THE RING OF TRUTH, THE CLANG OF LIES: ASSESSING CREDIBILITY IN THE COURTROOM

The Honourable Justice Lynn Smith*

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INTRODUCTION

Humans deliberately deceive one another. This capacity to deceive creates some of the greatest challenges in our lives and relationships. The deception in the Garden of Eden is central to the Judaeo-Christian Creation story and to the notion of "sin". It is no surprise that many works of literature and theatre explore human mendacity and its consequences.

The story of *Othello* captures the agony experienced by someone who does not know whether to believe another person. In the film Doubt,[1] a nun is suspicious of a priest's relationship with an altar boy, despite the priest's denials that he has done anything inappropriate. The film's promotional tagline captures the conflict the nun faces: "There is no evidence. There are no witnesses. But for one, there is no doubt."

Human beings are not only deceptive but frequently unreliable. Most often this is unintended; we make mistakes for any number of reasons. Our powers of observation and recollection are what they are: imperfect. As well, we may firmly, but wrongly, believe that something happened in a certain way because we are thinking wishfully, or because we are fearful, confused or misled.

But sometimes we are unreliable because we knowingly set out to deceive. That is my topic: deception in the courtroom that is knowingly perpetrated by witnesses who fail to give truthful accounts of events and the consequential "credibility assessment" that forms part of the fact-finding process in Canadian trials.

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* With thanks to Ted Murray, research assistant and law clerk.

[1] John Patrick Shanley, *Doubt* (2008).

I will use the term "credibility" for the specific issue of deliberate deception, and the term "reliability" to refer to the larger set of issues that may affect the testimony of witnesses, stemming from inaccurate observation or memory.

The title of my talk is "The Ring of Truth, The Clang of Lies." The title suggests that if one is born with, or can develop a good ear, the task of distinguishing the pure ring of truth from the harsh clang of lies might be straightforward; however, I will be exploring whether or not that is so.

Anyone involved in the legal system has thought about the problems inherent in fact-finding. It is a difficult task. That fact-finding can be difficult does not mean that it can be avoided. Trial judges, and jurors, must consider the evidence and find facts if at all possible. At the very least, they must decide whether the party with the burden of proof has or has not established a certain set of facts to the requisite standard.

Although fact-finding does not always depend on conclusions about truth-telling, it often does. Frequently, in order to decide what happened at a particular moment in the past, the trier of fact must first decide whom to believe, and how much to believe from various persons' accounts of the same events.

Of course, it is not only in courtrooms that people depend upon accurate credibility assessment. For example, in December, 2009, seven CIA agents were killed by a man they had believed to be their agent. He, in fact, turned out to be a triple agent. The CIA knew that this man had posted extreme anti-American views on the Internet, but had concluded that what he was doing in posting those views was creating a good "cover".

Another very well-known example of a long-term error in credibility assessment by a large number of people can be found in the huge financial losses experienced as a result of Bernie Madoff's deception.

The courtroom creates special conditions and imposes special constraints on the assessment of credibility, but the process itself is similar to what we informally and often silently do in our daily lives. In the courtroom, this process is formalized and, where credibility assessment matters, stated aloud. Most often, the finding of facts relates to past events and what a judge does in finding facts is write a history, based upon the evidence led at trial.

Judgments are meant to be historical accounts, not works of literature. However, there are lessons to be learned from literature for example, the common literary device of the unreliable narrator. An unreliable narrator is a character such as Mark Twain's character Huckleberry Finn[2] or Vladimir Nabokov's character Humbert Humbert in *Lolita*:[3] a character who tells the story from a point of view that we, the readers, know to be limited, partial and sometimes wholly inaccurate or deliberately misleading. As we progress through a novel or story told by an unreliable narrator, we experience growing doubt and scepticism, though we may still accept some of what the narrator relates.

There are also works in which multiple narrators tell the story, from competing and conflicting points of view. One example is the classic Japanese film Rashomon,[4] in which four witnesses give conflicting accounts of the rape of a woman and the murder of her samurai husband. A second example is *Small Island*,[5] a novel by Andrea Levy, where four characters are used, each with a distinct and partial point of view bearing on the events in their lives and, more expansively, on the settlement of Caribbean immigrants in England, the "Mother Country," after the Second World War. (Reading a work with multiple conflicting narrators can feel a lot like listening to evidence at a trial).

Another way to approach the narration of a fictional work is from omniscience. In *Middlemarch*,[6] for example, the omniscient narrator describes the "Provincial Life" in nineteenth century England from a god-like point of view, knowing everything, present everywhere, and understanding everyone's motives and intentions, even if none of the work's characters do so themselves.

I have not yet run across that in a witness. However, it is something like what a judge purports to do when he or she writes a judgment.

Not surprisingly, as well as a rich literature about truth and lies, there is also a rich store of fantasies about preventing deception or defeating those who set out to deceive us. Pinocchio is the archetype, of course, but an example that I find particularly interesting is Wonder Woman. It turns out that William Moulton Marston, the creator of the Wonder Woman comics, which began to run in 1942, had both an LL.B. and a Ph.D. in psychology. He is also credited as the creator of the

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[2] Mark Twain, *Adventures of Huckleberry Finn* (London: Chatto & Windus, 1884).

[3] Vladimir Nabokov, *Lolita* (New York: Van Rees Press, 1955).

[4] Akira Kurosawa, *Rashomon* (1950).

[5] Andrea Levy, *Small Island* (London: Review, 2004).

[6] George Eliot, *Middlemarch: A Study of Provincial Life* (London: William Blackwood and Sons, 1874).

systolic blood pressure test, which later became a component of the modern polygraph.

What does credibility assessment have to do with Wonder Woman? Those of us who devoured what we could now call "graphic novels" (which sounds so much more sophisticated than "comics") will recall that, as the child of an Amazon, Wonder Woman possessed a number of super powers and super devices, including her magic lasso. The Lasso of Truth, the iPad of its day, had a number of apps, including curbing the effects of the atomic bomb; but most significantly, Wonder Woman's lasso could compel whoever was encircled in it to tell the truth. The Lasso of Truth left even the most deceptive witness with no option but total candour.

Sadly, in the courtroom, as in daily life, we are unequipped with the Lasso of Truth, yet are nevertheless required to deal with the testimony of unreliable and sometimes mendacious human beings.

In this talk, I will touch on the following: What do we know about the ability of human beings to detect deception? What protocols or practices for the assessment of credibility have been developed in our adversarial system through the rules of evidence and procedure? Finally, what might we do to improve our ability to find facts accurately?

Review of Research Findings

An early judicial reference to the research on deception detection is found in *R. v. Marquard*.[7] In ruling that an expert witness had gone too far in commenting on the credibility of another witness, McLachlin J. (as she then was) commented, at para. 49, that:

> Credibility is a matter within the competence of lay people. Ordinary people draw conclusions about whether someone is lying or telling the truth on a daily basis.

While it is undeniably true that distinguishing between lies and truths is a part of all our daily lives, a vast body of social science research shows that this is a task at which neither lay people nor supposed experts are particularly competent.

[7] *R v Marquard*, [1993] 4 SCR 223, [1993] SCJ No 119 [*Marquard*].

It is impossible to do justice to the research findings about the human ability to detect deception in the brief time we have here, but the following is a basic summary of what I understand the state of knowledge to be.

Intensive research about deception detection has been carried out in many parts of the world for at least 40 years.[8] It began well before the attack on the World Trade Centre and the Pentagon in 2001, but has increased thereafter, possibly as a result of funding directed toward such research by military and security forces. The deception detection research field has conferences; competing schools of thought, lively academic debates and competition, and even a television show inspired by one line of research ("Lie to Me").

How is empirical research on the human ability to detect deception conducted? So far, two main methods have been developed.

The first method is to have volunteers in a laboratory setting either tell the truth or lie about an event. For example, the volunteer might be left alone in a room with a briefcase from which the volunteer is told that he can steal a wallet. The volunteer is later interviewed about whether he took the wallet. The researchers then analyze the volunteer's responses to see if they can observe any tell-tale signs of deception or of truth-telling. The researchers may also have a second set of participants try to decide whether the volunteers are lying or telling the truth by watching them live or on video.

A problem inherent to this approach is that the "stakes" are low for the volunteer interviewees, and it may be easier to lie successfully when the stakes are low. As well, if the volunteer is given permission to steal the wallet, and to lie, it is unlikely that he will experience feelings of guilt. The actual creation of "stakes" comparable to those in many real-life situations is impossible due to university human-research protocols and ethical constraints.

The second method employed for this kind of research is to analyze videotapes or transcripts of real-life interviews of people, for example, police interrogations of suspects. The "stakes" are present, but this research faces a serious problem of its own: how to know what actually occurred? Researchers call this the "ground truth," and establishing it with certainty can be difficult. However, where, for example, there has later been a confession with strong corroborating evidence,

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[8] Pär Anders Granhag & Leif A Strömwall, "Research on deception detection: past and present" in Pär Anders Granhag & Leif A Strömwall, eds, *The Detection of Deception in Forensic Contexts* (Cambridge: Cambridge University Press, 2004) at 7.

the researchers may proceed to analyze what a suspect said, and how he or she said it, comparing responses that were truthful with those that were not.

For example, to evaluate authentic high-stake liars, Mann, Vrij, and Bull acquired videotapes of 16 criminal suspects who had lied at some point during a police interview.[9] These 16 videotapes were broken down into 65 shorter clips, of which 27 were truths and 38 were lies. These clips were then analyzed to see if there were noticeable differences in behaviour when the suspect was lying or telling the truth.

The body of social science research into deception detection makes it clear that credibility assessment is an inherently difficult task. To begin with, although many people, across many cultures, believe that there are universal behavioural signals of deception – such as gaze aversion, fidgeting, or hesitation – it appears that this belief is ill-founded. The research indicates there are no universal signals. As one of the leading scholars of deception detection, Dr. Aldert Vrij, puts it:

> Perhaps the main difficulty is that ... not a single nonverbal, verbal, of physiological response is uniquely associated with deception. In other words, the equivalent of Pinocchio's growing nose does not exist. This means that there is no single response that the lie detector can truly rely upon.[10]

Thus, while an individual's behaviour may change when under stress or while lying, it appears that there are no specific verbal or non-verbal cues to deception that reliably indicate deception by all persons in all circumstances.

The research consistently shows that people are not particularly good lie detectors and that most people overestimate their competence at detecting lies. A large scale meta-analysis of 79 studies from 1980 until 2007 shows that accuracy rates for deception detection average 54.27%.[11] This, of course, is barely above chance (50%). In fact, the participants in 10 of these 79 studies accurately detected deception less than 50% of the time, or below chance.[12] The rates for supposed "professional lie catchers," usually police officers, are only marginally better. In an

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[9] Samantha Mann, Aldert Vrij & Ray Bull, "Suspects, Lies, and Videotape: An Analysis of Authentic High-Stake Liars" (2002) 26 Law and Human Behavior 365.

[10] Aldert Vrij, *Detecting Lies and Deceit: Pitfalls and Opportunities*, 2d ed (Chichester, England: John Wiley & Sons, Ltd, 2008) at 4 [Vrij, *Detecting Lies and Deceit*].

[11] *Ibid* at 148.

[12] *Ibid* at 187-88.

analysis of 28 studies of professionals from 1991 to 2007 an average accuracy rate of 55.91% was found.[13] Some studies have shown that certain groups do better than that interestingly, secret service agents[14] and incarcerated convicts.[15]

Despite these results, people are generally confident in their ability to detect deception.[16] In particular, professional lie catchers such as police officers have greater confidence in their ability to detect lies than lay people, despite their similar accuracy rates on testing. Moreover, studies that measure participants' confidence in their lie detection typically show no relationship between confidence and accuracy.[17] Research suggests that experience in a role as a lie detector does not necessarily result in improvement in one's accuracy.

These difficulties are compounded by misconceptions commonly held by professionals who assess credibility. For example, some American police training manuals have focused on supposed visual cues to deception that are not borne out by the research.[18] Some studies have shown that the more police officers mentioned such visual cues as indicating deception, the worse they became at deception detection.[19]

It is important to note that the research has mainly focused on one aspect of deception detection – our ability to detect deception in strangers, through verbal or non-verbal cues, on the basis of a one-off, often brief observation, without surrounding context. In fact, in daily life, in police interview rooms and in courtrooms, people do not usually assess credibility based only on isolated verbal and non-verbal cues, but rely in addition on such matters as contradictory or confirmatory information from third parties or physical evidence.[20]

It appears from the research that deception is easier to detect if observers consider a cluster of behaviours rather than single isolated behaviours; in studies

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[13] *Ibid* at 161.

[14] *Ibid* at 163.

[15] *Ibid* at 162.

[16] *Ibid* at 164-66.

[17] *Ibid* at 164.

[18] Leif A. Strömwall, Pär Anders Granhag, & Maria Hartwig, "Practitioners' beliefs about deception" in Pär Anders Granhag & Leif A. Strömwall, eds, *The Detection of Deception in Forensic Contexts* (Cambridge: Cambridge University Press, 2004) at 236-38.

[19] Vrij, *Detecting Lies and Deceit*, *supra* note 9 at 174.

[20] Hee Sun Park et al, "How People Really Detect Lies" (2002) 69 Communication Monographs 144.

where researchers considered a cluster of cues, accuracy rates exceeded 70%.[21] Further, some studies involving real-life events – "ecologically valid" studies – show higher deception detection rates, averaging about 62%, and up to 80% for lies.[22]

Researchers are working on ways to enhance our ability to detect lies and are putting forward protocols and best practices. These are usually aimed at police or security officers, but there may be lessons to be learned for the courtroom as well. One method that is being explored is based on the theory that, for liars, there is an increased "cognitive load." A liar has to work harder to keep his or her story straight, to fill in details from invention rather than from memory, and to conceal both the deception and possibly the feelings of guilt. This means that it may be important to observe when a witness has to "think hard" about an answer. It also means that questioning that increases the cognitive load may be effective in revealing deception. At the same time, witnesses who are telling the truth may also give the appearance of "thinking hard" because they are anxious and striving to appear credible.

Other approaches that are being actively explored include complex protocols for evaluating the truth of statements (called "statement validity analysis" or "content-based criteria analysis"),[23] and the observation of "microexpressions", advocated by Professor Ekman, which forms the basis of the television program "Lie to Me".[24]

I will turn next to the importance of credibility assessment in the trial process, then to the possible impact of these research findings on the judicial task of credibility assessment.

The Role of Credibility Assessment in the Trial Process

Our adversarial system has a strong preference for live oral testimony by witnesses who can be closely observed as they testify, in particular while they are under cross-examination. This strong preference serves to distinguish our system from those in some other countries where legal disputes are frequently determined wholly on the basis of a paper record.

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[21] Vrij, *Detecting Lies and Deceit, supra* note 9 at 66.

[22] See Carlucci, Marianna, Nadja Schreiber Compo & Erika Fountain, "Novices vs Experts: Detecting deception in pre-interrogative interviews" (Paper presented at the annual meeting of the American Psychology - Law Society, Vancouver, 18 March 2010) [unpublished].

[23] Vrij, *Detecting Lies and Deceit, supra* note 9 at 200-59.

[24] *Ibid* at 64-66.

The strength of the preference for live oral testimony is illustrated by a number of evidentiary rules. For example, the hearsay rule in part finds its rationale in the fact that the declarant – the person who made the observation – is unavailable for cross-examination.

Similarly, appellate courts are required to defer to findings of fact made by trial judges or juries because of the perceived advantages experienced by those who have had direct exposure to the witness.

The task of credibility assessment is central, and it is assigned to the trier of fact, and to no-one else – not to machines, and not to experts.

In *R. v. Béland*,[25] the accused had wished to take a polygraph test and produce the resulting evidence to the court. The Supreme Court of Canada (per McIntyre J.) said "no", explaining:

> I would seek to preserve the principle that in the resolution of disputes in litigation, issues of credibility will be decided by human triers of fact, using their experience of human affairs and basing judgment upon their assessment of the witness and on consideration of how an individual's evidence fits into the general picture revealed on a consideration of the whole of the case.

Further, credibility is not a question for experts. In *Marquard*,[26] the Court stated:

> A judge or jury who simply accepts an expert's opinion on the credibility of a witness would be abandoning its duty to itself determine the credibility of the witness. Credibility must always be the product of the judge or jury's view of the diverse ingredients it has perceived at trial, combined with experience, logic and an intuitive sense of the matter.

Our legal system has sufficient confidence in the ability of human triers of fact to distinguish truth from lies, unaided by experts or by technology, that cases go forward to trial even where findings of fact are wholly dependent on determining which of two or more witnesses is telling the truth. These are sometimes called "he said, she said" cases, a term which I choose not to use because it may seem to trivialize a certain category of case – the two-witness sexual assault case. As well, it

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[25] *R v Béland*, [1987] 2 SCR 398, [1987] SCJ No 60 at para 20 [*Béland*].

[26] *Supra* note 7 at para 49.

is important to note that credibility contests can be central in many cases, for example in commercial, family law or wrongful dismissal. (The difficulties with credibility in commercial cases are illustrated by the wise observation that "an oral contract is not worth the paper that it's written on").

Historically, the absence of corroboration or of a "recent complaint" served to screen out a number of criminal sexual assault cases from going forward to trial. In a civil context, limitation periods also served to screen out many actions for damages for sexual assault. Because over the past forty years our legal system has removed a number of such pre-existing barriers against certain categories of cases going to trial, there are now probably more two-witness cases than there were in the past. The decision to remove the barriers was, in my view, wholly correct and necessary in the interests of affording the proper protection of the law to the most common victims of sexual assault, that is, women and children. The consequence of an increased number of two-witness cases, however, is that credibility assessment has become increasingly important.

So assessment of credibility is a necessity in our civil and criminal justice process, and is arguably more significant than ever as a part of our work as trial judges.

What guidance do we receive from the law to assist us in the credibility assessment process? What protocols or practices have been approved or disapproved by the courts?

A review of the rules of evidence show that certain factors have been approved as ones that can legitimately be considered in assessing a witness's testimony, such as:

- the presence or absence of an oath or solemn affirmation;
- the witness's interest in the proceedings or relationship with the parties;
- consistency or inconsistency over time as between the witness's different iterations of the account;
- the presence or absence of corroboratory or supporting evidence;
- the witness's demeanour or manner of giving the evidence, including whether the witness was hesitant, argumentative, or forthcoming and straightforward; and
- prior criminal convictions of the witness, at least for offences involving dishonesty.

Certain factors have received the stamp of disapproval – as ones that should not be taken into account by a trier of fact – including:

- character evidence of the witness's previous conduct on other, unrelated, occasions;
- previous sexual conduct or sexual reputation of a woman testifying about sexual assault; and
- the mere fact of the witness having said the same thing before.

The assessment of credibility takes place in specific contexts – either criminal or civil – and is modulated by the relevant burden and standard of proof in those contexts.

The criminal jurisprudence in the last 10-20 years has elaborated on the presumption of innocence and the application of the reasonable doubt standard (*R v WD*[27]; *R v Lifchus*[28]). These authorities emphasize that, in a criminal context, because of the requirement for proof beyond a reasonable doubt, it is wrong to draw a straight line from the acceptance of the evidence of a complainant, or a rejection of the evidence of the accused, to a conclusion that the accused is guilty of the alleged crime. In a criminal case, even if one witness's evidence is accepted (let's say the complainant's), the accused's evidence or the evidence as a whole may still raise a reasonable doubt and the Crown must still prove the offence beyond a reasonable doubt on all of the evidence. Understanding this principle is so important that trial judges are required to apprise juries of it in the well-known "*WD* instruction".[29]

It is otherwise in civil cases, even two-witness cases. In *FH v McDougall*,[30] Mr. Justice Rothstein for the Court stated:

> In such cases, provided the judge has not ignored evidence, finding the evidence of one party credible may well be conclusive of the results because that evidence is inconsistent with that of the other party. In such cases, believing one party will mean explicitly or implicitly that the other party was not believed on the important issue in the case.

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[27] *R v WD*, [1991] 1 SCR 742, [1991] SCJ No 26 [*WD*].

[28] *R v Lifchus*, [1997] 3 SCR 320, [1997] SCJ No 77 [*Lifchus*].

[29] *WD*, *supra* note 27 at paras 27-29.

[30] *FH v McDougall*, 2008 SCC 53, [2008] SCR 41, [2008] SCJ No 54 at para 86.

So we have some approved factors, ones that can be considered in assessing credibility, and we have the principles derived from the rules about burden and standard of proof. These factors and principles have been developed, mostly by the common law but some by statute, over many hundreds of years. Naturally they evolve; for example, the diminishing strength of our belief in the effect of an oath.

An interesting question is whether or not these factors are predictive. Do they work? How do we know, for example, whether internal consistency in a witness's evidence is a positive sign of truth-telling, or whether an argumentative witness is more likely to be lying than one who is straightforward and co-operative?

You may be familiar with the term "evidence-based medicine". That term refers to the project of determining best diagnostic or treatment practices in health care by analyzing the best available evidence gained from the application of the scientific method. The "evidence-based medicine" movement asks hard questions about health-care treatments or practices that have become standard. It asks "To what extent have the standard treatments or practices been verified by double-blind clinical studies?" or "Sure, we use foetal monitors in labour rooms routinely, but to what extent has foetal monitoring been shown to improve health outcomes?"

Mostly, the sanctioned factors bearing on credibility (such as consistency, interest, the presence or absence of an oath) are founded in legal experience and common sense. If one wanted to put it pejoratively, one could say "legal folklore". My point is not that these factors bearing on credibility lack a foundation or that they are not predictive, just that they may bear further investigation if that is possible.

Investigation has been done in a few areas: for example, the study done by the Child Witness Project, an interdisciplinary research team headed by Professor Nicholas Bala that in part formed the basis for the reform of the rules for dealing with child witnesses through s. 486.2 of the Criminal Code.[31] The team's findings were specifically referred to by the British Columbia Court of Appeal when it upheld the constitutionality of s. 486.2 in *R v JZS*[32]. In its research, the project concluded that child witnesses can be just as reliable as adult witnesses; that there is no relationship between a child's ability to answer questions about such abstract concepts as "truth" and "lie", and whether the child will actually tell the truth or lie; and that a child who promises to tell the truth is more likely to tell the truth – even if the child cannot define "promise".

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[31] Nicholas Bala et al, *Brief on Bill C-2: Recognizing the Capacities and Needs of Children as Witnesses in Canada's Criminal Justice System*. Submitted to the House of Commons Committee on Justice, Human Rights, Public Safety & Emergency Preparedness, March 2005.

[32] *R v JZS*, 2008 BCCA 401, aff'd 2010 SCC 1.

I will suggest later in this paper that there has been a distinct shift away from reliance on demeanour, and toward a reliance on other factors, such as the "plausibility" of the witness's account. One reason for that shift is likely to have been the research findings I have referred to. But before I move to that discussion, it is worth noting an area in which the significance of demeanour is put to the test – the cases where, for one reason or another, a witness seeks or requires to testify behind a veil or a screen.

Testimonial Accommodation

A test of the strength of our preference for testimony by witnesses who can be carefully observed arises in cases where the witness seeks to testify behind a screen, while wearing a veil, or with some other form of accommodation.

In 2010, the Ontario Court of Appeal in *R v. N.S.*,[33] set out some principles that it concluded should govern when a witness, for religious reasons, wishes not to reveal her face when testifying in the courtroom.

In *N.S.*, a woman who alleged that she was the victim of "historical" sexual assaults by her uncle and her cousin was called to testify at a preliminary inquiry. She advised the court that she wished to wear, while testifying, a hijab which covers her body, and a veil or niqab, which covers her entire face with the exception of her eyes. She advised the court that she always wears the hijab and niqab when in public or in the presence of males who are not "direct" members of her family. One of the accused was not a "direct family member" and the other was.

During submissions, the preliminary inquiry judge was advised that the witness had had her picture taken without her niqab for the purpose of obtaining her driver's licence; the photograph had been taken by a female photographer behind a screen. The preliminary inquiry judge ruled that the witness had a religious belief that was "not that strong" and open to exceptions. Therefore, he concluded, she should testify in the preliminary inquiry without the use of her veil.

That order was quashed in the Ontario Superior Court.[34] In the Court of Appeal, Mr. Justice Doherty, for the Court, reviewed the competing Charter claims (the accused asserting that his right to a fair trial was infringed, and the witness asserting that her right to religious freedom was infringed).

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[33] *R v NS*, 2010 ONCA 670 [*NS*], leave to appeal to SCC granted, 418 NR 399 (note), argued and on reserve.

[34] *R v NS*, [2009] 95 OR (3d) 735.

The Court began by referring to what was at stake for the complainant in human terms:

> N.S. is facing a most difficult and intimidating task. She must describe intimate, humiliating and painful details of her childhood. She must do so, at least twice, in a public forum in which her credibility and reliability will be vigorously challenged and in which the person she says abused her is cloaked in the presumption of innocence. The pressures and pain that complainants in a sexual assault case must feel when testifying will no doubt be compounded in these circumstances where N.S. is testifying against family members. It should not surprise anyone that N.S., when faced with this daunting task, seeks the strength and solace of her religious beliefs and practices.[35]

In parallel fashion, the Court referred to what the accused was facing, including possible lengthy incarceration, the stigma of being labeled a child molester and the fact that within his family and community many were aware of the charges against him. The Court stated: "In a very real sense, the rest of [his] life depends on whether his counsel can show that N.S. is not a credible or reliable witness."[36]

The Court commented that trial fairness is not measured exclusively from the accused's perspective. Broader interests are relevant, including a process that achieves accurate and reliable verdicts in a manner that respects the rights and dignity of all participants in the process. The Court pointed out that while the accepted tradition of the common law is that questioning will occur in a public forum in the presence of the judge, Crown counsel, the accused and his counsel, and the witness and the public, there is no independent constitutional right to a face-to-face confrontation.[37] This is a distinction between the constitution of Canada and that of the United States, which has a "confrontation clause".[38]

The Court in *R v. N.S.* referred to the two ways in which covering the face of a witness might impede cross-examination: first, by limiting the trier of fact's ability to assess the witness's demeanour, and second, by depriving the cross-examiner of possibly valuable insights flowing from observation of nonverbal communication from the witness. The Court referred to a New Zealand case, *Police*

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[35] *NS*, *supra* note 33 at para 45.

[36] *Ibid* at para 46.

[37] *R v Levogiannis*, [1990] 1 OR (3rd) 351 (CA) at p. 366, aff'd [1993] 4 SCR 475. In *Levogiannis*, the constitutionality of s. 486(2.1) of the *Criminal Code* was upheld.

[38] *US Const.* amend. VI,

v. Razamjoo.[39] In that case, the trial judge heard an application by two Muslim witnesses to testify wearing veils, and commented that the actual process of effective cross-examination is often partly instinctive; involving an ongoing evaluation of how the witness is performing. This process, according to the court in *Razamjoo*, may include the reception and response to tiny signals from the witness involving facial expressions, signals that may be understood only at an unconscious level.

The Ontario Court of Appeal referred to the submission by counsel for the witness that credibility assessments based on demeanour can be unreliable and flat-out wrong, can reflect cultural assumptions and biases, and that judgments based on demeanour are no substitute for those based on a critical analysis of the substance of the entire evidence. It noted that the trier of fact will not lose all aspects of demeanour, even if the witness wears a niqab, because the witness's body language, eyes, voice, and manner of responding will still be observable.

The Court commented, however:

> The criminal justice system assumes that the truth is most likely to emerge through a public adversarial process. Face-to-face confrontation, especially between an accused and his accuser, is a feature of that adversarial process. The value of confrontation to the cross-examiner cannot be dismissed because credibility assessments based on demeanour, like credibility assessments based on anything else, can prove to be wrong. An accused who is denied the right to see the full face of a Crown witness, particularly the accuser, during cross-examination loses something of potential value to the defence. Whether he loses his constitutional right to make full answer and defence in a fair trial will depend on a fact-specific inquiry. That inquiry must look to the actual effect of denying face-to-face confrontation of the witness in the circumstances of the particular case. That inquiry must also have regard to other legitimate interests engaged in the circumstances and the constitutional values underlying those interests....[40]

In the end, the Court of Appeal concluded that the preliminary inquiry judge had erred, given the limited significance of credibility assessment at a preliminary inquiry. This case does not really decide what should happen at a trial; that remains an open question. However, the Court gave some guidance. It indicated that at the end of the day, if, having attempted to accommodate a witness by applying a sensitive understanding of all of the issues at stake, a trial judge concludes that the accused's right to a fair trial would be infringed, the accused's right to a fair trial

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[39] *Police v Razamjoo*, [2005] DCR 408.

[40] *NS*, *supra* note 33 at para 60.

would take priority over the right of the witness to wear a veil. If the judge orders the witness to remove the niqab, it would then be up to the Crown to decide whether to proceed or to enter a stay of proceedings.

Cases such as *N.S.*, about veils and screens, push the boundaries of our adherence to live oral testimony as the optimal basis for assessment of witnesses' credibility. The fact that courts have been willing to accept such compromises, but only within limits, shows where the boundaries still lie.

Shift From Confidence to Skepticism

Whether or not the change is based on a response to the scientific research, I think that there is less reliance on the belief that demeanour is an accurate method for determining credibility. The framework for credibility analysis has become more complex and judges are no longer encouraged to consider demeanour evidence to be a determining or even a central tool in credibility assessment.

The "classic view" was expressed by Lord Loreburn in *Kinloch v. Young*[41]:

> But this House and the Courts of appeal have always to remember that the judge of first instance had had the opportunity of watching the demeanour of witnesses – that he observes, as we cannot observe, the drift and conduct of the case; and also that he has impressed upon him by hearing every word the scope and nature of the evidence in a way that is denied to any Court of appeal. Even the most minute study by a Court of appeal fails to produce the same vivid appreciation of what the witnesses say or what they omit to say.

The more sceptical view was expressed by Lord Devlin in *The Judge*[42]:

> The great virtue of the English trial is usually said to be the opportunity it gives to the judge to tell from the demeanour of the witness whether or not he is telling the truth. I think that this is overrated. It is the tableau that constitutes the big advantage, the text with illustrations, rather than the demeanour of a particular witness.

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[41] *Kinloch v Young*, [1911] SC (HL) 1.

[42] Lord P Devlin, *The Judge*, (Oxford: Oxford University Press, 1979) at 63.

In the much quoted 1951 British Columbia Court of Appeal case on the subject of credibility assessment, *Faryna v. Chorny*,[43] Mr. Justice O'Halloran observed that:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions.[44]

The statement I have quoted from *R v. N.S.*[45] may serve as a concise summary of the currently prevailing view: credibility assessments based on demeanour, like credibility assessments based on anything else, can be wrong, but demeanour is not wholly irrelevant.

What are the reasons for this shift, significantly reducing emphasis on demeanour?

First, I think that the need for critical analysis or scepticism has been supported and underlined in the past three or four decades by dissemination of the research of psychologists and other social scientists who have studied human ability to detect deception.

Second, in some recent instances, including several revealed through the work of the "innocence projects," highly reliable evidence such as DNA has shown that people have been wrongfully convicted – sometimes executed, sometimes incarcerated for decades – on the basis of unreliable or untruthful testimonial evidence. In some instances, the evidence in question appears to have been deliberately deceptive, although in most instances, I would venture to say, the evidence was simply unreliable and mistaken. (Often eye-witness evidence has proven to be the source of the erroneous conviction.) These concrete examples of failure in the fact-finding process have assisted in casting doubt on the reliability of credibility assessment in the courtroom.

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[43] *Faryna v Chorny*, [1951] BCJ No 152, [1952] 2 DLR 354 [*Faryna*].

[44] *Ibid.*

[45] *NS, supra* note 33 at para 60.

How To Go On In These Circumstances

At the end of the day, notwithstanding the flaws in our system, judges are still required to make findings of fact that are sometimes dependent on conclusions about the credibility of witnesses.

How should we approach this task, in this time of increased scepticism, the recognition of serious consequences for errors, and few or no scientific studies to support what has traditionally been done in the courtroom?

There are at least four directions available: (1) learn from the research on deception detection and try to do better with visual and verbal cues; (2) consider the use of technology; (3) emphasize the analytical reasoning behind credibility conclusions; and (4) emphasize factors other than verbal or non-verbal cues. I will discuss these in turn, and the third and fourth in some detail.

First, there are ways in which we might be able to do better as human lie detectors by following the advice of the researchers: for example, avoid the common errors about behavioural cues, consider alternative explanations when interpreting cues, and rely on multiple cues in a flexible manner. It may also be possible to draw more accurate conclusions about credibility by emphasizing how the witness responds to unexpected questions or to confrontation with unexpected information, or the witness's ability to provide temporal and spatial detail. These, of course, have long been understood as highly effective areas for cross-examination.

However, almost all of the research focuses on conditions different from those in the courtroom, and there are distinct limits on our ability to follow in the courtroom the guidance that emerges from what the researchers have discovered. Consider all of the following about testimony in a courtroom.

- The judge has very limited scope for asking questions of a witness, and instead must rely on counsel or self-represented litigants to do so.
- Judges usually have a one-time, often very brief, exposure to a witness, and to their behaviour. There is no real opportunity, usually, to establish a "baseline" for that individual's behaviour when lying or telling the truth. There is no opportunity to see the witness in a normal setting.
- The witness's testimony in court is usually at least the second time he or she has told the story, and often the witness has

repeated the story many times prior to the courtroom appearance.

- It is difficult to come up with surprise questions for a well-practiced witness.
- There is no clear way that judges can learn, after the fact, whether or not they have been correct.

On the other hand, in a few ways we are at an advantage in the courtroom in comparison with most situations in daily life. Notably, the ordinary rules of conversation do not really apply. While our mothers told us not to ask probing questions and not to challenge directly what someone has said, it is quite appropriate for counsel to confront witnesses in those ways. Similarly, though staring fixedly, directly and without expression at the person speaking is not encouraged at a dinner party, it is normal and acceptable behaviour on the part of a judge. As well, sometimes we have fairly extensive opportunities to observe a witness and to take into account multiple cues, as well as the presence or absence of confirmatory evidence. Most importantly, a well-conducted cross-examination can reveal inconsistencies and implausibility in a witness's account.

I would suggest that we should take what we can from the research, recognizing its limitations, and that we should continue to learn from the wrongful conviction cases and the frailties they have exposed with respect to certain kinds of testimony.

The second direction we might take in going forward with credibility assessment is to seek salvation in technology, such as through the use of polygraph or fMRI.

The polygraph machine's operation is based on a longstanding belief that lying is accompanied by specific physiological activity within the liar's body.[46] The polygraph provides a graphical representation of electrodermal activity, blood pressure and respiration, and is able to detect even small differences in each. While it may accurately reveal those physiological changes, both laboratory and field studies of its accuracy show significant numbers of both false positives for individuals who are actually telling the truth and false negatives for individuals who are actually lying. In six laboratory studies, false positives were returned for 8% to 15% of participants, while false negatives were returned for 7% to 10% of participants.[47] The results in field studies were even worse: in five studies, false positives were returned for 12% to 47% of participants. One study was an outlier that returned only 1% false

[46] Vrij, *Detecting Lies and Deceit*, *supra* note 10 at 293.

[47] *Ibid* at 323.

negatives, but for the other four studies false negatives were returned between 11% and 17% of participants.[48] Given this high error rate, it is not surprising that the Supreme Court of Canada ruled in *Béland*[49] that such evidence should not be admissible. Although the polygraph is accurate enough that it may be useful for investigative purposes, the combination of its high error rate and the popular belief that it is a true "lie detector" makes it inappropriate for use in the courtroom.

The most recent development in physiological deception detection comes from the measurement of activity in brain structures and areas through devices such as a functional magnetic resonance imaging (fMRI) scanner. These scanners are commonly used in hospitals, but in the past ten years researchers in deception detection have begun to use them to attempt to detect lies.[50] The researchers' claims that the method provides "direct access to the seat of a person's thoughts, feelings, intentions and knowledge" may oversell its merits.[51] As of 2008, this research had been limited to a dozen laboratory studies. Each of those studies found that lying was associated with specific brain structure and area activity, but different studies have shown different brain activities as indicators of deceit. Only three studies have reported the extent to which the identified brain structure and area allow truth and lies to be correctly classified; this accuracy rate has ranged from 78% to 93%.[52] Given the novelty of this research, the limited number of studies completed to this point (all of which have been laboratory studies), the impracticalities of the current technology and the ethical concerns it may raise, fMRI seems to be at some distance from being useful in determining credibility in the courtroom.

In short, the Lasso of Truth remains elusive

I will spend a little more time on two other possible directions or areas of emphasis for possibly improving credibility assessment. The third possible direction is to focus on the analytical process, and the fourth is to focus on the "plausibility" of the witness's account. These are not mutually exclusive, nor do they exclude the use of behavioural observations where appropriate.

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[48] *Ibid* at 325.

[49] *Béland, supra* note 25.

[50] *Ibid* at 366.

[51] *Ibid* at 365.

[52] *Ibid* at 369.

The Analytical Process: Careful Preparation and Review of Reasons

Where credibility is a significant issue, reasons are particularly important. They are important, among other reasons, because if a judge chooses one version of events over another without providing specific reasons why the evidence of one witness was preferred, the parties have not been adequately informed why the decision was made.

There are only two bases upon which an appellate court can set aside a trial judge's findings of fact.

The first is where the findings of fact were not grounded in the evidence. A high standard must be met; the trial judge must have made a "palpable and overriding error." This proposition is sometimes stated as "prohibiting an appellate court from reviewing a trial judge's decision if there was some evidence upon which he or she could have relied to reach that conclusion".[53]

The second is where the reasons for the judge's findings of fact were not adequately stated; for example, if the judge has not adequately stated his or her reasons for deciding between conflicting evidence or for reaching his or her conclusions about credibility.

In 2002, the Supreme Court of Canada confirmed in *R v. Sheppard*[54] and *R v. Braich*[55] that a trial judge sitting alone in a criminal case has a duty to provide substantial reasons for his or her decisions, particularly those decisions relating to credibility. The Court held that "reasons fulfill an important function in the trial process" and that a judgment may be reversed on appeal if the function of giving reasons is not fulfilled – but only if the accused's or the Crown's right of appeal is prejudiced by insufficient or non-existent reasons.

It is interesting to note the reasons that were before the Court in *R v. Sheppard*. Mr. Sheppard, a carpenter, had been charged with the theft of two windows. The only evidence connecting him to the windows came from an estranged girlfriend who had vowed to "get him". The reasons at trial in their entirety were: "Having considered all the testimony in this case, and reminding myself of the burden on the Crown and the credibility of witnesses, and how this is to be assessed, I find the defendant guilty as charged."[56]

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[53] *Housen v Nikolaisen*, 2002 SCC 33 at para 10.

[54] *R v Sheppard*, 2002 SCC 26, [2002] 1 SCR 869, [2002] SCJ No 30 [*Sheppard*].

[55] *R v Braich*, 2002 SCC 27, [2002] 1 SCR 903, [2002] SCJ No 29.

[56] *Sheppard, supra* note 53 at para 2.

This issue of insufficiency of reasons was subsequently raised in a number of appeals. The Supreme Court of Canada handed down five cases on this topic in 2008: *R v. C.L.Y.*,[57] *R v. Dinardo*,[58] *R v. Walker*,[59] *R v. R.E.M.*,[60] and *R v. H.S.B.*[61]

The most intensive discussion of the topic was in *REM*, where Chief Justice McLachlin identified three main purposes for requiring reasons for judgment in a criminal trial, as well as two subsidiary purposes. The most important are the first three, and they are said to be relevant to the determination of whether the reasons are sufficient. Reasons are to: (1) "tell the parties affected by the decision why the decision was made"; (2) "provide public accountability of the judicial decision; justice is not only done, but is seen to be done"; (3) "permit effective appellate review".[62]

The Court also pointed out that the process of writing reasons itself helps to ensure fair and accurate decision making, by forcing the judge to think carefully about the relevant legal principles. Further, the Court said, written reasons contribute to the uniform development of the law in accordance with the principle of stare decisis.

The sufficiency of a trial judge's reasons is not to be determined on a stand-alone, self-contained basis. Rather they are to be evaluated in the whole context of the trial, including consideration of the record, the issues and the submissions of counsel. Where the evidentiary basis of the trial judge's decision is clear from the record, less detail will be required.

The duty to give reasons applies in civil cases as well.[63]

The Court acknowledged in *R.E.M.* that "assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete

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[57] *R v CLY*, 2008 SCC 2.

[58] *R v Dinardo*, 2008 SCC 24.

[59] *R v Walker*, 2008 SCC 34.

[60] *R v REM*, 2008 SCC 51 [*REM*].

[61] *R v HSB*, 2008 SCC 52.

[62] *REM*, *supra* note 60 at para 11.

[63] *Hill v Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 at paras 100-04.

verbalization."[64] The same recognition was evident in this comment by Mr. Justice Cory in *R v. Lifchus* with reference to the requirements for a jury charge on the definition of reasonable doubt:

> Nonetheless there is still another problem with this definition. It is that certain doubts, although reasonable, are simply incapable of articulation. For instance, there may be something about a person's demeanour in the witness box which will lead a juror to conclude that the witness is not credible. It may be that the juror is unable to point to the precise aspect of the witness's demeanour which was found to be suspicious, and as a result cannot articulate either to himself or others exactly why the witness should not be believed.[65]

However, in general, as stated in *R.E.M.* at para. 41, the reasons, viewed in light of the record and counsel submissions on the live issues in the case, must explain why the decision was reached by establishing a logical connection between the evidence and the law on the one hand and the conclusion on the other. With respect to credibility, the court must say how credibility concerns were resolved and why one version of events was preferred over another.

Again from *R.E.M.*, "the object is not to show how the judge arrived at his or her conclusion, in a 'watch me think' fashion. It is rather to show why the judge made that decision".[66]

The Supreme Court also recognized in *R.E.M.* that a trial judge may wish to avoid saying unflattering things about a witness. In my view, the greater our understanding of the challenges in credibility assessment, the greater the need for careful and temperate language when stating our findings; at the same time, the functional purposes of reasons must still be fulfilled, and conclusions about credibility should be made clear.

With specific reference to appellate review of reasons regarding credibility, the Court observed in *R v. Gagnon*:

> Assessing credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to

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[64] *REM, supra* note 60 at para 49.

[65] *Lifchus, supra* note 28 at para 29.

[66] *REM, supra* note 60 at para 17.

> reconcile the various versions of events. That is why this Court decided, most recently in H.L., that in the absence of a palpable and overriding error by the trial judge, his or her perceptions should be respected.[67]

Why do I say that this body of jurisprudence about sufficiency of reasons provides a useful direction for triers of fact in dealing with the substance of credibility issues?

It is because the requirement to give reasons explaining why one version of events is preferred over another, or why the evidence of a particular witness is accepted or rejected, imposes a very useful discipline. It requires conscious reflection about the components of the credibility decision. Further, reasons that cannot be openly stated in a judgment perhaps should not be operative.

This is not to say that I disagree with the observations of Mr. Justice Cory and others that there may be an element in credibility assessment that is incapable of articulation, yet still wholly legitimate. The "blink" response – "that makes sense" or "that doesn't make sense" from this person, in this case – in my view should not be wholly disregarded.

But, rather than allowing a decision simply on the basis of an instinctive response to the witness's manner of presentation and the content of what the witness has said, reasons require analysis and reflection, and careful consideration as to how the weaknesses or the strengths of the witness's testimony in the context of the evidence as a whole bear on the conclusions to be drawn with respect to the material issues in the case.

Focus on the Plausibility of the Evidence

The direction suggested by Mr. Justice O'Halloran in *Faryna v. Chorny*[68] and endorsed in many cases, is that the trier of fact should look primarily to confirmatory

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[67] *R v Gagnon*, 2006 SCC 17, [2006] 1 SCR 621, [2006] SCJ No 17 at para 20.

[68] See *Faryna*, *supra* note 43, at para 10-12:

> "If a trial Judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that 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, and cf. *Raymond v. Bosanquet* (1919), 50 D.L.R. 560 at p. 566, 59 S.C.R. 452 at p. 460, 17 O.W.N. 295. A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial

evidence and the inherent plausibility of the witness's account, rather than to observations of the witness's demeanour. I think it is fair to say that this is the method of choice for most of us, in and out of the courtroom, when we have to decide what we believe.

It is of course a sensible direction and one that I suspect most judges have been incorporating for much of juridical history.

However, insofar as it invokes our sense of what is plausible, it, too, carries its risks.

First, just as conclusions about credibility based on demeanour depend upon our apparently very modest abilities to detect deception in other humans, our assessments of plausibility depend upon our sometimes very modest store of personal or learned experience. To put it bluntly, what might seem wholly plausible to me might seem entirely implausible to someone who has lived a different and more sheltered life than I have, or a less sheltered life.

We assess plausibility against our own knowledge and experience of the world. With respect to judicial notice, Mr. Justice Binnie has written in "Judicial

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Judge, and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.

The credibility of interested witness, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skillful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.

The trial Judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial Judge with a divine insight into the hearts and minds of the witnesses. And a Court of Appeal must be satisfied that the trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can he tested in the particular case."

Notice: How Much is Too Much?"[69] that what is formally proved in court is the tip of the iceberg, resting on a "vast submerged universe of unproven fact, intuition, conjecture, out of court perception and other mental baggage brought into court [by the trier of fact], representing the product of their collective life experiences." On this view, most of what enters into fact finding is not visible, and is not accessible for contradiction by counsel in any precise detail.

For example, consider the everyday use of medical records for cross-examination in personal injury cases. Frequently defence counsel cross-examines the plaintiff along the lines of, "you went to your doctor on January 14, 2005 – but I don't see anything in her notes about problems with your shoulder," and then "you went to the doctor again on March 17, 2005 ... again no mention of your shoulder." It is now a common practice in the British Columbia medical system for practitioners to restrict patients to 10-minute visits with one problem per visit; knowledge or ignorance of that practice may make a difference to the assessment of the plausibility of the plaintiff's account and of his credibility.

A vivid example from my own experience occurred when I was a law student attending an appeal proceeding. The issue before the Court in *R v. Lavoie*[70] was whether the right to equality before the law in s. 1(b) of the *Canadian Bill of Rights*[71] served to render invalid the former s. 164(1)(c) of the *Criminal Code*,[72] which made it an offence for a woman who, being a common prostitute or nightwalker, was found abroad and failed to give a good account of herself (the "Vagrancy C provision"). In appealing the conviction of a woman under that section, her counsel argued that it constituted gender discrimination and was invalid under the *Canadian Bill of Rights* because only women could be convicted under it.

One of the justices of appeal was so taken aback by this argument that he said to counsel, "Are you really trying to tell me, counsel, that a man could be a prostitute?" This was a wholly implausible concept in his frame of reference.

My point is that in assessment of plausibility, the subjective element is inescapable, often ineffable, and elusive of contradiction. Some of the research about credibility assessment suggests that attractive people or likeable people tend to be assessed as more credible than others. Some of the jurisprudence about reasons

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[69] Mr. Justice Ian Binnie, "Judicial Notice: How Much is Too Much?" in Alan W Bryant, Marie Henein & Janet A Leiper, *Law Society of Upper Canada Special Lectures 2003, The Law of Evidence* (Toronto: Irwin Law, 2004).

[70] *R v Lavoie*, [1971] 23 DLR (3d) 364 (BCCA).

[71] SC 1960, c 44.

[72] SC 1953-54, c 51.

highlights the need to avoid asymmetrical scepticism – that is, great lashings of scepticism applied to one account and little or none to another. What I am suggesting is that the "the ring of plausibility" can be as problematic a touchstone as "the ring of truth".[73]

A second problem with overemphasis on "plausibility" is that sometimes the highly unusual does occur, and we err if we assume that it cannot.

Finally, a third problem is that just as good lawyering can assist a witness in presenting a demeanour that looks credible, so too can good lawyering assist a witness in presenting an account that looks plausible – emphasizing what counsel describes as the "telling detail" (which happens to be supported by some scraps of confirmatory evidence) and giving that detail supreme importance throughout the case.

CONCLUSION

Those of us working in the legal system are now largely sceptical about observation of demeanour as the linchpin of credibility assessment. However, in my view, it would be a mistake to conclude that demeanour must be wholly disregarded. In fact, the research supports the conclusion, which is consistent with the experience of many judges, that the best possible results are achieved when a combination of factors is considered, emphasizing the content of what is said, not how it is said, and its consistency with other evidence.

Although the research shows that credibility assessment based solely upon verbal or non-verbal cues is very difficult and that most people do no better than chance in discriminating truth from lies in laboratory tests, that is not the same situation as the typical credibility assessment done in a Canadian courtroom. Typically, there is an opportunity to assess not just the one-off delivery of testimony by a witness, but also the content of that testimony in the overall context of the case.

I have suggested that the discipline of stating reasons is a good one. Analyzing rigorously, questioning carefully, and remaining conscious of one's own preconceptions and biases or possible susceptibility to influences such as the likeability or attractiveness of the witness, is salutary. Such questioning, analysis, and self-awareness is fostered through writing reasons.

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[73] As an example, the evidence in *Faryna, supra* note 43, referred to by O'Halleran J.A. in his discussion related to a particular witness's claim that he had an imperfect knowledge of Ukrainian. Many assumptions rested beneath the surface of the assessment both at trial and on appeal.

At the same time, I agree with the observation that it may not be possible to express fully why it is that one has come to a conclusion about where the truth lies. The whole may be more than, and perhaps different from, the sum of the parts.

To return to my title, discriminating between the pure ring of truth and the harsh clang of lies does not seem to be a simple question of developing a good ear for the pitch, timbre and volume of the message as it is delivered, though attentiveness to those matters may form a small part of the process.