychiatry, Psychology and Law* 92.

52 Blumenthal 1993 *Nebraska LR* 1196.

truthful and deceitful witnesses alike.<sup>53</sup> In fact, the research bears out that, in the context of high stakes lies, no clear difference between the behavioural cues of truthful and deceptive speakers emerges.<sup>54</sup> As discussed in part 1 of this contribution there is an enduring *nexus* between outward signs of anxiety and the *appearance* of deception.<sup>55</sup> Studies have shown that emotionally-aroused truthful subjects exhibit more cues connoting deception than do calm and collected liars.<sup>56</sup> This is in contrast with the common stereotype that signs of nervousness are taken to be key indicators of deception, whereas comfort is associated with honesty.<sup>57</sup>

Moreover, the research reveals that a witness's head and body movements *decreased* significantly during high-motivation deception.<sup>58</sup> Thus, if a lie is of great importance to the witness, she can effectively control those so-called "tell-tale" behavioural signs of deception that most observers would be looking for and that are easily masked or controlled.<sup>59</sup> Indeed, compared to truthful communicators, deceitful communicators generally nod and gesture less, lean forward less, speak less, speak more slowly, smile more and exhibit pleasant facial expressions.<sup>60</sup>

Fourthly, most fact-finders, in an admirable attempt to be scrupulously fair to the witness, will at the outset of the witness's testimony presume that the witness is honest and answers the questions put to her truthfully. Unfortunately, the research demonstrates that when the fact-finder operates under such an assumption (the so-called "truth bias"),<sup>61</sup> her reliance on the face for cues to the witness's

53 Pager 2005 *Williamette LR* 383. It is patently obvious that the confrontational "high stakes" criminal justice setting, throughout the investigation and trial phases, is likely to have a significant bearing on an accused's mental state. This is expected to be reflected in her manner of verbal and nonverbal communication, and to interfere with underlying psychological and neurobiological processes. Andrewartha 2008 *Psychiatry, Psychology and Law* 93.

54 Vrij and Granhag "Eliciting cues to deception and truth: What matters are the questions asked" 2012 *J of Applied Research in Memory and Cognition* 111.

55 Pager 2005 *Williamette LR* 383.

56 Frank and Ekman "The ability to detect deceit generalizes across different types of high stakes lies" 1997 *Personality and Social Psychology* 1430–1431.

57 Andrewartha 2008 *Psychiatry, Psychology and Law* 92.

58 Liars tend to make fewer illustrators (hand and arm movements that modify or supplement what is being said) and fewer hand and finger movements (non-functional movement of the hands and fingers without moving the arms). The decrease in these movements might be the result of the increased cognitive load demanded by the act of lying. Increased cognitive load also likely explains why liars blink their eyes less (whereas nervousness not associated with lying leads to an increase in blinking). Vrij and Mann "Police use of nonverbal behavior as indicators of deception" in Riggio and Feldman (eds) *Applications of non-verbal communication* (2005) 68, 71.

59 Zuckerman *et al* 1981 *Advances in Experimental Social Psychology* 12–14.

60 LeVan 1984 *Law & Psychology R* 89. See also Remland *The importance of nonverbal communication in the courtroom* (1993) 4, paper presented at the 84th Annual Meeting of the Eastern Communication Association held in New Haven, Connecticut, 29 April 1993 to 2 May 1993.

61 The source of the truth bias most likely lies in a version of the availability heuristic. Because most statements encountered in ordinary life are true, people tend to assume that statements are more likely than not to be accurate. Minzner 2008 *Cardozo LR* 2570. With regard to cognitive biases and heuristics in general, see Gravett "The myth of rationality: Cognitive biases and heuristics in judicial decision-making" (2017) *SALJ* 53.



underlying thoughts increases.<sup>62</sup> This is clearly detrimental to the successful detection of deception as facial cues are highly misleading identifiers of deception.<sup>63</sup>

Lastly, trial lawyers have always had bounteous faith in cross-examination as it is considered, in Wigmore's words, "beyond doubt the greatest legal engine ever invented for the discovery of truth".<sup>64</sup> However, the question arises whether cross-examination enhances demeanour as a barometer of sincerity.<sup>65</sup> McCormick, for example, pondered "whether it is not the honest but weak or timid witness, rather than the rogue, who most often goes down under the fire of a cross-examination?"<sup>66</sup>

There is psychological evidence to support McCormick's hypothesis. When subjects are questioned by suspicious interviewers, observers tend to interpret their responses as deceptive even when they are honest, which significantly increases detection errors. Two phenomena contribute to these errors. Firstly, the suspicious interrogation distorts observers' perceptions. Secondly, as noted above, the interrogation increases subjects' levels of stress, which in turn induces behaviours likely to be interpreted as deceptive (ie "Othello's error").<sup>67</sup>

## 5 APPELLATE DEFERENCE TO CREDIBILITY FINDINGS OF FIRST INSTANCE

Decision-makers at the appellate level can functionally be described as "transcript reviewers", because they rely on a written record of the spoken evidence, rather than on personal observation of the witnesses.<sup>68</sup> Transcripts are most often strictly limited to the verbal content of testimony.<sup>69</sup>

Appellate courts across the common law world have traditionally accorded generous deference to the factual findings of trial courts, especially where those findings involve determinations of the credibility of oral testimony:<sup>70</sup>

"One thing is clear, not so much as a rule of law but rather as a working rule of common sense. A trial Judge has . . . a very great advantage over an appellate Court; evidence of a witness heard and seen has a very great advantage over a transcript of that evidence; and a Court of Appeal should never interfere unless it is satisfied both that the judgment ought not to stand and that the divergence of view between the trial Judge and the Court of Appeal has not been occasioned by any demeanour of the witnesses or truer atmosphere of the trial (which may have eluded an appellate Court) or by any other of those advantages which the trial Judge possess."

62 "A priori belief that the target is telling the truth increases reliance on the face for cues to a speaker's underlying thoughts relative to other indicia." Zuckerman *et al* "Nonverbal strategies for decoding deception" 1982 *J of Nonverbal Behavior* 171.

63 When an observer is suspicious, however, her attention tends, consciously or not, to be drawn to the vocal and paralinguistic cues that actually aid the detection of deception. Blumenthal 1993 *Nebraska LR* 1200.

64 Wigmore *Evidence* (1970) s1367.

65 Wellborn 1990–1991 *Cornell LR* 1080.

66 McCormick *Evidence* (1984) s245.

67 Ekman *Telling lies* (1987) 162–189; Bond and Fahey "False suspicion and the misperception of deceit" 1987 *British J of Social Psychology* 41.

68 Fisher 2014 *New Zealand LR* 585.

69 Only rarely will a fact-finder or trial lawyer read a witness's non-verbal cues into the record (eg: "The witness indicated with his hands a distance of approximately 50 cm."). *Ibid*.

70 *Kinloch v Young* 1968 2 Lloyd's Rep 431.

Of course, the assumption underlying appellate deference to findings of fact by the trial court is that a written transcript cannot reflect all the subtleties of live testimony, such as the inflection of the witness's voice or a particular gesture that may completely change the meaning of the testimony.<sup>71</sup> Because of the unexamined assumption that there must be incomparable advantages to observing a witness, appellate courts have erroneously believed that they simply could not make credibility assessments as accurately as trial courts.<sup>72</sup>

However, the empirical evidence from seven decades of social psychological research is clear: The accuracy of credibility assessments based solely upon reading a trial transcript is significantly *better* than assessments based on watching live testimony.<sup>73</sup> The likely reasons are that transcripts eliminate distracting, misleading and unreliable nonverbal data, and enhance the most reliable data – verbal content.<sup>74</sup> Thus, strictly with regard to the accuracy of credibility assessments, a transcript-reviewer is not at any disadvantage because the witness's demeanour, itself, adds precious little to the other information available from the transcript.<sup>75</sup> In fact, in many instances personal presence while the witness testifies might even distract from the content that matters.<sup>76</sup>

If, as empirical research indicates, a transcript is in fact a better basis for making a credibility assessment than live testimony, appellate courts could presumably make credibility determinations *de novo* without any sacrifice of accuracy.<sup>77</sup> It does not, however, follow from recognising the demeanour fallacy that appellate courts should start overturning trial courts' factual findings more frequently. Although an appellate court may always be "in as good a position to decide as the trial court" in the sense that the traditionally disparaged "cold record"<sup>78</sup> may in fact be a better basis for decision than the trial court's traditionally exalted opportunity to observe the witness, there are sound policy reasons for appellate courts' reluctance to interfere with first instance factual determinations, save in instances of clear error.<sup>79</sup>

The first is public confidence in fact-finders of first instance. It would do little for confidence in the work of trial courts if appellate courts placed scant weight on the decisions at first instance and started the fact-finding process *de novo*.<sup>80</sup> Trials serve purposes beyond the accurate determination of facts. It is arguably more important that the results of litigation be accepted than that they be accurate. Accuracy is merely one factor – albeit an important one – in acceptability.

71 Timony "Demeanor Credibility" 2000 *Catholic University LR* 903.

72 Zeffertt and Paizes *The South African law of evidence* (2009) 149.

73 Hocking *et al* 1979 *Human Communication Research* 42–43; Blumenthal 1993 *Nebraska LR* 1203.

74 Wellborn 1990–1991 *Cornell LR* 1091.

75 Pager 2005 *Williamette LR* 384.

76 Fisher 2014 *New Zealand LR* 591.

77 Wellborn 1990–1991 *Cornell LR* 1095.

78 Judge Jerome Frank likened even "[t]he best and most accurate record" with "a dried peach; it has neither the substance nor the flavor of the fruit before it has dried". Frank J as quoted in Sahn "Demeanor evidence: Elusive and intangible imponderables" 1961 *Am Bar Ass J* 580.

79 *S v Thebus* 2003 2 SACR 319 (CC).

80 Fisher 2014 *New Zealand LR* 593–594.

Live testimony might be essential to perceptions of fairness, regardless of the true correlation between live testimony and accuracy of outcome.<sup>81</sup>

A second reason for a reluctance to intervene is efficiency. Society cannot afford the limitless pursuit of justice. As a United States court of appeals put it, the scope of appellate review should<sup>82</sup>

“encourage appeals that are based on a conviction that the trial court’s decision has been unjust; it should not . . . encourage appeals that are based on the hope that the appellate court will second-guess the trial court”.

The result of turning appeals into rehearings in the literal sense would of course be to multiply appeals exponentially, with attendant expense and delay.<sup>83</sup> It would also promote uncertainty, because a litigant could never be sure on what version of the facts a point of law was decided. Duplicating an exercise already undertaken in the trial court would not only be an unwarranted cost on the parties and the public, but it would also be a wholly inefficient allocation of judicial resources.<sup>84</sup>

A third reason for giving first-instance decisions presumptive force is finality.<sup>85</sup> There is a public interest in *finis litium*. If there is no rebuttable presumption that appeals will be upheld, a losing litigant would have every incentive of starting afresh before an appellate court. After all, the odds of success or failure would not be any worse than they had been when the trial commenced in the lower court.<sup>86</sup> Raising the threshold before the appellant could prevail on appeal discourages those appeals based solely on the hope that, in an area of reasonable disagreement, there will always be the prospect that the second decision-maker would choose the other side. *De novo* hearings on appeal would create a paradise for vexatious litigants, but a prohibitively expensive burden on everyone else.<sup>87</sup>

There is a litany of reasons for appellate courts declining to intervene with factual determinations at first instance. Nonetheless, that litany should no longer include trial courts’ supposed advantage in assessing witnesses’ credibility from their demeanour.<sup>88</sup> Cynics might argue that myth is the mortar of the justice system anyway, and that as long as the assumptions drive a mechanism that generally turns out results accepted by the public, the system works well.<sup>89</sup> Greater – and needless – evil is done, the argument goes, by undermining the props of a working system than living by its hidden flaws.<sup>90</sup> Thus, in the cynics’ view, as long as appellate courts are slow to interfere, the reasons for their reluctance matter little.

However, the articulation of faulty review criteria produces faulty outcomes. In a case with relatively little oral evidence, an appellate court may hasten to substitute its own opinion for factual determinations of the court of first instance. Conversely, there is a risk that, in a case with abundant oral evidence, the

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81 Wellborn 1990–1991 *Cornell LR* 1092.

82 *Lundgren v Freeman* 1962 307 F2d 114 (9th Cir).

83 Wright and Miller *Federal practice and procedure* (1971) 748.

84 Fisher 2014 *New Zealand LR* 595.

85 *Ibid.*

86 *Ibid.*

87 *Idem* 596.

88 *Ibid.*

89 Uviller 1993 *Duke LJ* 777.

90 *Ibid.*

appellate court would be too slow to intervene because of the mistaken assumption that the fact-finder of first instance enjoyed advantages afforded by witnesses' demeanour not available on appeal.<sup>91</sup>

## 6 CONCLUSION

The notion that observing the demeanour of a witness significantly assists the fact-finder to determine the truthfulness of that witness's testimony appears to be as ancient as the concept of testimony itself. The supposed ability of fact-finders to discern sincerity or deception from nonverbal manifestations has played an important role in legal doctrine.<sup>92</sup>

If ordinary people did in fact possess the capacity to detect falsehood or error on the part of others by observing their nonverbal behaviour, then it should be possible, indeed easy, to demonstrate such a capacity under controlled conditions.<sup>93</sup> Indeed, social psychology has engaged in empirical studies of the act of deception and its detection for well nigh seven decades. However, in these scientific studies, not only do subjects rarely perform much better than chance in distinguishing truth from falsehood, they believe that they are better lie detectors than they in fact are.<sup>94</sup> With remarkable consistency these studies have produced findings that run counter to both popular and jurisprudential attitudes about the methods for identifying a liar.<sup>95</sup> There is no correlation whatsoever between behavioural cues popularly perceived to be associated with lying and those that are in fact displayed during *actual* deception.

In fact, it has been shown that those behaviours that are commonly believed to indicate deception – primarily those involving visual *indicia* such as gaze-avoidance, postural shifts and head movements – actually occur less often in those attempting to deceive.<sup>96</sup> To the extent that people can detect lying in another, they do so primarily by paying close attention to the verbal content of what the other says, not by observing demeanour. Also, anxiety and relaxation, even if detected correctly, cannot be relied upon to indicate veracity. Truthful witnesses might be anxious, and liars might be, or appear to be, relaxed.

The question that naturally arises is: What implications does this research have for the law?<sup>97</sup> For one thing, the legal system must acknowledge that the prevailing research results overwhelmingly indicate that the assumption that “ordinary people . . . will make significantly more accurate judgments of credibility if they have the opportunity to witness the demeanour of a witness than if they do not”<sup>98</sup> is simply false. In fact, the converse is true: Observers can be misled and fooled into making significantly less accurate judgments as to speakers' deceit when they watch witnesses' behaviour.<sup>99</sup>

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91 Fisher 2014 *New Zealand LR* 596.

92 Wellborn 1990–1991 *Cornell LR* 1104.

93 *Ibid.*

94 Fisher “The jury's rise as lie detector” 1997 *Yale LJ* 707.

95 De Paulo *et al* “Deceiving and detecting deceit” in Schlenker (ed) *The self and social life* (1985) 323; Zuckerman *et al* 1981 *Advances in Experimental Social Psychology* 1.

96 Blumenthal 1993 *Nebraska LR* 1200.

97 *Idem* 1201.

98 Wellborn 1990–1991 *Cornell LR* 1075.

99 Blumenthal 1993 *Nebraska LR* 1201.

The question is of course not whether fact-finders *should* make findings on credibility. The assessment of credibility is fundamental to the work of judges and other fact-finders. Rather, the question is what sources might be helpful to fact-finders in making findings with regard to credibility. The one source that fact-finders cannot usefully resort to is so-called “demeanour evidence”. As I have emphasised throughout this contribution, witnesses’ credibility simply cannot be accurately judged through their demeanour.

The fact-finder does not have any observational advantages when assessing a witness’s credibility. Appellate judges, confined to reading the trial transcript, will perform at least as well, if not significantly better. However, the fact that the law may have been wrong about the value of witness demeanour does not imply dramatic legal changes. Central procedural institutions are not threatened by the recognition that the law’s assumptions might be mistaken. Moreover, to conclude that a transcript may be as good a basis for credibility determinations as seeing and hearing the witness does not justify *de novo* appellate review of facts.

Recognising that so-called “demeanour evidence” lacks any reliability whatsoever in making credibility assessments does, however, require that the opportunity of the fact-finder at first instance to observe the witness’s demeanour be expunged from the list of reasons for the reluctance of appellate courts to review trial courts’ findings of fact. Adequate grounds – unrelated to the presumptive “utility” of demeanour – exist to restrict appellate review.

When a conventional jurisprudential principle is demonstrably unhelpful, despite all appeals to precedent and tradition, it should be reassessed in light of data that disprove it.<sup>100</sup> Experimental evidence strongly suggests that so-called “demeanour evidence” – as a means of accurate and reliable credibility assessment and decision-making in litigation – is essentially worthless. Human lie detection is fraught with difficulty. The problem is exacerbated by unconscious biases and social and cultural stereotypes, as well as the contextual impact of litigation on people’s otherwise normal social interaction.<sup>101</sup>

Thus, judicial demeanour conclusions do not – and cannot ever – have any sound basis in fact.<sup>102</sup> It is chilling to consider the many miscarriages of justice that must have been caused by reliance on so-called “demeanour evidence” over the centuries.

The time has come to excise the concept of demeanour evidence from the law of evidence in South Africa once and for all, and not simply to be cautious of it. At the very least, it seems obvious that those who are called upon to assess the veracity of evidence should be trained to keep these limitations in mind, so that fact-finders at first instance do not rely, at least consciously, on demeanour to make findings of witnesses’ credibility. The fact that a witness’s demeanour does not provide any reliable guidance as to the witness’s veracity currently does not – but should – be emphasised in the training of judges, arbitrators and other professional fact-finders.<sup>103</sup>

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100 *Idem* 1204.

101 Andrewartha 2008 *Psychiatry, Psychology and Law* 95.

102 Fisher 2014 *New Zealand LR* 583.

103 *Idem* 599–600.