

Spotting the liar in the witness box – How valuable is demeanour evidence really? (1)

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OPSOMMING

Herkenning van die leuenaar in die getuiebank – Hoe waardevol is gedragsgetuienis werklik?

Daar is eenvormigheid in die empiriese bevindings van die sosiale wetenskap dat die meeste mense eenvoudig nie baie goed vaar om uit ander se gedrag te oordeel of hulle oneerlik is al dan nie, alhoewel die meeste mense baie selfvertroue het in hulle vermoë om 'n akkurate oordeel te kan vel oor 'n ander se eerlikheid op grond van hulle gedrag. Hierdie beskikbare wetenskaplike navorsingsdata het meestal ongemerk by die reg en regspleging verby gegaan. Alhoewel Suid-Afrikaanse appèlhowe 'n gesonde skeptisisme toon ten opsigte van die akkuraatheid van sogenaamde “gedragsgetuienis”, is dit 'n feit dat dit steeds erkenning geniet as 'n vorm van getuienis in die Suid-Afrikaanse reg. Dit is hoog tyd dat die reg kennis neem, en die absurdheid bevestig, van 'n regsbeginnel wat so blindelings berus op 'n fundamentele wanopvatting oor menslike gedrag.

“O, what a goodly outside falsehood hath!”¹

1 INTRODUCTION

The trial of a case in the adversary mode relies heavily on the skill of the fact-finder to recognise truth and falsehood in the accounts of witnesses.² However, the trial as we know it is a product of history rather than deliberate design. No attempt was ever made to fashion a procedure that would present the facts in their most accurate form.³ Thus it has come to be that the premise of several legal rules and institutions is that the opportunity of a fact-finder to observe the demeanour of a witness is of great value in deciding whether or not to believe the witness's testimony.⁴ Stated differently, the premise is that ordinary people

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1 Shakespeare *The merchant of venice* act 1 scene 3 line 101.

2 Uviller “Credence, character and the rules of evidence: Seeing through the liar's tale” 1993 *Duke LJ* 776.

3 Re “Oral v written evidence: The myth of the ‘impressive witness’” 1983 *Australian LJ* 679.

4 Wellborn “Demeanor” 1990–1991 *Cornell LR* 1075. As expounded upon below, this is, even under the most favourable circumstances, a highly problematic undertaking. “Indeed, the adversarial trial might be fairly described as a structured process for the determination of the credibility of strangers, many of whom will, for one reason or another, try to deceive those who rely upon their word.” Uviller 1993 *Duke LJ* 776.

generally will make significantly more accurate judgments of credibility if they had the opportunity to view a speaker's demeanour, than if they did not. The legal realist Jerome Frank wrote:⁵

"All of us know that, in every-day life, the way a man behaves when he tells a story – his intonations, his fidgets or composure . . . the use of his eyes, his air of candor or of evasiveness – may furnish valuable clues to his reliability."

For centuries, jurists have used these and similar *indicia* as axiomatic in credibility judgments, implicating demeanour both directly and indirectly in diverse areas of the law.⁶ However, a well-developed body of behavioural science research spanning some seven decades overwhelmingly demonstrates that ordinary people, including fact-finders, have no particular talent for spotting lies.⁷ A review of the social science literature illustrates how ordinary observers use – or, more accurately, misuse – accepted folklore and so-called "common sense" in an attempt to detect falsehood in speakers, and how much of the accepted folklore and common sense concerning the human ability to detect deceit is misguided and inaccurate.⁸

Indeed, most subjects in controlled studies detect deception as well as they would have had they simply flipped a coin. For example, observers focus on the so-called "telltale" cues to deception – such as a speaker's inability to maintain a steady gaze – that are more often a sign of discomfort rather than deception. Moreover, the savvy liar, familiar with the same folklore, is able to suppress those cues to fool the observer. Specifically, observers tend to focus their attention on facial expressions – which are highly manipulable and controllable – instead of vocal intonations, which are far less controllable and more revealing of attempts to deceive.⁹

This inability of most ordinary people to detect deception accurately has even greater implications in a heterogeneous society, such as ours, in which fact-finders¹⁰ often have to overcome racial and cultural differences in determining witness credibility.¹¹ An accuracy rate in detecting deception that already hovers at around 50% for witnesses of the same race as the fact-finder decreases significantly in a cross-racial context. The research bears out that people of different races sometimes rely on contradictory cultural cues to detect deception.¹²

5 Frank *Courts on trial: Myth and reality in American justice* (1949).

6 Blumenthal "A wipe of the hands, a lick of the lips: The validity of demeanour evidence in assessing witness credibility" 1993 *Nebraska LR* 1166. It should be noted that the basis for many of our rules of evidence may be found in observation of human behaviour. For example, the common law's permissible inference of guilt by flight, disqualification for infants, hearsay exceptions for trustworthiness by admission of dying declarations and statements made against a party's interest, are all based in part on behavioural justifications. Timony "Demeanor Credibility" 2000 *Catholic Univ LR* 937.

7 Fisher "The jury's rise as lie detector" 1997 *Yale LJ* 707; Rand "The demeanor gap: Race, lie detection, and the jury" 2000 *Connecticut LR* 3.

8 Rand 2000 *Connecticut LR* 6.

9 *Idem* 3.

10 I use the generic descriptor "fact-finder" to include the trial judge, the magistrate, and any other presiding official in a judicial or administrative adjudicatory proceeding, such as arbitration.

11 Rand 2000 *Connecticut LR* 4.

12 For example, a witness of one cultural background might connote sincerity through indirect, non-assertive speech patterns, but a fact-finder of a different cultural background might misread these cues to indicate dissembling. *Ibid*.

The purpose of this contribution is to examine the value of a witness's demeanour as a guide to the truth of testimony in light of the pertinent social science, and to suggest an appropriate legal response.

2 HISTORY OF DEMEANOUR EVIDENCE AND ITS ROLE IN THE LAW OF EVIDENCE

Every verbal message (*what* we say)¹³ is accompanied by nonverbal cues – *how* we say it and *what we look like* when we say it.¹⁴ The nonverbal cues consist of body language (kinesics) – such as posture, body, hand and arm movements, facial gestures, eye contact and physical appearance generally (dress and grooming habits); and delivery (paralinguistics) – such as tone of voice, volume and inflection.¹⁵ So-called “demeanour evidence” consists of everything that the factfinder can readily discern about a witness's performance, excluding the semantic content of her testimony.¹⁶ In short, in court demeanour comprises “all matters which cold print do not preserve”.¹⁷

It is clear that assessment of demeanour requires direct observation of the witness. This can be as powerful as it is simplistic. For example, in one of the legendary American trial lawyer Clarence Darrow's cases, the prosecution called, as a key witness, a man with a rather unappealing appearance. Darrow wrote:¹⁸

13 The verbal message is the speaker's words that can be transcribed as text.

14 See Gravett “Subconscious advocacy — part 1: Nonverbal communication in the courtroom” 2018 *Stell LR* (forthcoming).

15 Mehrabian *Nonverbal communication* (1972) 8. These categories of non-verbal cues — face, body and voice — comprise what lawyers describe as “demeanour”. Fisher “The demeanour fallacy” 2014 *New Zealand LR* 577; Wellborn 1990–1991 *Cornell LR* 1078.

16 Sanchirico “Evidence, procedure, and upside of cognitive error” 2004 *Stanford LR* 310. In the *SARFU* case, the Constitutional Court described demeanour as “the subjective manner in which a witness testifies orally, as opposed to the objective content of the evidence so given.” 2000 1 SA 339 (CC) para 77. In *Cloete v Birch* 1993 2 PH F17 (E), the court held the demeanour of witnesses to include “the manner of testifying, their behaviour in the witness-box, their character and personality, and the impression they create . . .”

17 Timony 2000 *Catholic Univ LR* 907 citing *Broadcast Music Inc v Havana Madrid Restaurant Corp* (1949) 175 F2d 80. Lord Bingham has described “demeanour” as a witness's “conduct, manner, bearing, behaviour, delivery, inflection; in short, anything which characterises his mode of giving evidence but does not appear in a transcript of what he actually said” (Bingham “Assessing contentious eyewitness evidence: A judicial view” in Heaton-Armstrong *et al* (eds) *Witness testimony: Psychological, investigative and evidential perspectives* (2006) 333). Marcus Stone uses the word “demeanour” as “excluding the content of evidence”, and including “every visible or audible form of self-expression manifested by a witness, whether fixed or variable, voluntary or involuntary, simple or complex” (Stone “Instant lie detection? Demeanour and credibility in criminal trials” 1991 *Criminal LR* 821). *Black's law dictionary* defines “demeanour” as “the tone of voice in which the witness' statement is made, the hesitation or readiness with which his answers are given, the look of the witness, his carriage, his evidence of surprise, his gestures, his zeal, his bearing, his expression, his yawns, the use of his eyes, his furtive or meaningful glances, or his shrugs, the pitch of his voice, his self-possession and embarrassment, his air of candor or seeming levity” (*Black's law dictionary* (1990) 430 citing *Rains v Rains* 1939 8 A2d 717 (NJ)).

18 As cited in Imwinkelreid “Demeanor impeachment: Law and tactics” 1985 *American J of Trial Advocacy* 226–227.

“He was a squat, heavy-set man of medium height . . . His swollen face, bleary eyes, puffy eyelids, and reddish-purple nose marked the habitual drunkard. His shaggy . . . hair had been stranger to brush and comb for so long as to have become tangled and matted. His clothes . . . were covered with dirt and grease. His huge hands . . . were covered with grime.”

Darrow’s entire cross-examination of this witness consisted of a request that the witness stand up and turn around in the witness box. Then, Darrow simply said: “That’s all. I just wanted the jury to get a good look at you.”¹⁹

The belief in the usefulness of observing witnesses’ demeanour in assessing their credibility at trial is deeply rooted in the history of jurisprudence. Relying on a principle almost 3 000 years old, the legal community has instilled in its juristic framework the premise that “the opportunity . . . to view the demeanour of a witness is of great value” in deciding whether the witness is truthful.²⁰ Demeanour evidence comes to us up the long, winding staircase of the common law.²¹ The principle can be traced as a judicial axiom from the time of the early Roman *judex*,²² to the thirteenth and fourteenth century Postglossators,²³ through the earliest English common law,²⁴ and eventually to the evidentiary foundations of South African law.²⁵

Demeanour evidence is a barnacle firmly fastened to various legal principles.²⁶ Wigmore wrote that a witness’s demeanour “without any definite rules as to its significance, is always assumed to be in evidence.”²⁷ The value that the law attaches to the demeanour of witnesses as an indicator of credibility appears to be the undergirding evidentiary requirement for the common law rules that evidence be given orally rather than in writing; that witnesses give their own evidence in the absence of special reasons justifying hearsay; and that accusers personally confront the accused.²⁸ It underpins the deference accorded by reviewing courts to factual determinations of trial courts.²⁹ More recently, it has also become

19 As cited in *idem* 227.

20 Wellborn 1990–1991 *Cornell LR* 1075.

21 Timony 2000 *Catholic Univ LR* 943.

22 In early Roman legal practice, witnesses testified orally before the judge. *Idem* 916.

23 The Postglossators, sitting as judges, maintained that the “indispensable requisite for the judge to form his opinion on the trustworthiness of witnesses was that they appear before him [sic] personally”. *NLRB v Dinion Coil Co* 1952 201 F2d 484 (2d Cir, Frank J). The oral testimony was not recorded, but the judge put on the record the “personal impressions made upon the judge by the witnesses, their way of answering questions, their reactions and behavior in Court . . . [such as,] that the witness stammered, hesitated in replying to a specific question, or showed fear during the interrogation.” *Ibid*.

24 It is believed that the first English criminal jury trial took place in 1220 at Westminster. Timony 2000 *Catholic Univ LR* 917.

25 Blumenthal 1993 *Nebraska LR* 1158.

26 *Idem* 1188.

27 Wigmore *Evidence* (1970) s 946. Judge Jerome Frank called demeanour “wordless language” (as quoted in Sahn “Demeanour evidence: Elusive and intangible imponderables” 1961 *American Bar Association J* 581).

28 Fisher 2014 *New Zealand LR* 576; Wellborn 1990–1991 *Cornell LR* 1077.

29 See, eg, *R v Dhlumayo* 1948 2 SA 677 (A); *Merchant v Butler’s Furniture Factory* 1963 1 SA 885 (N) 890B; Wellborn 1990–1991 *Cornell LR* 1077.

evident in the controversy over the concealment of witnesses' faces behind a *niqab*.³⁰

South African reviewing courts have exhibited a healthy scepticism towards the value of demeanour evidence. In *S v Kelly*³¹ the Supreme Court of Appeal expressed caution about the reliability of demeanour findings:³²

“[D]emeanour is, at best, a tricky horse to ride. There is no doubt that demeanour – “that vague and indefinable factor in estimating a witness’s credibility” . . . can be most misleading. The hallmark of a truthful witness is not always a confident and courteous manner or an appearance of frankness and candour. As was stated by Wessels JA in *Estate Kaluza v Braeuer* . . . more than half a century ago in this Court: ‘A crafty witness may simulate an honest demeanour and the Judge had often but little before him to enable him to penetrate the armour of a witness who tells a plausible story.’ On the other hand an honest witness may be shy or nervous by nature, and in the witness-box show such hesitation and discomfort as to lead the court into concluding wrongly, that he is not a truthful person.”

In *President of the Republic of South Africa v South African Rugby Football Union*³³ the Constitutional Court likewise exhorted that “the truthfulness or untruthfulness of a witness can rarely be determined by demeanour alone without regard to other factors including, especially, probabilities”.³⁴

Notwithstanding the circumspection with which our appellate courts approach so-called “demeanour evidence”, however, the fact remains that the demeanour of a witness continues to be an important fixture of the South African law of evidence. The value of observing a witness’s demeanour is perennially raised in appeals on questions of fact.³⁵ In the *SARFU* case, the Constitutional Court maintained that the fact-finder at first instance has an “advantage” over appellate courts because of the opportunity of “seeing and hearing the witness testify”.³⁶ Recently, in *Monyepao and Another v S*³⁷ the court stated that “[a] trial court, ordinarily, has the undisputed advantage of observing the demeanour of the witness when giving testimony”.³⁸

30 See, for example, Naudé “Face-coverings, demeanour evidence and the right to a fair trial: Lessons from the USA and Canada” 2013 *CILSA* 166–184; Murray “Confronting religion: Veiled Muslim witnesses and the confrontation clause” 2010 *Notre Dame LR* 1727–1757; Williams “The veiled truth: Can the credibility of testimony given by a *niqab*-wearing witness be judged without the assistance of facial expressions” 2008 *Univ of Detroit Mercy LR* 273–291.

31 1980 3 SA 301 (A) 308.

32 *Idem* 308B–D.

33 2000 1 SA 339 (CC).

34 *Idem* para 79.

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

36 “The trial court sees and hears the witness testifying and is thus able to evaluate how a witness responds to questions and produces answers. This immediate relationship between witness and trier of fact enables the latter to assess the evidence in light of the behaviour and conduct of the witness while testifying, whereas the court of appeal is restricted to the written record of the witness’s oral testimony”: *SARFU* 2000 1 SA 339 (CC) para 77.

37 (A167/2016) 2017 ZAGPPHC 594 (19 September 2017).

38 *Idem* para 30.

In the South African law of evidence, demeanour is classified as real evidence,³⁹ and the evaluation of dememeanour evidence by the fact-finder has been held to be a matter of common sense.⁴⁰

“Nevertheless, while demeanour can never serve as a substitute for evidence, it can, and often does, ‘reflect on and enhance the credibility of oral testimony’. The experienced trial officer is well aware of this fact; it is a matter of common sense. He observes the witness closely – evasions, hesitations, and reactions to awkward questions.”

The Supreme Court of Appeal has explicitly referred to the witness’s “candour and demeanour in the witness box” as one of the factors to be taken into account in resolving factual disputes where there are “two irreconcilable versions”.⁴¹ Zeffertt and Paizes go so far as to suggest that the demeanour of a witness should be allowed “to turn the scale when the probabilities are evenly balanced”.⁴²

A fundamental principle of the common law trial system is that the fact-finder is the lie detector.⁴³ By one means or another, it is fact-finders’ duty to determine whether witnesses are telling the truth. There is no lack of tools to help them in this task of determining credibility. These include the witness’s opportunity and capacity to observe and relate to the event; the internal consistency of a witness’s account; consistency with what the witnesses has said on prior occasions; consistency with the testimony of other witnesses in the case; and the plausibility of the witness’s account.⁴⁴

The question that this contribution seeks to answer is whether these tools should continue to include the demeanour of a witness. My thesis is that all of the assumptions underlying demeanour evidence in our law – that it provides the first-instance fact-finder with an “undeniable” advantage over the appellate reviewer in assessing witness credibility; that it is a matter of common sense; in fact, even that it continues to be regarded as a legitimate form of evidence at all (albeit one to be handled with caution) – are highly problematic, and should be revisited in light of the extensive contradictory empirical social science data.

3 LIE DETECTION MYTHS AND REALITIES – THE EMPIRICAL EVIDENCE

Psychologists and other social scientists who study communication have empirically tested, as a scientific hypothesis, the legal premise underlying demeanour evidence. One branch of such research has focused on efforts to quantify experimentally the skill of ordinary subjects in judging, from a speaker’s manner and conduct, whether that speaker is telling the truth. With “impressive consistency”,⁴⁵ extensive testing of this legal precept – resulting in a substantial body of

39 It is something that the trial court observes. Schwikkard and Van der Merwe *Principles of evidence* (2016) 575.

40 *S v Kelly* 1980 3 SA 301 (AD) 308 B—G.

41 *Stellenbosch Farmers’ Winery Group v Martell et Cie* 1 SA 11 (SCA) para 5.

42 150.

43 Rand 2000 *Connecticut LR* 2: “The soul of the civil and criminal justice system . . . is the ability of [fact-finders] to ferret out truth from falsehood.” Bennett “Unspringing the witness memory and demeanour trap: What every judge and juror needs to know about cognitive psychology and witness credibility” 2015 *American Univ LR* 1333.

44 Fisher 2014 *New Zealand LR* 576–577.

45 Wellborn 1990–1991 *Cornell LR* 1075.

empirical evidence amassed in the course of seven decades of research – has repeatedly demonstrated the fallacy of according any weight to demeanour evidence in making credibility determinations.⁴⁶ Ordinary people simply cannot effectively use the demeanour of a witness in deciding whether to believe the witness or not.⁴⁷ Thus, the so-called “telltale” cues to credibility, long considered to be the core of demeanour evidence, do nothing to enhance fact-finders’ ability to discern whether a witness is telling the truth.⁴⁸ On the contrary, studies show that observation of demeanour *diminishes*, rather than enhances, the accuracy of credibility judgments.⁴⁹ In sum:⁵⁰

“[W]e put fact-finders to the intractable task of searching the faces and gestures of strangers for the signs of deceit. Our unguarded confidence that [they] are up to this task is the more remarkable for being so probably wrong.”

3.1 Research methodology

Studies generally involve variations of the following basic methodology. Researchers recruit subjects – typically undergraduate students – and under laboratory conditions the experimenters videotape these subjects telling stories that are either true or false. The video recordings are then shown to another group of students (the respondents) individually, each of whom must then judge whether the subject was truthful or deceitful, and rate his or her confidence in that judgment.⁵¹

The traditional legal perspective on the evaluation of demeanour evidence is premised on four fallacies regarding how liars and lie-detectors behave: (i) that detecting deception in another is a matter of “common sense”; (ii) that liars betray themselves through certain telltale signs in their physical demeanour; (iii) that observers know which behavioural cues to look for in evaluating speakers’

46 Blumenthal 1993 *Nebraska LR* 1159; Bennett 2015 *American Univ LR* 1339.

47 Blumenthal 1993 *Nebraska LR* 1189.

48 Bennett 2015 *American Univ LR* 1339.

49 Wellborn 1990–1991 *Cornell LR* 1075.

50 Fisher 1997 *Yale LJ* 578.

51 Kassin “Human judges of truth, deception and credibility: Confident but erroneous” 2002 *Cardozo LR* 810. Some experimenters went further and instructed undergraduate student subjects either to commit a mock crime (the “guilty” group), or to perform an innocent, but related act (the “innocent” group). Saul Kassin and Christina Fong describe the methodology of one of their experiments: “[Student subjects] were scheduled during evening hours to appear at the site of a college building. Those assigned to commit the crime were instructed to break into that building and steal the answer key to an exam. They were told that although the building would be locked, they could climb through an open window. The innocent suspects were told simply to enter through the front door (which was unlocked) to collect a questionnaire.” Kassin and Fong “‘I’m innocent!’: Effects of training on judgments of truth and deception in the interrogation room” 1999 *Law & Human Behavior* 507. Other scenarios involved vandalism, shoplifting, and snooping through confidential e-mail. In each case, the “innocent” and “guilty” subjects alike were apprehended by a security guard and taken into an interrogation room for questioning. The interrogation was performed by a respondent detective, who was blind as to either the “guilt” or “innocence” of the subjects. Each interrogation was videotaped. The student subjects were compensated for their participation if they were able to fool the detective as to their “guilt” or “innocence,” thus creating an incentive to perform convincingly. *Idem* 503–504.

truthfulness; and (iv) that observers thus have a substantially better-than-average chance of catching liars.⁵²

3.2 The common sense fallacy

For hundreds of years, fact-finders have decided the credibility of testimony based, at least in part, on the demeanour of witnesses. But, as Marcus Stone notes, “in principle and in practice, fact-finding, including the assessment of credibility, does not depend on legal rules; it begins where the law ends.”⁵³ The crucial process of assessing credibility is subjective and obscure.⁵⁴ This process is often described in such abstruse terms as requiring fact-finders to rely on their “common sense”, their “natural and acquired shrewdness”⁵⁵ and “acquired sagacity”.⁵⁶

Although “common sense” is a familiar concept to everyone, it is in itself subjective and difficult to define.⁵⁷ No doubt at some time the idea that the world was flat with a distant traveller likely to fall off the edge was a matter of common sense. The suggestion that liars shift in their seats, turn red in their faces and fail to make eye contact, are also accepted by many as a matter of common sense.⁵⁸ We are also told, for example, that witnesses react negatively to a questioner by folding their arms across their chests, and that witnesses who squint or frown are angry or hostile.⁵⁹ But is it not equally possible that a witness with a dour expression is making an extra effort to focus on the questions, instead of rejecting a point or being hostile to the examiner?⁶⁰

Because fact-finders’ use of common sense is almost always unguided, their application of common sense to credibility assessments based on demeanour is likely to be nothing more than “an instinct, a hunch or an inarticulate gut reaction”.⁶¹ It relies on subtle interpretations, delicate nuances and indefinable impressions.⁶²

52 See Rand 2000 *Connecticut LR* 7.

53 Stone 1991 *Criminal LR* 821. Kane “Judging credibility” 2007 *Litigation* 31 writes: “[M]ethods of evaluating oral testimony do not lend themselves to formulations in terms of rules and are thus, inescapably, ‘un-ruly’.”

54 Nicholas “Credibility of witnesses” 1985 *SALJ* 32.

55 Timony 2000 *Catholic Univ LR* 920.

56 Sahn 1961 *American Bar Association J* 581.

57 Timony 2000 *Catholic Univ LR* 905; McClellan “Who is telling the truth? Psychology, common sense and the law” 2006 *Australian LJ* 657.

58 McClellan 2006 *Australian LJ* 657. In other words, people assume that when someone lies, their demeanour or nonverbal displays will give them away. As a result, most people confidently assume that they can detect deception by using “common sense”. Andrewartha “Lie detection in litigation: Science or prejudice” 2008 *Psychiatry, Psychology and Law* 90.

59 Kane 2007 *Litigation* 32.

60 *Idem* 32.

61 Friedland “On common sense and the evaluation of witness credibility” 1989 *Case Western Reserve LR* 177. According to Kane 2007 *Litigation* 31, it is the product of, at best, rank speculation or, at worst, unmitigated legerdemain, and results in an entirely subjective evaluation. Most witnesses are observable in the witness box for only a relatively short period of time. Fact-finders know precious little about what makes one person stammer or hesitate and another not.

62 Sahn 1961 *American Bar Association J* 582. As explained in part 2 of this contribution, in addition to misinterpreting a witness’s credibility, application of “common sense” might lead to the increased use of untoward implicit biases in judging witness credibility.

Studies in cognitive psychology call into question the judicial system's reliance on "common sense" – the fact-finder's needle and thread – to assess the credibility of witnesses.⁶³ These studies reveal that ordinary people rely on inaccurate assumptions and misconceptions when assessing the credibility of others.⁶⁴ This renders so-called "common sense" as a tool for accurately determining credibility a "myth".⁶⁵

3.3 The witness cue fallacy

A central issue in the psychology of deception and deception detection is whether liars emit nonverbal signals of dishonesty,⁶⁶ which others can reliably perceive and interpret.⁶⁷ In other words, is there a "Pinocchio phenomenon", according to which dishonesty on the part of a witness manifests itself in a manner that is readily discernible by anyone physically present, but that does not appear on a transcript?⁶⁸

As early as 900 BC, the deceiver was described as someone who "speaks nonsense, rubs the great toe along the ground, and shivers; his face is discoloured, he rubs the root of his hair with his fingers; and he tries by every means to leave the house".⁶⁹

To this day, observers draw on the prevalent stereotype of the liar – as someone who is tormented, anxious and conscience-stricken, with trembling hands, shifty eyes, a furrowed brow and stammering speech – when considering speakers' veracity.⁷⁰ Regardless of whether they are *actually* truthful or not, speakers who closely resemble the stereotype are most likely to be regarded as liars; speakers who least resemble it are most likely to be believed.⁷¹

Police detectives, trial lawyers and mock jurors all express remarkable agreement as to the behavioural cues that they believe indicate deception.⁷² These cues include: grimaces, furtive glances, a shifty gaze, nervous blinking, postural shifts, head movements, fidgeting, gesturing, shrugs, and foot and leg movements.⁷³ In *Cele v S*⁷⁴ Pillay (J) described a witness who was, among other things,

63 See, eg, Friedland 1989 *Case Western Reserve LR* 187.

64 *Ibid*; Uviller 1993 *Duke LJ* 779.

65 Friedland 1989 *Case Western Reserve LR* 167.

66 So-called "stereotypical correlates of deception", Rand 2000 *Connecticut LR* 7.

67 Wellborn 1990–1991 *Cornell LR* 1078.

68 Gleeson "Judging the judges" 1979 *Australian LJ* 344.

69 The Ayur-Veda as quoted in Trovillo "A history of lie detection" 1939 *J of Criminal L & Criminology* 849.

70 See Rand 2000 *Connecticut LR* 7 citing Wigmore. Some of the other supposed tell-tale signs of dishonesty include excessive fidgeting, blushing, sweating, shielding the face, smiling inappropriately and the inability to sit still (Andrewartha 2008 *Psychiatry, Psychology and Law* 91).

71 Bond and De Paulo "Accuracy of deception judgments" 2006 *Personality and Social Psychology R* 216.

72 Potter and Brewer "Perceptions of witness behavior-accuracy relationships held by police, lawyers and mock-jurors" 1999 *Psychiatry, Psychology & Law* 97.

73 DePaulo *et al* "Deceiving and detecting deceit" in Schlenker (ed) *The self and social life* (1985) 340. In a 1979 study, John Hocking and his collaborators reported that subjects who were asked what behaviours they looked for to determine whether someone is lying, cited mostly nonverbal cues: "Many mentioned eye behavior, saying people have less eye contact when they are lying. Some said that liars were tense and nervous, slow to respond to questions, gestured unnaturally, swallowed 'too much', stuttered and exhibited other

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“evasive and visibly uncomfortable about testifying” as exhibiting “tried and tested indicators of an untruthful, unreliable witness.”

In Western culture, gaze aversion (looking slightly downward while speaking) is overwhelmingly perceived as a sign of deception, consonant with the common expression “look me in the eye and say that”.⁷⁵ The folklore that has developed is that people tend to feel guilty when they lie and, in an attempt to dissociate themselves from their deception, they avert their gaze.⁷⁶ For example, based on this belief, a fact-finder might decide to credit a witness’s answer only if it is delivered while the witness is looking the questioning lawyer in the eye. But, even assuming *arguendo* that there is a natural tendency to avert one’s gaze while lying, the impulse is too easily masked. Consequently, were it the case that averting one’s gaze was recognised as a sign of lying, liars would learn to fix their gaze, and looking away would be a poor signal of insincerity. Consistent with this hypothesis, experimental research is nearly unanimous in finding that gaze aversion is of no use in detecting lies.⁷⁷

The essential point is that there is no correlation between behavioural cues popularly perceived to be associated with lying and actual deception.⁷⁸ Thus, a truthful speaker trying to appear honest risks being unfairly labeled a “liar” if she engages in behaviours that are *perceived* as signs of deception, even if they are not *actually* signs of deception.⁷⁹ Also, as explained below, liars simply do not display many of the most cherished cultural stereotypes of deception, principally because they are able to control such behavioural cues, especially the face.⁸⁰

Starting in the 1980s, a number of exhaustive meta-studies⁸¹ (some involving

speaking non-fluencies, were ‘too stiff’, squinted, smiled unnaturally, had ‘tight’ faces, scratched their heads and so on. Obviously, there is no shortage of beliefs about what behaviors are associated with deception.” Hocking *et al* “Detecting deceptive communication from verbal, visual, and paralinguistic cues” 1979 *Human Communication Research* 42.

74 2016 2 All SA 75 (KZP) para 61.

75 Hemsley and Doob “The effect of looking behaviour on perceptions of a communicator’s credibility” 1978 *Journal of Applied Social Psychology* 140. This study, using a courtroom setting, tested whether subjects were influenced by a speaker’s tendency to exhibit gaze aversion while testifying, since gaze aversion is one of the most highly regarded cues to deception. Half of the subjects observed testimony presented on behalf of the accused by a witness who was either looking directly (gaze maintenance) at the subjects, or looking down slightly (gaze aversion). The results showed conclusively that subjects judged witnesses who averted their gaze as less credible than those who kept their gaze on the subjects while testifying. *Idem* at 141–142. Obviously, the perception that gaze avoidance signals deception is inaccurate, because a cool-headed liar who knows that the fact-finder will interpret gaze aversion as a sign that she is lying, will easily be able to maintain a steady gaze and thereby thwart any attempt at lie detection.

76 Sanchirico 2004 *Stanford LR* 310.

77 *Idem* 310–311.

78 Pager “Blind justice, coloured truths and the veil of ignorance” 2005 *Williamette LR* 389. See also Minzner “Detecting lies using demeanour, bias, and context” 2008 *Cardozo LR* 2561: “[W]hile the subjects had strong beliefs about cues of deception, these beliefs bore little relationship to reality.”

79 Rand 2000 *Connecticut LR* 13.

80 *Idem* 8; Bennett 2015 *American Univ LR* 1367.

81 A meta-analysis is a statistical technique that takes other social science studies as the observational units and tries to measure an effect size across all of the studies (Minzner 2008 *Cardozo LR* 2565).

as many as 25 000 observers)⁸² examined and statistically analysed the entire *corpus* of psychological literature on deception to determine which, if any, individual, observable *indicia* could predict and identify a speaker's deception.⁸³ These reviews revealed that not one of those most treasured stereotypical visual correlates of deception – grimaces or smiles, adaptors (hand-to-face movements), furtive glances, shifty gaze, excessive gesturing, shrugging, lip pressing, object fidgeting, brow lowering and nervous blinking – were observed at a significant level when speakers lied.⁸⁴

The important conclusion from these findings is that those behaviours that are popularly believed to manifest a speaker's deception are *qualitatively* and *quantitatively* different from those actually observed during deception.⁸⁵ In reality, during actual deception, speakers tend to be still and to perform *fewer* body movements. Thus, deceptive speakers most often do not appear uncomfortable, shifty, restless in their seats, or move their heads excessively to avoid an observer's scrutiny.⁸⁶ During actual deception there is in fact a *decrease* in each of these behaviours.⁸⁷ Liars thus behave in exactly the opposite manner than expected: they fidget less, remain still, maintain eye contact and retain a pleasant, "normal" demeanour.⁸⁸ This is likely a direct result of the fact that people who are lying know which behaviours will result in judgments of deception, and they then try to reduce such behaviours.

3.4 The confidence fallacy

Most people are supremely confident in their own lie-detecting abilities.⁸⁹ In a typical study, after respondents judged the veracity of videotaped testimony, they

82 Vrij and Granhag "Eliciting cues to deception and truth: What matters are the questions asked" 2012 *Journal of Applied Research in Memory and Cognition* 110.

83 Zuckerman *et al* "Verbal and nonverbal communication of deception" 1981 *Advances in Experimental Social Psychology* 1; DePaulo *et al* "Deceiving and detecting deceit" in Schlenker (ed) (1985) 323. A 2003 study by DePaulo and her collaborators reviewed 116 studies that examined deception detection. They concluded that, generally, there exist few reliable behavioural cues to deception, and particularly, that the cues widely believed to signify deception generally do not. DePaulo *et al* "Cues to deception" 2003 *Psychological Bulletin* 74. Sporer's 2007 study of a more limited set of cues also concluded that there was little evidence that these nonverbal cues bore any relationship to deceit. Sporer *et al* "Moderators of nonverbal indicators of deception: A meta-analytic synthesis" 2007 *Psychology, Public Policy, and Law* 17. See also Bond and DePaulo "Accuracy of deception judgments" 2006 *Personality & Social Psychology Review* 214.

84 Blumenthal 1993 *Nebraska LR* 1192. The studies show that: "[S]ome of our favourite cultural stereotypes about liars do not withstand the test provided by the existing empirical data . . . [T]he studies that have been conducted so far do not support the notion that liars have shifty eyes — nor even shifty bodies, neither glances nor shifts in posture occur significantly more often when people are lying compared to when they are telling the truth." DePaulo *et al* "Deceiving and detecting deceit" in Schlenker (ed) (1985) 339.

85 Blumenthal 1993 *Nebraska LR* 1194.

86 Zuckerman *et al* 1981 *Advances in Experimental Social Psychology* 17.

87 *Idem* 12.

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

89 Ekman *Telling lies: Clues to deceit in the marketplace, politics and marriage* (2009) 170.

were asked how accurate they believed they were in their credibility judgments. They estimated an 82% accuracy rate.⁹⁰

Unfortunately, the research establishes that “[o]ur confidence in . . . our ability . . . to sort truth from fiction is largely misplaced”.⁹¹ Significantly, the research did not find any statistical correlation between confidence and accuracy; and confidence most certainly does not predict accuracy.⁹² People who are highly confident in their lie detection skills are no more accurate than those who express low to modest levels of confidence.

Studies that compare the confidence and accuracy levels of laypersons and professionals who routinely are expected to make credibility judgements as part of their work (so-called “professional lie catchers”) – trial judges fall in the latter category – reveal an interesting trend. The “professional lie catchers” were more confident in their veracity judgments than laypersons, but were no more accurate.⁹³

3.5 The accuracy fallacy

Given the prevalence of lying in daily life,⁹⁴ it is not entirely unreasonable to assume – and most people do in fact believe – that human beings can, with a fair degree of accuracy, identify dishonesty in others. Experimental social psychology has repeatedly tested the ability of humans to differentiate between truth and falsehood using a variety of methodologies. The findings of this impressive body of empirical research literature converge on one unanimous conclusion: Most people are poor lie detectors; they cannot identify deception in others with any reliable degree of precision.⁹⁵

Experimental subjects correctly detected truth and deceit between 45% and 58% of the time.⁹⁶ It should be borne in mind that the task calls on respondents to make a binary judgment – either that the subjects are truthful or deceitful. Thus, even if a respondent was blind, deaf and dumb and guessed, or simply

90 Kassin 2002 *Cardozo LR* 814. Moreover, Kassin and Fong 1999 *Law & Human Behavior* 507 note that in a mock crime-enactment, in which the respondents judged guilt or innocence of the subjects based upon videotaped denials, 78% of the “guilty” subjects and 86% of the “innocent” subjects believed that the respondents would judge their denials accurately (ie, as either true or false).

91 Hutchins “You can’t handle the truth! Trial juries and credibility” 2014 *Seton Hall LR* 521; Payer 2005 *Williamette LR* 380.

92 Vrij and Granhag 2012 *Journal of Applied Research in Memory and Cognition* 111.

93 *Ibid.* The tendency to be overconfident is not unique to police officers, but is common amongst many groups of professionals. Allwood and Granhag “Feelings of confidence and the realism of confidence judgments in daily life” in Juslin and Montgomery (eds) *Judgment and decision making* (1999) 123.

94 Although most people might prefer not to acknowledge this fact, lying is in fact a normal, natural and indispensable aspect of daily life. Evidence suggests that humans lie and are lied to, successfully, approximately one to two times per day, and possibly much more frequently. The majority of these deceptions involve outright, albeit mostly “harmless”, lies (or “white lies”), that are helpful and sometimes necessary to facilitate comfortable social interaction. Just as alcohol is a social lubricant, deception is a social prophylactic; it shields people from implantable and potentially damaging truths and interpersonal confrontations (Andrewartha 2008 *Psychiatry, Psychology and Law* 88).

95 Rand 2000 *Connecticut LR* 14.

96 Zuckerman *et al* “Verbal and nonverbal communication of deception” 1981 *Advances in Experimental Social Psychology* 39–40.

tossed a coin, that respondent would have a statistical chance of being correct 50% of the time. Statistically, then, most people perform barely better than they would if they simply tossed a coin in judging whether a speaker is being truthful or not.⁹⁷

Another widely believed myth is that lie-detection ability can be significantly enhanced by experience.⁹⁸ Surprisingly, however, so-called “professional lie catchers”⁹⁹ are, like inexperienced civilians, highly prone to error.

In 1991, Paul Ekman and Maureen O’Sullivan assessed the lie detection ability of more than 500 subjects, including officers from the Federal Bureau of Investigation, the Secret Service, the National Security Agency, the Drug Enforcement Agency, and the California State Police, as well as psychiatrists, college students and – specifically relevant for present purposes – trial judges.¹⁰⁰ Not surprisingly, the college students had an average accuracy rate of 52.8%. However, for the so-called “expert” lie detectors, the accuracy rates were not significantly higher, ranging from between 55.8% for police detectives to 57.6% for psychiatrists.¹⁰¹ The average accuracy rate for trial judges was 56.7%.¹⁰² Ekman and O’Sullivan summarised the result of their study thus:¹⁰³

“Two types of errors occur when truthfulness based on demeanour is judged: In a false negative, a liar is incorrectly judged to be truthful; in a false positive, a truthful person is incorrectly judged to be lying. In a high stakes lie, either type of mistake can have serious consequences. In dealing with such situations it would be important – for the clinician, the jurist, the businessman, the counterintelligence agent . . . – to know how much confidence should be placed in judgments based on demeanour . . . The answer from 20 years of research is ‘not much’.”

3.5 Summary of the empirical research

The conclusions reached by one of the pre-eminent deception researchers, Paul Ekman, who carried out intensive research into lying for a period of 25 years in his psychology laboratory at the University of California at San Francisco, contradict the widespread belief in the existence of signs of lying, and the claims that deception can be detected from behavioural cues:¹⁰⁴

97 The “consensus view based on series of social science studies demonstrate[s] that the test subjects in laboratory experiments correctly determined when a person was lying only slightly more than half the time.” Minzner 2008 *Cardozo LR* 2558. See also Bennett 2015 *American Univ LR* 1367.

98 Pager 2005 *Williamette LR* 380.

99 Ekman and O’Sullivan “Who can catch a liar?” 1991 *American Psychologist* 913.

100 *Idem* 914–916.

101 There was one outlier group among the so-called “experts.” US Secret Service agents had an average accuracy rate of 64%, significantly outperforming all the other expert groups. *Idem* 916. Kassim and Fong replicated this study with 25 detectives from Florida. These detectives had an average of 14 years’ experience, and 68% of them had received special training in lie detection. Their overall accuracy rate was 56%, barely better than chance (Kassin and Fong 1999 *Law & Human Behavior* 508).

102 Ekman and O’Sullivan 1991 *American Psychologist* 916. To my knowledge this is the only study that has empirically tested the accuracy rate of judges making credibility assessments.

103 *Idem* 913.

104 Ekman (2009) 170.

“There is no sign of deceit itself – no gesture, facial expression, or muscle twitch, that in and of itself means that a person is lying . . . Most people believe they can detect false expression; our research has shown most cannot.”

Much to the point, Ekman added:¹⁰⁵

“Most liars can fool most people most of the time . . . Our research and the research of most others ha[ve] found that few people do better than chance in judging whether someone is lying or truthful. We also found that most people think they are making accurate judgments even though they are not.”

In short, there exists cogent evidence from social science studies that demonstrates that the concept of demeanour evidence as accepted by the law is invalid as it stands.¹⁰⁶ In attempting to use a witness’s conduct, manner, bearing (“demeanour”) to assess that witness’s credibility, most fact-finders will in fact rely on highly manipulable cues that actually mislead them, and will conclude that a witness is perjurious more often than they should.¹⁰⁷

In the second part of this contribution, I consider the reasons for the poor lie detecting ability of people; the effect of race on deception cues; and why lie detecting in court is even more difficult than in the laboratory. I then explore the potential impact of the empirical findings of social science with regard to veracity judgments based on demeanour, upon the principle of appellate deference to credibility findings of first instance. I conclude by addressing the question of the appropriate response of the legal system in the face of the overwhelming research data on the unreliability of so-called “demeanour evidence”.

(to be continued)

105 *Ibid.*

106 Blumenthal 1993 *Nebraska LR* 1197.

107 *Ibid.* With intensive training, people may be able to learn to detect lies by studying speakers’ “micro-expressions” (movements of the facial muscles lasting only approximately one fifteenth of a second that indicate incongruity between a speaker’s words and emotion). Ekman *Emotions revealed: Recognizing faces and feelings to improve communication and emotional life* (2007) 15 214–216. Even if it were possible to train fact-finders in the detection of micro-expressions, such an exercise would be impracticable given the physical distance between the fact-finder and the witness and the angles and lighting of the courtroom.