

# CAN WE TELL WHEN PEOPLE ARE LYING?

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## **I POPULAR BELIEF**

I have often been struck by the faith society places in the assumption that we can decide whether someone is lying from the way they look and sound. I was reminded of this recently when struggling to decide whether to believe two women giving evidence in support of a claim to compensation for unjustified imprisonment.

The assessment of witnesses can determine whether a person spends many years in prison or walks free. Judges, juries and arbitrators all have to decide whom they believe. Mediating lawyers have to decide whether a "last" offer is really a prelude to further negotiation. Advocates have to decide whether to accept statements at face value or cross-examine further. There is no escaping the need to decide whom we believe. The question is how to go about it.

As in all serious matters, our first resort should be to television. The news here is good. Dr Cal Lightman of the television series "Lie to Me" can see through porkies, as can the former psychic Patrick Jane in "The Mentalist". They do so by staring intently into their subjects' faces, usually with remarkable acquiescence on the subjects' part. Apparently, facial micro-expressions betray lies. And even if liars were clever enough to mask their micro-expressions, author Allan Pease assures us that lack of congruence between facial signals and body gestures would give them away.<sup>1</sup> The lesson is that lying can be detected by careful observation.

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\* I am grateful to Augustine Choi of Bankside Chambers, Auckland for much of the research underlying this paper.

1 Allan Pease *Body Language: How to read others' thoughts by their gestures* (Sheldon Press, 1997) at 17.

## **II LEGAL ASSUMPTIONS**

This endorsement must be reassuring for the courts. Courts have always assumed that liars look and sound shifty. As Jerome Frank put it in 1949:<sup>2</sup>

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

Such is one of the premises on which the common law system of justice has been built. The premise that demeanour betrays falsity is one of the reasons for requiring that critical evidence be given orally rather than in writing; for requiring witnesses to give their own evidence in the absence of special reasons justifying hearsay; and for requiring accusers to personally confront those who are accused. Appellate courts routinely defer to the supposed advantage of first instance judges and juries in seeing and hearing witnesses. In deciding whether they believe people, juries are encouraged to use an expertise assumed to have been acquired from daily experience.

It seems that through ordinary life experience, each of us has become a Dr Lightman without realising it.

Or have we?

## **III SCIENTIFIC EVALUATION OF DEMEANOUR ASSESSMENT**

Speakers provide two sources of information — verbal and non-verbal.

The verbal information is the meaning of the words used by the speaker. Appellate courts and other decision-makers can examine the text of a witness's account for internal consistency, inherent likelihood, consistency with contemporaneous documents, and consistency with other witnesses and exhibits. In evaluating the textual meaning of what was said (verbal content analysis), a decision-maker reading a transcript is as well placed as those who had been present when the speaker uttered the words in question.

The words used by a speaker (the verbal content) can be contrasted with the way in which they were uttered (non-verbal content). A speaker simultaneously manifests a package of non-verbal information which is normally subconscious. It consists of facial expressions, bodily movements and vocal characteristics. The vocal characteristics, or "paralinguistic cues", include pitch, pace, volume,

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<sup>2</sup> Jerome Frank *Courts on Trial: Myth and Reality in American Justice* (Princeton University Press, 1949) at 21.

timbre, expression and tremors. It is this package of face, body and voice that lawyers describe as "demeanour".

Many experiments have been conducted to gauge the extent to which observation of demeanour is of help when assessing veracity. The participants in the experiment are typically divided into four categories – "respondents", who may or may not be telling the truth when answering a series of questions, "interviewers", who ask the questions, "subjects", who observe the process and try to decide whether or not the respondents are telling the truth and "experimenters", who compare the conclusions reached by the subjects with the actual truth or falsity of the answers given by the respondents.

Typically the interviewers ask questions of the respondents. By prior arrangement some of the respondents have been asked to lie and others to tell the truth. The subjects do not know which is which. In the simplest form of the experiment, two groups of subjects are asked to assess the truthfulness of the respondents. One is permitted to see and hear the interviews, and thus to assess demeanour. The other is confined to reading a transcript of the interviews.

Both groups are asked to decide which respondents were telling the truth. A comparison is then made to see whether those subjects who had enjoyed the opportunity to assess demeanour fare better than those confined to the transcript. Variants of the basic model involve different forms of interview (eg psychologist or trial lawyer, cooperative or aggressive), different settings (eg laboratory or courtroom), different cues from respondents (eg confident or hesitant), and different attitudes or perceptions on the part of the subjects (eg liberal or conservative).

The result of these experiments can be summarised as follows:

- Behavioural cues popularly thought to be associated with lying - posture, head movements, shifty eyes, gaze aversion, fidgeting, and gesturing - have no correlation with dishonesty or lack of credibility.<sup>3</sup>
- Facial information and other paralinguistic cues are not effectively utilised in the detection of truth and lying when the speaker is attempting to conceal the lie.<sup>4</sup>

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3 M Stone "Instant Lie Detection? Demeanour and Credibility in Criminal Trials" [1991] Crim LR 821 at 829; and Anthony Heaton-Armstrong and others *Witness Testimony: Psychological, Investigative and Evidential Perspectives* (Oxford University Press, 2006) at 28–30.

4 Glenn Littlepage and Tony Pineault "Verbal, Facial, and Paralinguistic Cues to the Detection of Truth and Lying" (1978) 4 Pers Soc Psychol Bull 461 at 463.

- Although there can be physical cues to deceit — for example, reduction in gestures, subtle changes in pitch, and less vocal involvement — these are not perceptible to the ordinary person. The changes in pitch, for example, can be measured only with sophisticated equipment.<sup>5</sup>
- Those few physical cues that are displayed by a person telling a lie are due to increased cognitive demand (that is, the concentration required in order to tell a false story), rather than nervousness.<sup>6</sup>
- Nervousness is normal for a witness under interrogation. It is likely to result in "Othello error", the error resulting from interrogation stress which induces behaviour likely to be interpreted as deceptive.<sup>7</sup>
- The witnesses most likely to be believed, whether or not truthful in fact, are those who appear confident and open, have a good memory for peripheral detail, and are attractive. Those who exhibit nervousness and hesitancy are less likely to be believed, especially if unsavoury and unattractive.<sup>8</sup>
- Visual cues of an interview serve primarily to distract, lowering the proportion of accurate decisions by the observer. Interview situations in which a respondent is motivated to deceive may be more accurately judged when the interview is not directly observed; non-verbal information actually diminishes the ability to detect deceit.<sup>9</sup>
- Suspicious interviewers tend to view responses as deceptive because suspicious interrogation distorts observers' perceptions.<sup>10</sup>
- Due to the so-called "halo effect", a perceived good or bad quality in a person will tend to colour all judgments pertaining to that person. Consequently, once a positive or negative impression is formed, this is likely to attach to all the evidence of that witness. People tend not to differentiate between different parts of a testimony.<sup>11</sup>

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5 Heaton-Armstrong and others, above n 3, at 28.

6 Heaton-Armstrong and others, above n 3, at 29–30.

7 See Paul Ekman *Telling Lies: Clues to Deceit in the Marketplace, Politics, and Marriage* (Norton, 1985) at 170; and Charles F Bond Jr and William E Fahey "False suspicion and the misperception of deceit" (1987) 26 *British Journal of Social Psychology* 41 at 41.

8 Peter McClellan "Who is telling the truth? Psychology, common sense and the law" (2006) 80 *ALJ* 655 at 661–662.

9 Norman RF Maier and James A Thurber "Accuracy of Judgments of Deception When an Interview is Watched, Heard, and Read" (1968) 21 *Personnel Psychology* 23 at 23.

10 Olin Guy Wellborn III "Demeanour" (1991) 76 *Cornell L Rev* 1075 at 1080.

11 McClellan, above n 8, at 662.

- Where respondents are induced to engage in real deception, subjects attempting to detect deception are unable to do so, whether observing live, with video, with audio, or from transcript. Subjects who receive both audio and transcript perform significantly worse than those who receive transcript alone.<sup>12</sup>
- An analysis of psychological studies of deception detection consistently shows that most people cannot do better than chance in discerning lies under laboratory conditions. Most of the results fall in the 0.45 to 0.60 range with a chance level of 0.5. The face does not seem to give away deception cues and may even have provided misleading information.<sup>13</sup>
- Although most people cannot do better than chance in detecting falsehoods, most confidently believe that they can.<sup>14</sup>

The overall result of these experiments has been summarised by an American commentator, Professor Olin Wellborn, in the following terms:<sup>15</sup>

Taken as a whole, the experimental evidence indicates that ordinary observers do not benefit from the opportunity to observe nonverbal behaviour in judging whether someone is lying. There is no evidence that facial behaviour is of any benefit; some evidence suggests that observation of facial behaviour diminishes the accuracy of lie detection. Nor do paralinguistic cues appear to be of value; subjects who receive transcript consistently perform as well as or better than subjects who receive recordings of the respondent's voice. With respect to body cues, there is no persuasive evidence to support the hypothesis that lying is accompanied by distinctive body behaviour that others can discern.

The overwhelming conclusion is that demeanour is not a useful guide to veracity. There are no observational advantages when assessing the honesty of a witness's evidence. Those confined to reading the transcript will do just as well. Those who think they are capable of assessing veracity through demeanour are mistaken.

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12 Gerald R Miller, Norman E Fontes and Arthur Konopka "The Effects of Videotaped Court Materials on Juror Response: Final Report" (Michigan State University, 1978) at 11–42.

13 Miron Zuckerman, Bella M DePaulo and Robert Rosenthal "Verbal and Nonverbal Communication of Deception" (1981) 14 *Advances in Experimental Social Psychology* 1 at 39–40.

14 Ekman *Telling Lies*, at 162; and Glenn E Littlepage and Martin A Pineault "Detection of Deceptive Factual Statements from the Body and the Face" (1979) 5 *Pers Soc Psychol Bull* 325 at 328

15 Wellborn "Demeanour", above n 10 at 1088.

#### **IV SUBJECTIVE REACTIONS TO WITNESSES**

None of this would matter if the demeanour fallacy remained in the laboratory. Unfortunately, popular misconceptions about it have far-reaching consequences. It is hard to escape the conclusion that countless miscarriages of justice must have occurred over the years when juries, in particular, mistakenly thought they could tell whether or not someone was lying.

To take a simple example, the studies just discussed show that confident speakers tend to be believed and nervous ones disbelieved. Accused facing their first trial are likely to be nervous. Repeat offenders are likely to give their evidence with growing confidence. Juries are therefore more likely to find repeat offenders convincing, particularly if deprived of their prior histories. Psychopaths tend to make convincing witnesses.

Another example is the treatment of rape complainants. Studies show that juries think they know how a genuine rape victim will behave. Complainants tend to be judged by the emotions they display: visibly upset rape complainants are seen as more credible than those who appear calm or relaxed.<sup>16</sup> Yet an appearance of calmness may be no more than a mask used as a means of coping. This may help to explain those many rape acquittals which otherwise seem to defy rational explanation.

People who do not show the emotional behaviour popularly expected of them are likely to be disbelieved.<sup>17</sup>

#### **V LINDY CHAMBERLAIN**

Lindy Chamberlain is an example.

She was charged with the murder of her baby, Azaria, in the Australian outback. The critical question was whether responsibility lay with her or a dingo. The nature of the blood on the tent, dingo tracks nearby, and known dingo behaviour, were all consistent with a dingo as the culprit. Although initially convicted,<sup>18</sup> she was ultimately and definitively vindicated at an inquest in May 2012.

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16 Elisabeth MacDonald and Yvette Tinsley (eds) *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, 2011) at 371; Blackwell H&S 14.7 and see generally Ellen Wessel and others "Credibility of the Emotional Witness: A Study of Ratings by Court Judges" (2006) 30 *Law Hum Behav* 221.

17 Mary R Rose, Janice Nadler and Jim Clark "Appropriately Upset? Emotional Norms and Perceptions of Crime Victims" (2006) 30 *Law Hum Behav* 203.

18 *Chamberlain v R* (1983) 46 ALR 493 (FCA).

For present purposes, the point is not Lindy Chamberlain's guilt or innocence but the reliance placed on her demeanour.

Several days after the tragedy, a reporter told the Chamberlains that he found their composure suspicious. During the many television interviews that followed, their cool demeanour alienated many Australians. As Lindy Chamberlain recently commented: "It wouldn't have mattered what we did. If we didn't react exactly the same as the individual watching us reacted, that individual thought we were being weird".<sup>19</sup>

The significant point was the readiness of the public - and according to Michael Chamberlain enforcement authorities as well - to assess guilt according to misconceptions over the way in which an innocent person would look and sound.<sup>20</sup>

## ***VI CONCLUSION***

The demeanour fallacy matters. It is no exaggeration to say that, in our courtrooms, arbitration rooms, mediation rooms and elsewhere, major decisions are made every day based on a false assumption. The assumption is that we can detect lying by personal observation of the speaker.

We are simply not capable of telling whether or not people are lying by assessing their demeanour. That has been scientifically demonstrated so often, and so consistently, that it is surely now time to say that it is beyond argument.

If we are in a situation in which we need to assess credibility, we must look to speakers' internal consistency, the inherent likelihood of what they are saying, consistency with contemporaneous documents, and consistency with other witnesses and exhibits. Seeking guidance from their demeanour is a fool's errand.

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19 "Lindy Chamberlain: Some will never believe me" The New Zealand Herald (online ed, Auckland, 13 June 2012).

20 Nicholas Jones "Rumours and lies fed dingo case" The New Zealand Herald (Auckland, 7 July 2012).

