

Looks Can Be Deceiving: The Irrelevance of Demeanour in Witness Assessments

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What happened to Jeffrey Deskovic was a tragedy of Shakespearean proportions. At the age of 17, before he could revel in the freedoms of adulthood, he was convicted of raping and murdering a high-school classmate. He spent the next 16 years locked up – for crimes he did not commit.¹

Deskovic's fate was sealed with the equivalent of Othello's error. Although there was no tangible evidence linking him to the crimes, detectives read his demeanour – being visibly upset and crying at the victim's wakes – as signaling guilt, and soon targeted him as their exclusive suspect. What followed was a series of increasingly aggressive interrogations to secure a confession that affirmed their initial assessment. An assessment that turned out to be wrong. What were taken to be behavioural cues of a guilty offender was really that of a sensitive teenage outlier.²

Despite the dangers of judging people by their demeanour, judges and jurors have been in the habit of relying on demeanour to appraise the credibility of those testifying before them. Indeed, the law directs them to do so. The purpose of this article is to revisit the wisdom of that direction, and to propose a more objective framework for evaluating witnesses, one in which demeanour has no place.

But first, a bit of history to bring us to where the law now stands.

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1. On December 7, 1990, Deskovic was convicted of first-degree rape and second-degree murder, despite DNA results showing that he was not the source of the semen in the victim's rape kit. His conviction was overturned on September 20, 2006, after semen from the rape kit, re-tested with new technology, was matched to someone else.
2. In an interview after his release, Deskovic explained that he was always picked on in school and the victim was one of few students who was nice to him: Fernanda Santos, "Vindicated by DNA, but a Lost Man on the Outside", *The New York Times*, November 25, 2007, online: <https://www.nytimes.com/2007/11/25/us/25jeffrey.html?pagewanted=all&_r=0>.

1. The Long-Standing Role of Demeanour Evidence

Trials have been oral events since the days of the Roman *judex*,³ with litigants making their case by presenting *viva voce* testimony to the trier of fact who can see and interact with witnesses firsthand. Outcomes often hinged on judgment about whether a witness is credible, and in turn, how much of his testimony is to be believed. Central to credibility determination is the witness's demeanour. Chief Justice Ritchie of the Supreme Court of Canada said it plainly in 1880's *McKay v. Glen*: "the demeanour and manner of the witnesses are very material elements in judging of their credibility."⁴

Demeanour was deemed a material element in credibility determinations because it is assumed that the way someone tells their story on the stand – their voice, deportment, facial expressions, physical gestures, glances, the readiness and promptness of their answers, and the like⁵ – furnishes valuable clues as to whether they are prevaricating. Face-to-face testimony allow triers of fact to discern the demeanour of witnesses, and go about answering the question, critical in almost every case, of whose account to believe. As a testament to the law's conviction in the relevance of demeanour evidence, a witness's demeanour, "without any definite rules as to its significance, is always assumed to be in evidence."⁶ On the corollary, hearsay is presumptively inadmissible since "the trier of fact cannot observe the declarant's demeanor as she makes the statement";⁷ it is therefore "difficult for the trier of fact to assess whether it is trustworthy."⁸

3. *National Labor Relations Board v. Dinion Coil Co.*, 201 F.2d 484 (2d Cir., 1952) at 487. See also James P. Timony, "Demeanor Credibility" (2000), 49 *Cath. U. L. Rev.* 903 at 904-906 for a brief history on the use of demeanour evidence.
4. *McKay v. Glen* (1880), 3 S.C.R. 641, 1880 CarswellOnt 214 (S.C.C.) at 666.
5. A broad array of non-verbal cues is swept under the term "demeanour". Demeanour has been described as the "intangibles" (*R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, 118 C.C.C. (3d) 353, 10 C.R. (5th) 1 (S.C.C.) at para. 128); "face, body language, voice, etc." (*R. v. S. (N.)*, [2012] 3 S.C.R. 726, 290 C.C.C. (3d) 404, 98 C.R. (6th) 1 (S.C.C.) at para. 91); and "how it was said" rather than "what was said" (*R. v. Howe* (2005), 192 C.C.C. (3d) 480, 2005 CarswellOnt 44, [2005] O.J. No. 39 (Ont. C.A.) at para. 46). See also *R. v. Bent*, 2016 CarswellOnt 16258, [2016] O.J. No. 5307, 2016 ONSC 6388 (Ont. S.C.J.) at para. 112; and *Laurentide Motels Ltd. c. Beauport (Ville)*, [1989] 1 S.C.R. 705, 94 N.R. 1, 45 M.P.L.R. 1 (S.C.C.), for other descriptions of demeanour.
6. *Wigmore on Evidence*, Vol. III, § 946, p. 498.
7. *R. v. Bradshaw*, [2017] 1 S.C.R. 865, 349 C.C.C. (3d) 429, 38 C.R. (7th) 1 (S.C.C.) at para. 20. See also *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740, 79 C.C.C. (3d) 257, 19 C.R. (4th) 1 (S.C.C.) at para. 32.

Common-law jurisprudence abounds with statements made without any source reference endorsing demeanour as a touchstone for veracity.⁹ “It is more difficult not to tell the truth about a person when looking at that person eye to eye”,¹⁰ the reasoning goes. The opportunity to watch and hear witnesses, and screen truth-tellers from liars by their eyes, voice, and deportment, is considered so pivotal that to be deprived of it would compromise trial fairness in cases where the witnesses’ respective versions of key facts are at variance.¹¹ Findings of credibility are well-nigh unassailable on appellate review for the same reason:

Now when the Judge who presided at the trial, who heard this witness, who saw his demeanor in the box and the manner in which he gave his evidence, has believed him and has accepted his evidence as entirely reliable, can we here reject his testimony as unreliable and decide that he is not a credible witness?¹²

2. Good Lie Spotters We Are Not

Notwithstanding the roots and reach of demeanour evidence in our legal system, there has long been a suspicion that demeanour can lead us astray in the search for truth. It is sounded in the age-old adage that “looks can be deceiving”. According to the Book of John, Jesus instructed: “do not judge according to appearances” (7:24), a teaching that is animated by the story of David and Goliath, Hannah’s first encounter with Eli the High Priest and other narratives in the Bible. Fables such as *The Ant and the Chrysalis*, told and retold through generations, are themed on the fallibility of putting too much stock on appearances. Tragedy struck in William Shakespeare’s *Othello* when Othello chose to ignore what his wife said in favour of how she said it.¹³ The examples can go on.

8. *R. v. Bradshaw*, *ibid.*, at para. 20.

9. See e.g., *R. v. White*, [1947] S.C.R. 268, 89 C.C.C. 148, 3 C.R. 232 (S.C.C.).

10. *R. v. Levogiannis* (1990), 62 C.C.C. (3d) 59, 2 C.R. (4th) 355, 1 O.R. (3d) 351 (Ont. C.A.), affirmed [1993] 4 S.C.R. 475, 85 C.C.C. (3d) 327, 25 C.R. (4th) 325 (S.C.C.).

11. *R. v. S. (N.)*, *supra* note 5 at paras. 27-28.

12. *Larue v. Deslauriers* (1881), 5 S.C.R. 91, 1881 CarswellQue 3 (S.C.C.). See also *R. v. S. (N.)*, *supra* note 5 at para. 25; *Ball v. Parker*, [1877] O.J. No. 28 (Ont. C.A.) at para. 37; *R. v. B. (K.G.)*, *supra* note 7 at para. 164; *R. v. Crowley* (2015), 333 C.C.C. (3d) 46, 1152 A.P.R. 146, 441 N.B.R. (2d) 146 (N.B. C.A.) at para. 11; *R. v. G. (B.G.)* (2015), 24 C.R. (7th) 44, 638 W.A.C. 306, 319 Man. R. (2d) 306 (Man. C.A.) at para. 16.

13. In the famed play, Othello rejects his wife’s denials of an affair with his lieutenant, choosing instead to pin her credibility on her crying out at the

What we have suspected all along gained new credence when social scientists began studying deception detection. Empirical research over the last few decades reveals that people are poor lie-spotters, with an accuracy rate that is hardly better than chance – guessing would yield a similar outcome.¹⁴ The rate is only marginally better for “professional lie catchers” (e.g., law enforcement personnel like police officers and custom officers) who, despite being very confident in their lie-detection ability,¹⁵ succeeded in discerning lies from truths only about 56 percent of the time.¹⁶

The main reason for the sore accuracy rate is that there is no telltale physical sign akin to Pinocchio’s growing nose that always accompanies deception. Behavioural cues stereotypically associated with liars – fidgeting; looking away; blinking; speech hesitation; blushing; appearing nervous or uncomfortable – are just as likely to be signs of genuine stress or anxiety, unrelated to lying.¹⁷ Some people are, by virtue of personality and/or negative past

news of the lieutenant’s death. His ill-founded credibility determination proves fatal: he kills her.

14. Scientific studies concerning lie detection typically involve subjects being asked to discriminate lies from truths from watching videotapes or listening to audiotapes of people either lying or telling the truth. A meta-analysis of 206 studies revealed an average accuracy rate of 54%: Charles F. Bond Jr. and Bella M. DePaulo, “Accuracy of Deception Judgments” (2006), 10:3 *Personality and Social Psychology Review* 214 at 230. See also Charles F. Bond Jr. and Bella M. DePaulo, “Individual Differences in Judging Deception: Accuracy and Bias” (2008), 134:4 *Psychological Bulletin* 477; Aldert Vrij, “Nonverbal Communication and Deception” in Valerie Manusov and Miles L. Patterson, eds., *The SAGE Handbook of Nonverbal Communication* (Thousand Oaks, California: SAGE Publications Inc., 2006) 341 at 349. Legal commentators have taken note of the work done by psychologists: see e.g., Olin Guy Wellborn, “Demeanor” (1991), 76 *Cornell L. Rev.* 1075 at 1088; Jeremy A. Blumenthal, “A Wipe of the Hands, a Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility” (1993), 72 *Neb. L. Rev.* 1157 at 1189-92; Renée McDonald Hutchins, “You Can’t Handle the Truth! Trial Juries and Credibility” (2014), 44 *Seton Hall L. Rev.* 505 at 526. Timothy R. Levine, *Duped: Truth-Default Theory and the Social Science of Lying and Deception* (Tuscaloosa: University of Alabama Press, 2020) at 10, 36-54.
15. Aldert Vrij, *Detecting Lies and Deceit: Pitfalls and Opportunities*, 2nd ed. (New York: Wiley, 2008) at 142 and 164-65 [*Detecting Lies*]. High levels of confidence in one’s ability to detect deceit have consequences for the justice system, as research shows that jurors are particularly influenced by how confident witnesses are. Police officers who communicate with confidence are more likely to be believed by jurors: see Aldert Vrij and Samantha Mann, “Who Killed My Relative? Police Officers’ Ability to Detect Real-Life High-Stake Lies” (2001), 7 *Psychology, Crime and Law* 119 at 121.
16. *Detecting Lies*, *ibid.*, at 160-61.
17. *Detecting Lies*, *ibid.*, at 4 and 37. Danielle Andrewartha, “Lie Detection in

experience, prone to being apprehensive when questioned by others, especially during an ordeal as intense and foreign as cross-examination. Their apprehension is then interpreted as indicative of dishonesty even when they are telling the truth. Conversely, people whose natural behaviour matches the stereotype of how honest people carry themselves are more likely to be perceived as credible.¹⁸ A confident, composed, friendly, and engaged appearance is taken as a sign of honesty, even though there is no actual correlation between the two.¹⁹

People lying do not, as a matter of course, give it away in their demeanour. Knowing the stereotypical cues associated with truthfulness or deception that others are going to watch for, liars can rehearse their fabrications, censor what they say, and control their face, voice and body to project a credible impression. The more practice they have, the more at ease they will be, further distancing themselves from the stereotypical deceiver who fidgets and looks nervous. Justice Anderson summed it up: “Skilled liars can present very well.”²⁰

Compounding matters is the fact that demeanour is culturally mediated. An individual’s culture can affect how he or she talks and behaves, as each culture has its own dictates for the manifestation of emotions (i.e., the types and frequencies of emotional displays considered acceptable), as well as norms for rate, tone and volume of speech, as well as gaze and body language. Cultural differences in communication can create misunderstandings.²¹ For example,

Litigation: Science or Prejudice?” (2008), 15:1 *Psychiatry, Psychology and Law* 88 at 91.

18. Stereotypes are activated automatically and often without one’s awareness, such that the influence they wield on our judgments cannot be easily shut off and impacts even low-prejudice people who disapprove the use of stereotypes as bases for evaluating information and judging others. See Patricia G. Devine, “Stereotypes and Prejudice: Their Automatic and Controlled Components” (1989), 56:1 *J Personality & Soc Psychol* 5; Chad E. Forbes et al, “Negative Stereotype Activation Alters Interaction between Neural Correlates of Arousal, Inhibition and Cognitive Control” (2012), 7:7 *Social Cognitive and Affective Neuroscience* 771; Regina Krieglmeyer and Jeffrey W. Sherman, “Disentangling Stereotype Activation and Stereotype Application in the Stereotype Misperception Task” (2012), 103:2 *J Personality & Soc Psychol* 205.
19. Levine, *supra* note 14 at 9-10.
20. *R. v. McKay*, 2011 CarswellAlta 314, [2011] A.J. No. 240, 2011 ABPC 82 (Alta. Prov. Ct.) at para. 14, affirmed (2012), 84 Alta. L.R. (5th) 404, 2012 CarswellAlta 1771, [2012] A.J. No. 1070 (Alta. C.A.). See also *R. v. P. (S.H.)* (2003), 176 C.C.C. (3d) 281, 675 A.P.R. 66, 215 N.S.R. (2d) 66 (N.S. C.A.) at para. 29 (“A polished, well-mannered individual may prove to be a consummate liar”).

Indigenous speech habits involving pauses, indirect answers and negative answers are susceptible to being mistaken for evasion, confusion or guilt by a judge of another culture.²² Looking someone in the eyes during conversation is frowned upon as disrespectful in East Asian cultures²³ and for many Indigenous Peoples,²⁴ yet is considered proper course in Western cultures where gaze avoidance is taken to be a sign of deception.²⁵

As there is no shared understanding across cultures as to what behavioural cues indicate truthfulness or deception, one might expect the accuracy of demeanour-based credibility assessments to be worse than a coin flip where the judge and witness are from different cultures. Psychologist Charles F. Bond's experiment confirms it.²⁶ To study cross-cultural deceit, Americans and Jordanians were videotaped while telling lies and truths; other Americans and Jordanians viewed the videotapes and judged who was lying. American judges fared decidedly worse in detecting deception by Jordanians than they did in catching lies by Americans. It was the same with Jordanian judges: they misread Americans more often than they did compatriots.²⁷ The discrepancy in accuracy points to a

21. Martin Jones and France Houle, "Introduction: Building a Better Refugee Status Determination System" (2008), 25:2 *Refuge* 3 at 7. Paul Ekman, *Telling Lies: Clues to Deceit in the Marketplace, Politics, and Marriage* (New York: W.W. Norton & Company, 1992) at 261-62.
22. The Honourable Justice Giles, "The Assessment of Reliability and Credibility" (1996), 2 *The Judicial Review* 281 at 292.
23. Anjanie McCarthy et al., "Cultural Display Rules Drive Eye Gaze During Thinking" (2006), 37:6 *J Cross Cult Psychol* 717, online: <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2613330/>>; Shota Uono and Jari K. Hietanen, "Eye Contact Perception in the West and East: A Cross-Cultural Study" (2015), 10:2 *PLOS ONE*, online: <<https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0118094>>; *Detecting Lies and Deceit*, *supra* note 15 at 179.
24. McCarthy, *ibid.*
25. Scott Rempell, "Gauging Credibility in Immigration Proceedings" (2011), 25 *Geo. Immigr. L.J.* 377 at 403. See also Aldert Vrij, Par Anders Granhag, and Stephen Porter, "Pitfalls and Opportunities in Nonverbal and Verbal Lie Detection" (2010), 11:3 *Psychological Science in the Public Interest* 89; Joseph M. Rand, "The Demeanor Gap: Race, Lie Detection, and the Jury" (2000), 33 *Conn L Rev* 1. Justice Posner acknowledged the cultural difference in *Iao v. Gonzales*, 400 F.3d 530 (7th Cir., 2005) at 534: "Behaviors that in our culture are considered evidence of unreliability, such as refusing to look a person in the eyes when he is talking to you, are in Asian cultures a sign of respect."
26. Charles F. Bond Jr. et al., "Lie Detection Across Cultures" (1990), 14:3 *Journal of Nonverbal Behavior* 189.
27. The accuracy rate for within-culture lie detection for Jordanians and Americans averaged 56% while that of cross-cultural judgments averaged

“demeanour gap” in cross-cultural situations, with ramifications for credibility determinations.²⁸

The demeanour gap can spell trouble in real-world adjudication, particularly in the context of refugee hearings where there is, more likely than not, a cultural disconnect between the adjudicator and the claimant. As Justice Muldoon pointed out in *Valtchev v. Canada (Minister of Citizenship & Immigration)*, “problems may arise in interpreting the demeanour of refugee claimants from different cultural backgrounds.”²⁹ The stakes to get it right when assessing credibility are high as there is usually a lack of available documentary evidence to either support or refute claimants’ account of their experiences in their countries of origin, and claimants who are wrongly disbelieved are deported to a place where they may face torture or death. Given the stakes involved and the susceptibility of demeanour to misinterpretation, the International Association of Refugee Law Judges urged: “using demeanour as a basis for credibility assessment should be avoided in virtually all situations.”³⁰

Cultural barriers often co-occur with language barriers. The perils of assessing truthfulness by reference to demeanour are magnified when a witness testifies through an interpreter. When testimony is interpreted, it is modulated by the interpreter’s own demeanour, as well as cultural and linguistic competence.³¹ Certain words and

49%. For other studies on cross-cultural deception, see Charles F. Bond and Adnan Atoum “International Deception” (2000), 26(2) *Personality and Social Psychology Bulletin* 385; Carmen Lewis, Joey George, and Gabriel Giordano, “A Cross-Cultural Comparison of Computer-Mediated Deceptive Communication” (2009), PACIS 2009 Proceedings 21. Available online: <<http://aisel.aisnet.org/pacis2009/21>>; Aldert Vrij et al, “Cross-Cultural Verbal Deception” (2018), 23(2) *Legal and Criminological Psychology* 192.

28. The term “demeanour gap” was coined by Joseph Rand to explain how jurors, even well-intentioned ones, might have problems accurately evaluating the demeanour of a witness of another race due to differences in communication styles.

29. *Valtchev v. Canada (Minister of Citizenship & Immigration)* (2001), 208 F.T.R. 267, 2001 CarswellNat 1534, 2001 CarswellNat 5929 (Fed. T.D.) at para. 24. See also *Rajaratnam v. Canada (Minister of Citizenship and Immigration)*, 2014 CarswellNat 4530, 2014 CarswellNat 5180, 2014 CF 1071 (F.C.) at para. 46; *Nahimana v. Canada (Minister of Citizenship & Immigration)*, 2006 CarswellNat 2212, 2006 CarswellNat 323, [2006] F.C.J. No. 219 (F.C.) at paras. 26-27; *Chowdhury v. Canada (Minister of Citizenship & Immigration)* (2003), 27 Imm. L.R. (3d) 30, 2003 CarswellNat 880, 2003 CarswellNat 2832 (Fed. T.D.) at para. 23.

30. “Assessment of Credibility in Refugee and Subsidiary Protection Claims under the EU Qualification Directive: Judicial Criteria and Standards” (2013), at p. 41, online: <https://www.iarmj.org/images/stories/Credo/Credo_Paper_18Apr2013.pdf>.

phrases, especially those that are idiosyncratic to a language with no exact equivalent in another, cannot be translated without losing some of the nuance and impact.³² As the Alberta Court of Appeal observed, “the delay and absence of simultaneous body language to the spoken word, in addition to the inevitable rewording and interpretation of meaning inherent in translation, can and often will create a fog over the original meaning and impact of the words.”³³ Cultural differences, coupled with linguistic barriers and the use of interpreter, can make it close to impossible to accurately assess witnesses’ credibility from their demeanour.³⁴

Impressions formed on the basis of demeanour, already dubious in accuracy, can trigger confirmation bias, creating more complications for trial fairness.³⁵ *R. v. S. (W.)*³⁶ serves to illustrate. There, the trial judge accepted the evidence of the complainant “despite its obvious exaggeration, solely on the basis of her demeanour.”³⁷ Having decided that he believed her, the judge proceeded to discredit the credibility of those who contradicted the complainant, disregarded the absence of confirmatory evidence of the alleged sexual interference, and convicted the accused.³⁸ *R. v. S. (W.)* is a rare

31. Michael Barnett, “Mind Your Language: Interpreters in Australian Immigration Proceedings” (2006), 10 University of Western Sydney L Rev 109 at 111-12.

32. Joshua Karton, “Lost in Translation: International Criminal Tribunals and the Legal Implications of Interpreted Testimony” (2008), 41 Vand J Transnat’l L 1 at 3.

33. *R. v. Davis* (1995), 98 C.C.C. (3d) 98, 165 A.R. 243, 89 W.A.C. 243 (Alta. C.A.) at para. 17.

34. See *R. v. Singh*, [2017] A.J. No. 940 (Prov. Ct.). With respect to the accused who testified in Punjabi and through an interpreter, Justice F.K. MacDonald candidly admitted at para. 92: “I have no training in or experience of the cultural norms of expression for persons born raised and educated on the Indian sub-continent. I am aware that India has an ancient diverse and extraordinarily rich culture with a multitude of ethnic, religious, linguistic groups and subgroups. In this case, it is impossible for me to assess demeanour.”

35. Confirmation bias is a well-recognized error in inductive reasoning that can be thought of, in lay terms, as results-oriented reasoning. The most widely accepted definition of confirmation bias is that by psychologist Raymond Nickerson: “the seeking or interpreting of evidence in ways that are partial to existing beliefs, expectations of a hypothesis in hand”: Raymond Nickerson, “Confirmation Bias, A Ubiquitous Phenomenon in Many Guises” (1998), 2:2 Review of General Psychology 175 at 175.

36. *R. v. S. (W.)* (1994), 90 C.C.C. (3d) 242, 29 C.R. (4th) 143, 18 O.R. (3d) 509 (Ont. C.A.), leave to appeal dismissed [1994] 2 S.C.R. x (note), 93 C.C.C. (3d) vi (note), 35 C.R. (4th) 402 (note) (S.C.C.).

37. *Ibid.*, at para. 22.

38. *Ibid.*, at paras. 19, 23-25.

example in that the appellate court picked up on the demeanour-driven error and overturned the conviction. Most of the time confirmation bias goes undetected, as it operates subconsciously and may not be obvious from written reasons, yet it can no less skew trial outcomes.

3. Where the Law is At Now

In light of the known potential for misinterpretation of visual and oral cues, there has been a shift in the law over time towards placing less reliance on demeanour evidence in assessing credibility. *R. v. R. (T.)* neatly captures the way the law currently leans: “There are cases cautioning against overreliance on demeanour when assessing credibility, but the law in Canada continues to recognize that demeanour during testimony is a legitimate consideration.”³⁹ Justice Beveridge elaborated in *R. v. W.J.M.*:

[C]ourts have long recognized that reliance on demeanor must be approached with caution. It is not infallible and should not be used as the sole determinant of credibility. This was succinctly summarized by Epstein J.A., writing for the Court in *R. v. Hemsworth*, 2016 ONCA 85:

[44] This court has repeatedly cautioned against giving undue weight to demeanour evidence because of its fallibility as a predictor of the accuracy of a witness’s testimony: *Law Society of Upper Canada v. Neinstein*, 2010 ONCA 193, 99 O.R. (3d) 1, at para. 66; *R. v. Rhayel*, 2015 ONCA 377, 324 C.C.C. (3d) 362. As I indicated in *Rhayel*, at para. 85, “[i]t is now acknowledged that demeanour is of limited value because it can be affected by many factors including the culture of the witness, stereotypical attitudes, and the artificiality of and pressures associated with a courtroom.”

[45] Although the law is well settled that a trial judge is entitled to consider demeanour in assessing the credibility of witnesses, reliance on demeanour must be approached cautiously: see *R. v. S. (N.)*, 2012 SCC 72, [2012] 3 S.C.R. 726, at paras. 18 and 26. Of significance in this case is the further principle that a witness’s demeanour cannot become the exclusive determinant of his or her credibility or of the reliability of his or her evidence: *R. v. A. (A.)*, 2015 ONCA 558, 327 C.C.C. (3d) 377, at para. 131; *R. v. Norman* (1993), 16 O.R. (3d) 295 (C.A.), at pp. 313-14.⁴⁰

While the prevailing approach is commendable for urging

39. *R. v. R. (T.)*, 2016 CarswellAlta 2167, [2016] A.J. No. 1162, 2016 ABCA 355 (Alta. C.A.) at para. 20.

40. *R. v. W.J.M.* (2018), 362 C.C.C. (3d) 273, 2018 CarswellNS 466, 2018 NSCA 54 (N.S. C.A.) at para. 45.

restraint, it does not offer much guidance as to the weight to be accorded to demeanour in credibility assessments, other than to say that demeanour cannot be the “sole” or “exclusive” determinant. If just a single non-demeanour consideration is mentioned, then arguably demeanour is not the sole determinant, even if it bores heavily, and the credibility finding is untouchable on appeal, save for some other defect. Triers of fact are still conferred a wide measure of discretion to interpret a witness’s nonverbal cues, which is very much a subjective exercise dependent on the judge’s and the witness’s personal, experiential and cultural dispositions, and one that has been proven unreliable, with a chance of being flat-out wrong half the time. Because of the subjective nature, credibility evaluations based on the impression that a witness’s demeanour makes will no doubt vary from one judge to another. Subjectivity, insufficiently curtailed, and the resultant inconsistency have the potential to undermine public confidence in the adjudication system.

The potential for inconsistency was thrown into sharp relief in the recent case of *R. v. N.M.*⁴¹ The accused was charged with sexually abusing his eldest daughter, which he denied. During the trial, he became visibly distraught and cried when the complainant recounted the alleged sexual assault incidents. When his younger daughter took the stand to describe the accused putting his hands down her sister’s pants, the accused got up and started to leave the courtroom. The trial judge read the accused’s “exceptional” reactions as weighing negatively on his credibility and suggestive of guilt. The three judges on the panel that heard the appeal saw things differently. To them, the accused’s demeanour while listening to his daughters’ evidence “could have just as likely been, as he explained in cross-examination, triggered by the emotional upset of hearing untrue allegations levelled against him.”⁴²

4. A New Framework: Small Changes Can Make a Difference

Given the mountain of research confirming that people can barely out-perform chance in lie-detection, it is time to abandon demeanour as a factor in witness assessments. Even if we can improve our ability to gauge whether a witness is being candid or not from her appearance and nonverbal behaviour, honesty is only part of the story. Whether someone is telling the truth says little to nothing about the reliability or accuracy of their testimony. For example, an eyewitness who

41. *R. v. N.M.* (2019), 370 C.C.C. (3d) 143, 2019 CarswellNS 34, 2019 NSCA 4 (N.S. C.A.).

42. *Ibid.*, at para. 58.

points the finger at the defendant could very well be sincere in his belief that the defendant is the one who committed the crime, yet mistaken in his identification due to suggestive identification procedures, and/or perception and memory issues. Honest but nonetheless erroneous eyewitness identifications are responsible for a formidable number of wrongful convictions.⁴³

Considering that the goal of all court proceedings is to find out what actually happened, the focus of fact-finders in judging witnesses should first and foremost be on reliability,⁴⁴ with credibility being secondary in the analysis. While credibility and reliability are occasionally conflated under the mantle of “credibility assessment,”⁴⁵ they are distinct concepts.⁴⁶ A credible witness is one believed by the judge or jury to be trustworthy, whereas a reliable witness is someone who can offer evidence that is accurate, and upon which trust and confidence can be placed. “Truthfulness and reliability are not necessarily synonymous,” as Madam Justice Dickson observed in *Gilbert v. Bottle*, “a witness may sincerely attempt to be truthful, but lack the perceptive, recall or narrative capacity to provide reliable testimony on a given matter.”⁴⁷ Judge

43. Faulty eyewitness identification has been identified as the leading cause of wrongful convictions in the United States: Noah Clements, “Flipping a Coin: A Solution for the Inherent Unreliability of Eyewitness Identification Testimony” (2007), 40 Ind L Rev 271 at 271.

44. Reliability, as the term is used here, refers to ultimate reliability and not threshold reliability of hearsay statements. Threshold reliability concerns admissibility whereas ultimate reliability concerns reliance: *R. v. Khelawon*, [2006] 2 S.C.R. 787, 215 C.C.C. (3d) 161, 42 C.R. (6th) 1 (S.C.C.) at para. 3.

45. See e.g., *R. v. White*, *supra* note 9, *per* Estey J: “[Credibility] is a matter in which so many human characteristics, both the strong and the weak, must be taken into consideration. The general integrity and intelligence of the witness, his powers to observe, his capacity to remember and his accuracy in statement are important. It is also important to determine whether he is honestly endeavouring to tell the truth, whether he is sincere and frank or whether he is biased [*sic*], reticent and evasive. All these questions and others may be answered from the observation of the witness’ general conduct and demeanour in determining the question of credibility.”; *Faryna v. Chorny* (1951), [1952] 2 D.L.R. 354, 4 W.W.R. (N.S.) 171, [1952] 4 W.W.R. 171 (B.C. C.A.) at 356-357, O’Halloran JA: “the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility”.

46. See e.g., Lord Clarke’s comments in *Jenkins v. HMA*, [2011] HCJAC 86, 2011 SCL 927 at para. 44.

47. *Gilbert v. Bottle*, 2011 CarswellBC 2815, [2011] B.C.J. No. 1931, 2011 BCSC 1389 (B.C. S.C.) at para. 9.

Semenuk put it crisply: “Just because the witness is credible does not mean that his evidence is reliable.”⁴⁸

Credibility hardly matters, if reliability is lacking. A colour-blind witness may be giving a *bona fide* account that she saw the light was red when the defendant drove through the intersection, even though it was actually green. Her evidence may be subjectively accurate, but it is objectively false and probatively worthless insofar as to prove the colour of the light. Hence, if a witness is found to be completely unreliable and could not give competent testimony as to matters in dispute, there is no need to embark on the credibility inquiry. Her testimony cannot be relied upon in deciding the issue – though it may be relied upon on a different issue – however sincere she may be.

In determining whether a witness is a reliable witness to the events in question,⁴⁹ and in turn, whether and to what degree her evidence should be believed and relied upon to decide issues in the case, considerations should be given to the witness’s capacity to:

- observe the original event;
- retain what she saw, heard, and sensed;
- retrieve the memory; and
- communicate what is recalled.

It is also important to consider factors that can compromise perception, memory and recall, such as passage of time, age, disability, illness, stress and trauma. Traumatic events, for example, tend to be recorded as sensory “snapshots” – a shriek, a smell, a silhouette – with little verbal narrative to tie them together. Unlike memories of innocuous events that can be recalled at will, traumatic memories are not marked as being in the past and can return involuntarily when triggered by reminders.⁵⁰ Judges and

48. *R. v. S. (D.)*, 2015 CarswellAlta 1320, [2015] A.J. No. 801, 2015 ABPC 159 (Alta. Prov. Ct.) at para. 61.

49. There will be other considerations at play if the witness is testifying to hearsay, but a witness giving hearsay evidence should be evaluated for reliability, even after the evidence is deemed admissible. For example, if she is recounting a dying declaration, the question ought to be asked: was she able to properly hear the declaration? The reliability of hearsay statements is a topic that would warrant a paper on its own; for a recent authoritative overview, see *R. v. Bradshaw*, *supra* note 7.

50. Jane Herlihy & Stuart W. Turner, “The Psychology of Seeking Protection” (2009), 21 *Intl J. Refugee L.* 171; Bessel A. van der Kolk, “Trauma and Memory” in Bessel A. van der Kolk, Alexander C. McFarlane & Lars Weisaeth, eds., *Traumatic Stress: The Effects of Overwhelming Experience on Mind, Body, and Society* (New York: Guilford Press, 1996) at 279-302. See also Richard J. McNally, “Debunking Myths About Trauma and Memory” (2005), 50:13 *Can J. Psychiatry* 817.

jurors should be mindful that even in its natural, unadulterated state, memory is imperfect and dynamic, as it is a reconstructive process that is susceptible to distortion (strengthening, weakening, modification and even erasure) and influence from information introduced after the event.⁵¹ Depending on the case, it may be necessary and appropriate to have the benefit of expert opinion on conditions that impacted the witness's ability to perceive, recollect and/or relay her recollection, and the magnitude of the impact, in order to properly assess the witness's reliability.

Once a witness is screened for having at least some reliability, then the question may be asked, is the witness credible? Here, the analysis shifts from whether the witness can give objectively trustworthy evidence to whether the witness is being trustworthy and hence, to be believed. As with the assessment of reliability, credibility determinations ought to be as objective as possible.

Demeanour has no place in this objective analysis. There is no escaping the subjectivity that infuses interpretation of another's demeanour, an exercise that is driven by personal preferences and biases, cultural backgrounds and life experiences. Just as frequent giggling may come across as endearing to some yet annoying to others, judges could well come to opposite conclusions about whether or not a particular witness is shading the truth from the way he carries himself. Indeed, the chances of it happening is 50-50. When an error in such subjective judgment calls arises, it is unlikely to be corrected since credibility evaluations are largely impervious to appellate review.

51. Since memories are used not just for remembering the past and interpreting the present, but also to plan for and anticipate the future, our memory system needs to be dynamic and responsive to changes that occur with new learning. The contents of new experiences can shade into what has been reactivated in memory, and these altered contents get reconsolidated in memory. Hence, contrary to metaphors that likened memory to a filing cabinet or a recording device, it is nothing like it. Memory is neither complete nor stable; instead, it is prone to contamination and transformation over time. See Almut Hubbach et al, "Dynamics of Memory: Context-Dependent Updating" (2008), 15:8 *Learning & Memory* 574 at 574; Mark L. Howe, "Memory Development: Implications for Adults Recalling Childhood Experiences in the Courtroom" (2013), 14:12 *Nature Reviews Neuroscience* 869; Bruce Ecker, "Memory Reconsolidation Understood and Misunderstood" (2015), 3:1 *International Journal of Neuropsychotherapy* 2; Hilary Evans Cameron, "Refugee Status Determinations and the Limits of Memory" (2010), 22:4 *Intl J. Refugee L.* 469; Elizabeth F. Loftus, *Memory* (New York: Ardsley House Publishers, Inc. 1980). Loftus famously testified to the malleability of memory for the defence in Harvey Weinstein's rape trial.

There are more objective and reliable factors than the nonverbal cues exhibited by witnesses to assess whether they are telling the truth or not. They include:

- Presence of corroborative evidence such as contemporaneous documentation or independent oral evidence to confirm the oral evidence of the subject witness;
- Presence of contradictory evidence such as prior inconsistent statements made by the subject witness, contradictory documentation or forensic evidence;
- Consistency of the witness's accounts, particularly on matters of significance, as attested during examination in chief and cross-examination, and on other prior occasions as confirmed independently of the witness's own testimony;⁵²
- Sufficiency of detail and specificity;⁵³
- Bias, interest, or motive to lie.

These factors should be assessed in relation to each issue in dispute to which the witness is testifying, rather than in a blanket fashion staining all judgments pertaining to the witness. Just because a witness may have a motive to fudge a distinct issue does not necessarily follow that his evidence on every other issue should be discounted as disingenuous. Taken together, these factors shine a

52. Cognitive psychologists have found a correlation between consistency and accuracy: people who had more inconsistencies in their recall are less accurate even in the information that they consistently recalled. With that said, inconsistencies are common when people are asked to describe an event on multiple occasions ranging over a wide period of time and a variety of circumstances. Inaccurate recollection for one component of an event cannot predict the accuracy of a witness's memory for other parts of the event. Considering the ubiquity of inconsistencies and that inconsistency on one detail tells us nothing about the accuracy of the rest of the testimony, minor inconsistencies should not be regarded as diagnostic cues of dishonesty or inaccuracy. See Sarah E. Stanley and Aaron S. Benjamin, "That's Not What You Said the First Time: A Theoretical Account of the Relationship between Consistency and Accuracy of Recall" (2016), 1:14 *Cognitive Research: Principles and Implications* at 1. See also Ronald P. Fisher, Neil Brewer and Gregory Mitchell "The Relation between Consistency and Accuracy of Eyewitness Testimony: Legal versus Cognitive Explanations" in Ray Bull, Tim Valentine and Tom Williamson (eds), *Handbook of Psychology of Investigative Interviewing: Current Developments and Future Directions* (Chichester, UK: John Wiley & Sons, 2009), pp. 121-36.

53. In general, accurate memories are relayed with more details than inaccurate memories, though sometimes vague memories may be more veridical than very detailed accounts: Joyce W. Lacy and Craig E. L. Stark, "The Neuroscience of Memory: Implications for the Courtroom" (2013), 14:9 *Nature Reviews Neuroscience* 649.

more objective light on whether the witness is credible or not, than what can be gauged from the impression that his demeanour made on a specific judge on a particular day.

5. Conclusion

The assessment of witnesses is an indispensable component of every trial. Witnesses who are judged reliable and credible are believed, and those who are not might as well have not testified for the side who called them. In cases where facts are hotly contested, verdicts can turn on who is believed to be telling the truth and who is not.

For a very long time, our legal system has operated under the assumption that a witness's demeanour is probative of his truthfulness. Demeanour is thought to be so illuminating such that live testimony subject to cross-examination is regarded as the paradigm of acceptable evidence. Appellate courts will not lightly overturn findings of fact made by trial courts that have had the advantage of heeding witnesses' tone of voice, inflections, mannerism and body language as they testified.

Empirical research in the past few decades has demonstrated that there are no universal cues of deception, shaking loose the assumption that our legal system has held dear. As the research mounted, courts have come to acknowledge the perils of relying on demeanour. The law now cautions against relying on a witness's demeanour as the exclusive determinant of her credibility or of the reliability of her evidence, but falls short of jettisoning demeanour as a factor altogether. There is no sound reason for continuing to rely on demeanour. This is especially so when there are more objective and reliable ways to assess witnesses and the weight to accord to their testimony.

With that said, it would be naïve to think that demeanour will have no bearing whatsoever once pronounced to be irrelevant, just as it would be naïve to think that judges' individual temperament, personal beliefs, and lifelong experiences do not influence decisions. Judging is an ineluctably human activity. Judges are not automatons in robes, immune to the emotions that play out before them in court. They appreciate a heartfelt, well-told rendering of a story. Witnesses with sweat on their foreheads and under their arms, who hem and haw, lose their cool, or otherwise cannot deliver a polished – but not too polished – presentation make a lesser impression. Judges' emotional reactions to litigants influence what information they process, what they remember, and ultimately, their

decisions, especially when the law is unclear or highly discretionary, and/or the facts are disputed.⁵⁴

Still, there is much to be gained from ushering in a more objective framework for assessing witnesses, one that excludes demeanour. It guards against decision-making based on “hunches” and intuition about a witness without further inquiry. While judges and jurors may draw on their emotion and intuition as a guide, they must then subject their intuitive reactions to slow, reflective, and critical reasoning. When intuitive responses are shown to be indefensible on the materials at the trier of fact’s command, they must be let go. Demeanour-based impressions and hunches may continue to have an impact on judicial decision-making even if demeanour is declared irrelevant, but the impact will be better constrained, minimizing the risk of Othello’s error transpiring in courtrooms.

54. Legal realists have long contended that judges cannot actually decide cases based entirely on the law; instead, their emotions, moral views, and feelings about the parties drive judicial decision-making. See e.g., Terry A. Maroney, “The Persistent Cultural Script of Judicial Dispassion” (2011), 99 *Calif L Rev* 629 at 652-57; Jerome M. Frank, “Are Judges Human? Part One: The Effect on Legal Thinking of the Assumption that Judges Behave Like Human Beings” (1931), 80 *U Pa L Rev* 17 at 25. Experiments with mock jurors and with actual judges as subjects offer evidence that judges’ emotions sway legal rulings: see e.g., Andrew J. Wistrich, Jeffrey J. Rachlinski and Chris Guthrie, “Heart versus Head: Do Judge Follow the Law or Follow Their Feelings?” (2015), 93 *Texas L Rev* 855.