At a Glance conference: 12 October 2022

Keynote address

"Would you believe it? The relevance of demeanour in assessing the truthfulness of witness testimony"

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[Before the start of this address, the members of the audience were polled electronically and asked to answer the following question (without discussing it with anybody else): "*Do you believe that, in judging whether witness testimony is honest, the witness's demeanour may offer important information?*"
Of approximately 200 people, 85% answered "yes" and 15% answered "no".]

Introduction

I am flattered to be asked to speak to you this morning about assessing the credibility of witnesses at a trial. I appreciate the irony of the invitation. Deciding whether witnesses should be believed is one of the most important tasks that judges have to perform. But it is not one of the competencies required for my job, which consists entirely of deciding points of law on appeal. Certainly, I have seen my fair share of witnesses give evidence when I was a barrister and a first instance judge. But I make no claim to have acquired any special expertise in assessing credibility.

What I do bring to the topic is a somewhat nerdish enthusiasm for popular books about psychology - books such as Daniel Kahneman's *Thinking Fast and Slow* and by authors such as Daniel Ariely, Steven Pinker and, in a more journalistic vein, Malcolm Gladwell and Matthew Syed. I expect that many of you have read books of this kind. The best ones do an excellent job of communicating to the general reader notable and often surprising discoveries of psychological science. In the last, let us say, 40 years - the span of my career as a lawyer - there has been a vast amount of research carried out into human cognition and behaviour - research which has yielded many significant findings. Some of these findings seem to me to be of real relevance for legal decision-making - including the evaluation of witness testimony. But the lessons of this research have been slow to impinge on the consciousness of lawyers.

The reduced role of witness testimony

Traditionally, calling witnesses to testify orally to what they have themselves observed has been regarded as the primary - and often the only permissible - method of proving facts at a trial. In the heyday of this approach, any other source of information was branded as "hearsay" and was either excluded altogether or was considered an inferior form of evidence when exceptionally it was admitted. Before I come to my main topic, it is worth noting the revolution in how facts are proved at trials brought about by developments in technology. In an age when more and more information is recorded, often electronically, the best evidence in most cases is now hearsay evidence. Documents (using that term in its broadest sense to include any kind of record of information) generally provide more contemporaneous and reliable evidence than the assertions of witnesses testifying in court, often several years after the relevant events.[2] I have no doubt that the displacement of witness evidence by documentary evidence is a trend that will continue with further technological advance.

Nevertheless, unless and until absolutely everything that we do and say is recorded, there will remain cases in which courts depend to a greater or lesser extent on witness evidence to establish facts. It is a remarkable feature of the human brain that people can recall and report past experiences as accurately as they often do. But witness evidence has drawbacks that documentary evidence does not. One of them is the fallibility of human perception and memory. Another is that, of course, not all witnesses give honest evidence. Sometimes they lie.

Psychological research has much to teach us about both these limitations of witness testimony. In the case of *Gestmin v Credit Suisse* in 2013 I drew attention to some of the lessons of psychological research into the nature of memory.[3] Today I want to highlight another area of psychological research which I believe has important implications for the assessment of witness evidence. This is research into deception and lying.

Family litigation

Often there is no reason to question the honesty of a witness - particularly where the witness is independent of the parties and has no interest in the

outcome of the litigation. But in some cases the honesty of witness testimony is impugned. In the family courts many of these cases used to be cases about sex. I have the impression - which may be quite wrong - that back in the day when, say, John Mortimer's father was practising in the divorce courts,[4] the principal duty of the judge was to decide whether or not sexual intercourse had taken place. The issue arose in disputes about the paternity of children and on petitions for divorce based on adultery where the allegation was denied. Any of you who have watched "A Very British Scandal" will have been reminded of one of the most notorious of such cases.

Today it is of course no longer necessary to show fault in order to obtain a timely divorce.[5] And where questions of paternity are raised, DNA analysis has made witness testimony almost entirely redundant - an illustration of my earlier point that factual witness evidence is becoming less important as technology advances. In addition to the many cases about the welfare of children, money has replaced sex as the main subject of family law disputes. But of course people sometimes lie about money just as they do about sex. And I am assured by your Chair that disputes about matrimonial finance give rise to acute questions of honesty just as blatant as those that arise in other areas of litigation.

Belief in the relevance of demeanour

So how can or should a judge (or anyone else) decide whether a witness is giving honest evidence or lying? It is widely assumed that in making such judgments how a person looks and behaves when giving evidence - what lawyers usually term the "demeanour" of a witness - can provide useful information. This assumption is very deep-rooted in our trial process, and indeed is widely held in everyday life. But I call it an assumption because, so far as I am aware, there is no reliable scientific evidence to support it. Indeed, my theme this morning is that modern scientific research has shown that the assumption is false.

The assumption that a witness's demeanour may offer important information about whether a witness is telling the truth not only affects how judges approach the task of fact-finding; it has also influenced our procedural law. Historically, it has been the primary reason given for the reluctance of appeal

courts to interfere with factual findings made by a judge after a trial. For example, in one leading case Lord Sumner said that:

> "… not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher Court ought not to take the responsibility of reversing conclusions so arrived at …"[6]

In another decision of the House of Lords Lord Shaw explained the rationale in this way:

> "witnesses … may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of an eyelid, left an impression upon the man who saw and heard them which can never be repeated in the printed page."[7]

That statement is undeniably true. We all do form impressions from the demeanour of witnesses which cannot be replicated by reading a transcript. But the unspoken assumption underlying these remarks is that such impressions are a reliable basis for judging the honesty of a witness. This has generally been taken for granted. But is it true?

Doubts about the value of demeanour

In modern times doubts have increasingly been expressed. A powerful influence has been Lord Bingham's essay "The Judge as Juror".[8] Since it was reprinted in a collection called *The Business of Judging* in 2000, that essay has been referred to in a good many judgments (I found over 50 on Westlaw), including by your Chair and myself.[9] In that essay, in the course of a luminous discussion of the fact-finding process, Lord Bingham suggested reasons for distrusting demeanour as a guide to honesty and quoted other distinguished judges and advocates who have shared his scepticism.

I mean no criticism of Lord Bingham or the lawyers whom he quoted when I note that their doubts about the value of demeanour were based solely on their own courtroom experience and intuition. The only evidence offered was anecdotal. No reference was made to any scientific studies. That is not surprising. In 1985 when "The Judge as Juror" was written there was little

relevant empirical research on lie detection and the specialist journals in which such research is published were not easily accessible to those outside the academic world. As I will explain shortly, the position today is very different and there is now a vast amount of published research on this subject - much of it readily accessible online.

I think it fair to say that scepticism among lawyers about the value of demeanour as a guide to truth has been growing. In a case in 2018 in the Court of Appeal called *SS (Sri Lanka)*,[10] I made some comments of my own on the subject which I see are quoted in the latest edition of *Phipson on Evidence*.[11] But it is apparent that many members of the legal profession continue to believe that the demeanour of a witness is a source of potentially important information. For example, it is common to find in judgments given after a trial a section in which the judge faithfully records his or her impressions of each witness. There would be no point in doing this if such impressions were thought to deserve little or no weight. And in a family case last year the Court of Appeal endorsed the conventional view that:

> "… in a case where the facts are not likely to be primarily found in contemporaneous documents the assessment of credibility can quite properly include the impression made upon the court by the witness, with due allowance being made for the pressures that may arise from the process of giving evidence."[12]

To illustrate what I perceive to be the current divergence of opinion, compare two judgments handed down in the Family Court in July just a few days apart.[13] In both cases the court was asked to determine the cause of injuries suffered by a baby; and in each case one hypothesis was that the injuries were deliberately inflicted by the baby's father. In each case the father gave oral evidence. In the first case the judge directed herself by reference to Lord Bingham's essay and my remarks in *SS (Sri Lanka)* that it is unsafe to draw inferences from the demeanour of a witness about whether the witness is telling the truth.[14] By contrast, in the other case the judge appears to have attached substantial weight to the father's demeanour and her impression that he was an "*honest*" and "*wholly believable*" witness.[15]

Veiled Witnesses

A controversial question that has brought the relevance of demeanour into sharp focus in the 21st century is whether a woman of Islamic faith should be permitted to give evidence in court wearing a niqab, a veil which covers the whole face apart from the eyes.

The question arose in a family case in 2006.[16] A young Muslim woman alleged that she had been forced into marriage. She petitioned the court for a decree of nullity. In court she wore a niqab. As it happened, the case was heard by a female judge and when the petitioner came to give evidence the only male person present was her own counsel. After some discussion, the petitioner agreed to remove her veil while she gave evidence provided her counsel could not see her face. To achieve this, a somewhat makeshift arrangement was adopted whereby her counsel hid behind an umbrella positioned on the bench in front of him. In her judgment the judge explained that she had approached the matter on the basis that "*the ability to observe a witness's demeanour and deportment during the giving of evidence is … essential to assess accuracy and credibility*." She recommended that, if the problem arose again, it could be solved in a similar way by listing the case before a female judge and ensuring that the witness is screened from the view of any male person present in court when testifying.[17]

The same problem has arisen in criminal cases. In 2012 a case (*R v NS*) reached the Supreme Court of Canada in which the complainant in a prosecution for sexual assault wore a niqab for religious reasons and a preliminary question was raised whether she could be required to remove it so that her face could be seen while she was testifying.[18] Although they reached differing conclusions, all the members of the Canadian Supreme Court approached the question on the basis that assessment of a witness's demeanour is important in judging credibility. They therefore saw the issue as involving a conflict between the witness's freedom of religion and the defendant's right to a fair trial, which could be harmed if it is not possible to see the witness's face in order to assess her demeanour. The majority of the Court held that, where a witness's evidence is important to the prosecution case and her credibility is in issue, the balance may be struck in favour of ordering her to remove the niqab while testifying, so as to avoid jeopardising the fairness of the trial.

A year later, in 2013, the issue arose in this country in a case at Blackfriars Crown Court - although this time it was the defendant who was asserting the right to wear a niqab.[19] The late Judge Peter Murphy gave a long and detailed judgment in which he naturally attached considerable weight to the Canadian decision. He accepted that under article 9 of the Human Rights Convention the defendant had a right to wear the niqab as a manifestation of her religious beliefs. However, this right is not absolute and the judge held that, if the defendant chose to give evidence, her right to religious freedom was outweighed by the public interest in the fair and effective conduct of the proceedings. On that basis he directed that the defendant would not be permitted to give evidence wearing the niqab. The essence of the judge's reasoning was that *"the ability of the jury to see the defendant for the purposes of evaluating her evidence is crucial"* and that this is *"a fundamental and necessary attribute of the adversarial trial"*.[20]

Such reasoning is not new. As long ago as 1615, at the trial of Ann Turner as an accessory to the murder of Sir Thomas Overbury, the defendant protested that if she could be covered in church it ought to be the same in court. Sir Edward Coke replied:

> "that from God no secrets were hid, but it was not so with man, whose intellects were weak; therefore in the investigation of truth . . . the court should see all the obstacles removed; and because the countenance is often an index to the mind, all covering should be removed from the face."[21]

The need to have regard to science

What I find striking about these cases is the unquestioned assumption that, in order properly to assess the truthfulness of witness testimony, it is crucial to be able to observe the witness's demeanour. In the Canadian case McLachlin CJ, who gave the majority judgment, justified this assumption on the basis that it is deeply rooted in the common law. She described it as *"the accepted judicial view"*, *"backed by centuries of practice"*.[22]

Those statements are clearly correct, but I do not myself find the reasoning persuasive. The proposition that observing the demeanour of a witness assists in assessing truthfulness is not a proposition of law to which the doctrine of

precedent applies. It is an empirical claim. If judges are being asked to restrict religious freedom on this ground, how can they legitimately do so without any evidence that observation of demeanour actually does assist in determining whether a witness is telling the truth? To assume that it does just because judges have always assumed that it does might once have been sufficient. But once that assumption is seriously questioned, it does not seem to me acceptable to rely simply on folklore. It is necessary to have regard to current scientific knowledge.

That is what I have tried to do in preparing this address. For this purpose I have not contented myself with the popular science books that are part of my regular holiday reading but have sought to grapple with primary sources. I have read some of the major research studies on lying and deception published in academic journals, as well as reviews of the literature. I acknowledge a particular debt to a recent book written by an academic psychologist called Tim Levine who has himself carried out much important original research in this field and who has been good enough to help me with this talk by answering my queries in email correspondence. For anyone interested in learning more about this subject, I recommend his book to you. It is a called *Duped* - with the slightly less catchy subtitle *Truth-Default Theory and the Social Science of Lying and Deception*.[23]

Accuracy in Lie Detection

There have now been literally hundreds of experimental studies involving thousands of participants carried out by psychologists to test whether people can detect lies on the basis of a speaker's demeanour. The results of these studies have been strikingly consistent. They have consistently found that, when people are asked to judge whether individuals are lying or telling the truth from how they appear and behave when speaking, such judgments are accurate on average just slightly more than half the time.

The most comprehensive survey to date is a meta-analysis published in 2006 by two psychologists, Charles Bond and Bella DePaulo, which analysed the data from all the previously reported experimental studies they could find.[24] Bond and DePaulo found 206 such studies which between them comprised almost 25,000 judgments of over 4,000 individuals. Across the studies the mean

percentage of accurate judgments was 54%. Accuracy was a little higher (61% on average) where the speakers were telling the truth and a little lower (47%) where the speakers were lying. This suggests that people generally have a bias towards assuming that others are telling the truth – a hypothesis that much other evidence also supports. But overall, in detecting lies and truths, the mean percentage of correct judgments across all studies was 54%. In other words, on average, accuracy was slightly better, but only slightly better, than chance.

It was also notable how little this accuracy rate varied across studies. To give you a sense of this, in half of the studies included by Bond and DePaulo in their meta-analysis, the mean percentage of accurate judgments was between 50% and 58%, and in 90% of the studies it was between 45% and 64%. For the statisticians among you, the standard deviation in the mean percentage of accurate judgments across studies was only 6%. Moreover, in general, the larger the study and the greater the number of judgments it comprised, the more closely the result approximated to 54%. This 54% figure is therefore remarkably stable and robust.

Equally remarkable is that factors which you might think would affect the result turned out to make little or no difference. For example, it made no significant difference to accuracy in lie detection whether the speaker could be both seen and heard or could only be heard but not seen - although where the observation was purely visual, the accuracy rate reduced from 54% to 50%. Bond and DePaulo also found that it made no significant difference whether the speaker had a "stake" in lying successfully; whether lies were planned or spontaneous; or whether the speaker was observed answering questions or simply giving their account of events. And where the speaker answered questions, it made no difference to accuracy whether the questions were asked by the person judging their demeanour or by a third party. Other studies have found that the length of interview is also not a material factor: a longer observation period is not associated with greater accuracy.[25]

Of particular note, perhaps, is that people who might be thought to be experts at lie detection - such as law enforcement officers, psychiatrists and (dare I say) judges - proved to be no more accurate in their assessments than lay

people. Bond and DePaulo found that the mean accuracy percentage for people classified as experts was the same as for non-experts and was around 54% in each case.

Individual differences in judging deception

Some of the mathematicians among you may be thinking: you have told us that this 54% figure was a mean calculated across groups of individuals. But perhaps this conceals a range of individual abilities. Perhaps some individuals are very good at detecting lies - well above average - while others are below average. It is just that when you combine all the individual results you get a mean of around 54%.

Well, Bond and DePaulo went on to investigate this possibility. In 2008 they published the results of another meta-analysis, this time examining individual differences in judging deception.[26] Naturally, in any study in which participants are asked to judge whether speakers are lying or telling the truth, even if all the participants are equally good or bad at detecting lies, there is bound to be some variation in how many of their judgments are correct that arises just through chance. There is always this random element in the results of any test which is not infallible. Suppose that you spin a coin several times and ask a number of people to predict whether the result is heads or tails each time. If this is repeated, say, 20 times, it is almost inevitable that some individuals will have made more correct calls than others, just by chance - even though we know that in this example there are no individual differences in ability to make accurate judgments.

For the purpose of their analysis, Bond and DePaulo used a statistical technique to estimate the extent of the variation in the results of studies that would be expected to occur just by chance if individuals do not differ in their ability to detect lies. They then compared this expected variation with the variation actually observed in the studies. They found that the difference was miniscule. In other words, the observed variation in results almost exactly matched the variation you would expect to occur just by chance if there are no individual differences in lie detection ability.

Bond and DePaulo measured this in several ways. For simplicity I will describe just one of the measures used. In 88 studies, it was possible to determine the highest and the lowest percentage of accurate judgments achieved by any individual. Bond and DePaulo found that, across the studies, the mean difference between these figures - the range - was 44.38%. The mean range that would be expected to occur just by chance was 44.18%. The observed range was therefore only 0.2% wider than the range that would be expected if individuals do not differ in their ability to detect lies. This miniscule difference was not statistically significant. Other measures produced similar findings. Taking account also of other research, Bond and DePaulo concluded that individual variation in ability to detect lies on the basis of demeanour is negligible.

Veiled and blind witnesses

To return for a moment to the topic of veiled witnesses, after the Canadian Supreme Court case was decided a research study was carried out in Canada, the UK and the Netherlands designed specifically to test whether accuracy in lie detection is impaired by wearing a niqab.[27] In this study, accuracy in distinguishing truth from lies was found to be no worse when speakers wore niqabs than when they were bare-headed. In fact, accuracy was slightly <u>higher</u> in relation to the speakers who wore niqabs. The explanation for that last finding is debatable and the way in which study was conducted has been criticised.[28] But this study supports the more modest conclusion that wearing a niqab does not impair lie detection. That conclusion is in any case consistent with the robust finding mentioned earlier that it makes no significant difference to the accuracy of detection whether the speaker can be both seen and heard or only heard and not seen.

I recognise that the practice of wearing a niqab and its place in modern British society is a subject on which there are many different and some strongly held opinions. I am not expressing any opinion on this subject. But I have pointed out that courts have approached the question whether a witness may be required to remove the niqab while testifying on the footing that seeing a witness's face significantly assists in judging whether the witness is telling the truth. It is relevant that a large body of scientific evidence indicates that this belief is mistaken.

I would add that, if the belief were correct, the logic of the decisions about veiled witnesses would imply that people who are blind should be disqualified from serving as trial judges or on juries. There is no such ban, and rightly so. Given the research findings that I have summarised, there is no reason to think that blind individuals will be any less accurate in judging deception than sighted people. And indeed, in a study carried out recently in Poland, blind participants achieved <u>higher</u> accuracy on average than sighted participants in judging veracity.[29] The difference between the two groups was not statistically significant, but once again the study confirms that inability to see a witness's face does not deprive a person judging veracity of useful information.

Summary so far

To sum up so far, there is extensive scientific research showing that, as a method of distinguishing truth telling from lying, judging on the basis of demeanour is slightly, but only slightly, more reliable than spinning a coin.

I could stop there. This finding is, I think, enough by itself to demonstrate that attaching any weight to demeanour in making such assessments is not a rational approach to decision-making. But there are more research findings that I would like to tell you about.

Differences in credulity

I have referred to the analysis carried out by Bond and DePaulo of individual differences in judging deception and their conclusion that individuals hardly vary from one another in their ability to detect lies based on demeanour. In the same study, Bond and DePaulo also examined the extent of other individual differences.

I mentioned earlier that there is a general human bias towards believing other people to be truthful. Bond and DePaulo analysed the extent to which this bias varies from one individual to another. They found that there is such individual variation. As you might expect, some people are more credulous and less suspicious than others. If we again take the range as the measure, Bond and DePaulo identified those studies in their data set where it was possible to determine the range between the individual who judged the speaker to be telling the truth in the highest percentage of cases and the individual who

made the lowest percentage of such judgments (and therefore most often judged the speaker to be lying). The mean observed range was (in round numbers) 50%. By comparison, the mean range that would be expected if there are no individual differences in how credulous or suspicious people are was 36%. Comparing the observed range of 50% and the expected range of 36%, the observed range was 40% wider than would be expected by chance.

Speaker differences

Bond and DePaulo also looked at the other side of the coin, so to speak, and at whether judgments of truthfulness are affected by individual differences among the speakers whose truthfulness is being judged. They found that there are such individual differences and that they are more significant than any differences among the individuals who are making the judgments.

They found, first of all, that people vary more widely than would be expected by chance in how detectable their lies are. In other words, there are some individuals whose demeanour is more transparent and gives more away than is the case with others. Taking the range again as a measure, Bond and DePaulo analysed those studies where it was possible to determine the highest and the lowest percentage of correct judgments made of any individual speaker. They found that the observed range was, on average, around twice as wide as would be expected by chance.

Bond and DePaulo also examined whether people differ in how credible they are, irrespective of whether they are in fact telling the truth. They found that there are such individual differences in credibility and that they are substantial. Some people appear honest and others dishonest, regardless of whether they are telling the truth or not. Bond and DePaulo found that people vary more widely in credibility when lying than when they are telling the truth, though generally the people who appear most honest when lying are also the ones who appear most honest when telling the truth. Overall they found that the mean observed range in the credibility of speakers was almost 2 ½ times wider than the range that would be expected by chance.

A further, and I think important, finding was that whether a person has an honest demeanour has a bigger impact on whether the person is judged to be

telling the truth than whether he or she is in fact telling the truth. In numerical terms, the impact was more than twice as large.

Demeanour cues

I will come back to this important point, but first let me mention another body of research which has investigated what types of behaviour - or cues, as psychologists call them - are relied on when people attempt to judge whether or not someone is lying from their demeanour. This topic has been approached from two different angles.

One approach has been to ask people about their beliefs. Some of these studies have been cross-cultural. The most comprehensive study, published in 2006 by a group of researchers who rather grandly called themselves "The Global Deception Research Team", collected data from almost 5,000 participants in 75 different countries using 43 different languages. Participants were simply asked in their own language: "*How can you tell when people are lying?*" They could give more than one answer. By far and away the most common response was that liars won't look you in the eye. That answer was given by almost two-thirds of participants. Other common beliefs were that liars are nervous, exhibit incoherent speech and make many body movements. There was a striking consistency of beliefs across different cultures.

The other approach has been to infer what cues people rely on from the judgments they actually make. For example, participants may be shown a series of videos and asked to assess whether the person in each video is lying or telling the truth. The researchers separately analyse the behaviour of the people shown in the videos and classify their behaviour according, for example, to how much eye contact they showed and whether they acted nervously. The data are then analysed to see whether there is any correlation between the types of behaviour exhibited by the people shown in the videos and the judgments made about whether they are lying or telling the truth.

Such studies have also produced fairly consistent findings. They have shown that people are more likely to be judged to be lying if they avoid eye contact, shift posture more often, take longer to respond to questions, talk more quickly, make more speech errors, have more pauses and hesitations, are less

conversationally involved, are less friendly and cooperative or generally act in a nervous way.

In many such studies the hope of the research has been to discover behavioural cues that can be used to detect whether someone is lying - a discovery which, if attainable, would obviously be of immense value to interrogators (not to mention judges). Alas this Holy Grail has proved elusive. Studies have found only very weak associations or no association at all between particular cues and lying. The most comprehensive analysis is probably one carried out by Bella DePaulo and others, reported in a 2003 paper entitled "Cues to Deception" which examined no fewer than 158 individual cues.[30] To give one example of the results found, the analysis failed to support the widespread belief that liars do not look you in the eye. The correlation found between gaze aversion or reduced eye contact and lying was close to zero.

The proposition that there are no reliable cues to deception is unsurprising when you consider the findings I have mentioned, first, that accuracy in judging truthfulness from demeanour is, on average, only slightly better than 50% and, second, that differences among individuals, including experts, in lie detection ability are negligible. The fact that accuracy has been consistently found to be better than chance indicates that the inferences that people draw from demeanour are not utterly groundless. On the other hand, the fact that accuracy is only slightly better than chance shows that the reliability of such inferences is so poor as to be of no practical use.

Overall impressions

Most of the studies of behavioural cues have focused on specific cues as if they existed in isolation from each other. There is evidence, however, that people do not generally base judgments about whether someone is lying on individual cues. Rather, they rely on an overall impression derived from a combination of interrelated elements.

Tim Levine has carried out a series of studies which illustrate this.[31] In one study participants were first shown videorecorded interviews and asked to judge whether the speakers were truthful or lying. The participants were then

shown the videos again several times and asked to identify what behaviours and impressions had led them to make the judgments they did. The results are summed up in the following lists:

Honest demeanour cues

1. Confidence and composure

2. Pleasant and friendly interaction style

3. Engaged and involved interaction style

4. Gives plausible explanations

Dishonest demeanour cues

1. Avoids eye contact

2. Appears hesitant and slow in providing answers

3. Vocal uncertainty (conveys uncertainty in tone of voice)

4. Excessive fidgeting with hands or foot movements

5. Appears tense, nervous and anxious

6. Portrays an inconsistent demeanour over course of interaction

7. Verbal uncertainty (conveys uncertainty with words)

(I am not sure whether number 4 in the list of "honest demeanour cues" is really an aspect of demeanour but nothing turns on this.)

Levine then asked a different group of participants to watch the videorecorded interviews and judge whether the speakers were telling the truth or lying. After making their judgments, the participants watched the interviews again and this time were asked to rate each speaker for each of the cues I have listed. The honest demeanour cues proved to be highly inter-related. A speaker rated as displaying any one of those cues was very likely to be rated as displaying the others. The same was true for the dishonest demeanour cues. Moreover, the two sets of cues were more or less mutually exclusive. Thus, a speaker who was rated as displaying any one of the honest demeanour cues was highly

unlikely to be rated as displaying any of the dishonest demeanour cues, and vice-versa. This supports the theory that the behaviours which create a person's demeanour are strongly interwoven and are perceived as a single coherent impression. Analysis of the data also showed a strong correlation between the overall impression of honesty or dishonesty measured by the extent to which a speaker displayed one or other set of cues and whether the speaker was judged to be truthful or lying. There was no significant correlation, on the other hand, between the honesty of the speaker's demeanour measured in this way and whether the speaker was actually telling the truth or lying.

Illustrating the effect of mismatch

Tim Levine has taken this line of research a stage further. He has conducted experiments which graphically illustrate how the honesty of a speaker's demeanour has a powerful impact on whether or not the speaker is believed to be truthful that is largely independent of whether the speaker is actually telling the truth.[32] For this purpose, he used the results of earlier research to select videorecorded interviews of speakers in each of the following four categories:

1. individuals with an honest demeanour who were telling the truth;

2. individuals with an honest demeanour who were lying;

3. individuals with a dishonest demeanour who were telling the truth; and

4. individuals with a dishonest demeanour who were lying.

For the individuals in categories 1 and 4, therefore, their demeanour matched their actual veracity, whereas for those in categories 2 and 3 there was a mismatch.

In a series of experiments Levine showed these recorded interviews to observers who were asked to identify which speakers were lying and which were telling the truth. He consistently found that, where the speaker's demeanour matched their veracity, accuracy was high - typically between 70% and 80% and as high as 96% in an experiment where the judges were US government agents trained in detecting lies. However, where there was a mismatch between demeanour and veracity, accuracy was low - typically

between 30% and 40%. It was particularly low for people with an honest demeanour who were lying. Moreover, the worst group at detecting those liars were the most experienced government agents who were fooled 85% of the time.

These results show the extent to which the honesty or dishonesty of a person's general demeanour determines whether that person is believed to be telling the truth, irrespective of their actual honesty. The fact that this effect was found to be strongest for government agents suggests that they are more sensitive to demeanour than lay people who are not trained in detecting lies. Unfortunately this renders such 'experts' more liable to error than 'nonexperts' when judging the credibility of speakers who are truthful but have a demeanour that tends to be judged dishonest and (even more so) when judging speakers who present with an honest demeanour but are lying. As variation in demeanour is mostly independent of actual honesty, such errors are assured.

Other research showing the impact of demeanour

There is other research about the impact of demeanour on credibility which suggests, for example, that individuals who are untidily dressed are more likely to be disbelieved than those who are smartly dressed[33] - something which barristers and solicitors are well aware of when advising their clients what to wear in court. Other studies have found that black clothing makes a negative impression in comparison with light clothing.[34] Yet other studies found that facial appearance has an impact and that people with attractive faces are typically thought of as more honest.[35]

The overall lesson is clear. If you rely on demeanour to assess honesty, your judgments are liable to be biased by impressions that are more likely to mislead than to provide any insight into the speaker's actual veracity.

Conclusions

Let me seek to draw this material together and summarise what seem to me the key conclusions that emerge from the research I have described:

1. On average, accuracy in judging veracity from demeanour is 54%.

2. There is a general 'truth' bias, which varies somewhat between individuals, towards believing other people to be honest.

3. Individual variation in ability to judge veracity from demeanour is negligible and 'experts' are no more accurate than others.

4. Some individuals are more transparent than others, though most people are pretty good liars.

5. Having an honest demeanour has much more impact on whether a speaker is believed than whether the speaker is in fact telling the truth.

If you try to infer veracity from demeanour, you are likely to be fooled by witnesses who have an honest demeanour but are lying and to disbelieve witnesses who have a poor demeanour but are in fact giving honest evidence.

Does this mean that we should give up on the idea that it is possible to make reliable judgments about whether someone is lying? Certainly not. I had originally planned to go on this morning to describe research bearing on other methods of assessing whether a witness is lying, such as inferences based on various kinds of inconsistency. I had also intended to say something about the role of cross-examination and how it can sometimes be an effective method for exposing lies. But these are big subjects in themselves and time does not permit. I have burdened you with enough social science and statistics for one day and must leave you in a moment to your main business of discussing financial remedies.

In the poll that we conducted at the start of this talk the vast majority of you subscribed to the belief, which I am sure most people hold, that in judging whether witness testimony is honest, the witness's demeanour may offer important information. I hope that I have given you at least pause for thought by drawing your attention to a body of scientific research which, I would like to suggest, has important implications for how witness evidence is assessed and deserves to be more widely known.

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[1] Justice of the Supreme Court. I am grateful to my Judicial Assistant, Robert Bellin, for helping me with my research.
[2]   I made this point in *Rogers v Hoyle* [2013] EWHC 1409 (QB), [2015] QB 265, para 54.

3 *Gestmin SCPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm), paras 15-22.

4 See John Mortimer, *A Voyage Round My Father* (1971).

5 Particularly since the Divorce, Dissolution and Separation Act 2020 came into force on 6 April 2022.

6 Owners of Steamship Hontestroom v Owners of Steamship Sagaporack [1927] AC 37, 47.

7 *Clarke v Edinburgh Tramways* [1919] SC (HL) 35, 36.

8 See Lord Bingham, "The Judge as Juror: The Judicial Determination of Factual Issues" (1985) 38 Current Legal Problems 1 (reprinted in Bingham, *The Business of Judging* (2000)).

9 See *A County Council v Mother* [2011] EWHC 1804 (Fam), para 29 (Mostyn J); and *R (on the application of SS (Sri Lanka)) v Secretary of State for the Home Department* [2018] EWCA Civ 1391, paras 36-37 (Leggatt LJ).

10 *R (on the application of SS (Sri Lanka)) v Secretary of State for the Home Department* [2018] EWCA Civ 1391.

11 See *Phipson on Evidence*, 20th Edn (2022), para 45-22.

12 *B-M (Children: Findings of Fact)* [2021] EWCA Civ 1371, [2021] 3 FCR 531, para 25.

13 *A Local Authority v BB* [2022] EWFC 105 (20 July 2022) and *A Local Authority v AA* [2022] EWHC 2321 (Fam) (25 July 2022).

14 See *A Local Authority v BB* [2022] EWFC 105, paras 21-22.

15 See *A Local Authority v AA* [2022] EWHC 2321 (Fam), para 110.

16 *Re S (Practice: Muslim Women Giving Evidence)* [2006] EWHC 3743 (Fam), [2007] 2 FLR 461.

17 Ibid, para 16. See also Lady Hale's account of a case she heard when a High Court judge given in a lecture at the Woolf Institute, Cambridge, on "Religious Dress" on 28 February 2019.

18 *R v NS*, 2012 SCC 72, [2012] 3 SCR 726.

19 *R v D(R)* [2013] 9 WLUK 348; [2013] Eq LR 1034.

20 Ibid, paras 69-70.

21 I am grateful to my new Judicial Assistant, Patrick Devine, for finding this quotation. We have not been able to trace its original source, but it is reported in *The Percy Anecdotes* (1821) p 14 and at (1900) 108 Law Times 520.

22 *R v NS*, paras 48-49.

23 Published in 2020 by the University of Alabama Press.

24 Bond CF and DePaulo BM (2006) "Accuracy of deception judgments" Personality and Social Psychology Review 10, 214-34.

25 See Hartwig M and Bond CF (2011) "Why do lie-catchers fail? A lens model meta-analysis of human lie judgments" Psychological Bulletin 137, 643-659.

26 Bond CF and DePaulo BM (2008) "Individual Differences in Judging Deception: Accuracy and Bias" Psychological Bulletin 134, 477-492.

27 Leach A-M et al (2016) "Less is more? Detecting lies in veiled witnesses" Law and Human Behavior 40(4), 401-410.

[28] Denault V et al (2017) "To veil or not to veil: Detecting lies in the courtroom. A comment on Leach et al (2016)" Psychiatry, Psychology and Law 24(1), 102-117.

[29] Sak-Wernicka J (2021) "Lie Detection and Blindness: Research in Pandemic Times" Roczniki Humanistyczne 69(6), 141-154.

[30] DePaulo BM et al (2003) "Cues to Deception" Psychological Bulletin 129, 74-118.

[31] Levine TR et al (2011) "Sender Demeanor: Individual Differences in Sender Believability Have a Powerful Impact on Deception Detection Judgments" Human Communication Research 37, 377-403.

[32] Levine TR et al (2011) "Sender Demeanor: Individual Differences in Sender Believability Have a Powerful Impact on Deception Detection Judgments" Human Communication Research 37, 377-403.

[33] Vrij A (1993) "Credibility judgments of detectives: The impact of nonverbal behavior, social skills and physical characteristics on impression formation" Journal of Social Psychology 133, 601-611

[34] Vrij A & Akehurst L (1997) "The existence of a black clothing stereotype: The impact of a victim's black clothing on impression formation" Psychology, Crime, & Law 3, 227-237.

[35] Aune RK et al (1993) "The influence of perceived source reward value on attributions of deception" Communication Research Reports 10, 15-27.