

# ASSESSING CREDIBILITY

*People only correctly judge whether someone is lying 50 per cent of the time. Why is it so hard to tell if someone is telling the truth? And how can tribunals improve their rate of detecting deceit? HAZEL GENN explains.*

The assessment of credibility is an essential and difficult aspect of fact-finding in judicial decision-making. Deep within our legal culture, with its emphasis on orality, is the presumption that the seeing and hearing of witnesses is not merely useful but crucial to accurate and fair judicial decisions. Despite the importance and difficulty of this aspect of the judicial role, we spend little time in judicial training discussing how assessments of credibility are and should be made. Why is this so? Perhaps it is because we feel that assessing credibility is something instinctive and personal to the individual judge – not amenable to the kind of guidance given for decisions on points of law and procedure. But precisely because the subject is hard, and because on appeal such assessments are difficult to reconsider or dislodge, it is important to discuss how credibility is evaluated and what are helpful, legitimate and appropriate factors to weigh in reaching those assessments.

## What is ‘credibility’?

At its most basic, credibility involves the issue of whether the witness appears to be telling the truth as he now believes it to be<sup>1</sup>. Involved in that assessment may be judgments about whether the witness can generally be considered to be a truthful or untruthful person and whether, although generally truthful, he may be telling less than the truth on this occasion. In order to make these assessments, Eggleston<sup>2</sup> suggests a number of tests including:

- Consistency of the witness’s evidence with what is agreed or clearly shown by other evidence to have occurred.
- The internal consistency of the witness’s evidence.

- Consistency with what the witness has said or deposed on other occasions.
- The credit of the witness in relation to matters not germane to the litigation.
- The demeanour of the witness.

In many tribunals, and some other proceedings, the judicial decision-maker often has little more to go on than a party’s oral evidence about his or her situation and the circumstances leading to the claim being decided. There may be scant supporting documentary evidence and an absence of other witnesses to corroborate the story being told. In these situations, decisions about credibility or truth-telling may be crucial to the outcome of the case and the demeanour of the appellant or witness may be central in reaching a judgment about credibility.

Why is it that we think demeanour helps us in assessments of credibility? It is because, as social beings as well as professionals concerned with truth-telling, we believe that liars give themselves away not simply in the words they use but through their non-spoken behaviour. Lord Bingham describes demeanour as the sum of a witness’s ‘conduct, manner, bearing, behaviour, delivery, inflexion’. In short, ‘anything which characterises his mode of giving evidence but does not appear in a transcript of what he actually said’.<sup>3</sup> So demeanour is about the language of the body rather than words – emotion about lying that is translated into visible or audible signs. Although Lord Bingham and some other distinguished judges have cautioned against too great a dependence on demeanour in reaching assessments of credibility, most judicial decision-makers accept that it is an important element in the finding of facts and,

of course, part of the point of having witnesses giving evidence orally.

However, assessing credibility on the basis of demeanour presents two potential types of error:

- 1 Mistakenly believing someone who is lying.
- 2 Mistakenly disbelieving someone who is telling the truth.

### The complexities of detecting lies

In seeking to improve our ability to assess credibility, we must search for insights within the literature of social psychology rather than law<sup>4</sup>. Social psychologists recognise that lying is a central characteristic of life and that understanding the phenomenon is relevant to almost all human affairs – not simply to the tribunal or court context.

For the purposes of better understanding the process of lying, psychologists distinguish two types of lying and several types of emotion about lying that serve to complicate matters for those charged with the job of detecting lies.

### Two types of lying

There are two primary ways to lie:

- 1 To conceal – withholding information without actually saying anything that is untrue.
- 2 To falsify – presenting false information as if it were true.

Often it is necessary to combine concealing information with falsifying information, but sometimes it is possible simply to conceal information. When there is a choice about how to lie, psychological research suggests that liars generally prefer to conceal information than to falsify information, principally because concealing is generally easier than falsifying information. If you don't have to make anything up you don't have to remember your story. It is also possible

that witnesses consider concealing information to be less reprehensible than falsifying information and are therefore less likely to reveal signs of discomfort about concealment and less fear of detection.

### Emotions about lying

A key problem in assessing credibility from the *demeanour* of the witness is the possibility of confusing two types of emotion that might be expressed by a person giving evidence or being questioned:

- 1 The innocent witness's fear of being disbelieved.
- 2 The guilty witness's apprehension about being detected.

Many of the signs that people commonly use as indicators of untruthfulness are simply the physical signs of raised emotion that can occur for many different reasons. Hearts beat faster, faces may redden and bodies sweat whenever emotion is aroused, so that these signs in themselves cannot reliably be taken as a guide for deceit.

Moreover, experiments show marked individual differences within the population in our ability to conceal emotions. Some people are naturally vulnerable to detection apprehension while others successfully lie with ease. The ability to perpetrate a lie apparently cuts across the type of lie being told, so that a good liar will be good at all lies – no matter how big or small. Indeed, there may actually be genes for lying.

*To the judge, resolution of factual issues is (I think) frequently more difficult and more exacting than the deciding of pure points of law... He is dependent, for better or worse, on his own unaided judgment*

Lord Bingham  
'The Business of Judging'

Natural liars know about their ability to deceive and will have been getting away with things throughout their lives. They feel no detection apprehension because they are confident in their ability to deceive. This quality is useful among certain professions, for example actors, salesmen, negotiators and spies.<sup>5</sup>

On the other hand, some people are unusually vulnerable

to a fear of being disbelieved. This may occur when people have a deep sense of guilt about some unresolved issue in their life, and their feelings of guilt are aroused whenever they realise that they are suspected of wrongdoing. They may appear uncomfortable or even distressed while giving evidence, but this relates to anxiety about being disbelieved, rather than evidence of lying.

So it seems that although the causes will be different, both the liar and the truthful person may display signs of emotion prompted by the suspicions or questions of the tribunal probing their evidence.

Emotions around lying and truthfulness are therefore difficult to read, but liars may sometimes give themselves away by two further emotions described as ‘deception guilt’ and ‘duping delight’. A successful liar may eventually send out an emotional signal because he misjudges the guilt or shame he will feel at having lied. Alternatively, a successful liar may become excited at the prospect of success and fail to conceal that emotion.

*The absence of a sign of deceit is not evidence of truth*

### The mistakes we make in judging who is lying

Experimental research by psychologists has established that few people do better than chance in judging whether someone is lying or truthful. The research also consistently shows that most people *think* they are making accurate judgments when they are not.

Studies suggest that people are about 45 to 60 per cent accurate in spotting lies – in fact, very close to chance, which would be 50 per cent. One study comparing the ability of different professional groups to detect lies found that the police were no better than ordinary people in identifying who was lying, although they were confident that their judgments were better. In another US study involving secret service agents, psychiatrists, judges, robbery investigators, FBI polygraphers and college students, the only group to score significantly above chance in detecting lies were the secret service agents. In all groups, the subjects’ self-assessment of their skill at lie detection bore no relation to their actual score.

This all suggests that although we are not very good at detecting deceit, we *think* that we are.

There are two types of error made in assessing the truthfulness or untruthfulness of a witness: *disbelieving the truth* and *believing a lie*. Our failure to take into account how people differ in their expressive behaviour leads to both types of mistake in detecting deceit. We may believe a lie because the person telling their story gives no clue that they are deceiving us. She may be a natural liar or someone who has simply come to believe her own lies. The absence of a sign of deceit is not evidence of truth.

But on the other hand, if we detect what we believe to be a sign of deceit we may misbelieve the truth. Many

people have odd behavioural quirks.

Some may be naturally hesitant and speak with pauses between words and this is a particular problem when the judgment is being made relatively quickly and on the evidence of a first meeting. On a first meeting what is the basis for comparison?

Are the quirks part of normal behaviour or is the person behaving differently on this occasion?

Many people may show signs of fear, anger or distress that are unrelated to lying but to the situation in which they are being questioned. Disbelieving the truth may occur when the decision-maker fails to appreciate that a truthful person who is under stress may appear to be lying. For most people, presence in a tribunal or court is a unique experience and one that is likely to arouse strong emotions. There is a danger here that a truthful person under stress may appear to be lying.

Poor guides to whether or not someone is lying are signs such as breathing, blinking or sweating. These are all physical manifestations of emotion but they are non-specific. Similarly, blushing may be a reflection of embarrassment, of shame, of anger or of guilt, and blanching may reflect either fear or anger.

In trying to assess whether someone is lying, we often pay attention to words and to facial expressions, which

research suggests are relatively unreliable sources of information. Liars will be very careful about their choice of words and are also generally careful about controlling their facial expressions. On the other hand, they may be somewhat less conscious of their body and voice and therefore less able to control 'leakage' of emotion through movement and voice inflexion and pitch.

Ekman argues that it is hardest to detect a lie in the following circumstances:

- *When the liar and the recipient have never met before.* It is harder for the recipient to avoid making mistakes about individual quirks of behaviour.
- *When the liar can anticipate when he has to lie.* In these situations the lies can be prepared and rehearsed so that the liar presents a seamless and internally consistent story. Repeated preparation of evidence increases confidence and decreases fear of being detected.
- *When the lie only involves concealment.* This is generally harder to detect than falsification because nothing has to be said and emotion about concealment may be less.
- *When the liar and the recipient come from different cultures or backgrounds.* The recipient will make more errors in judging clues to deceit.
- *When the recipient is impersonal or anonymous.* This decreases the deception guilt felt by the liar who will therefore display fewer signs of emotion around the lie.
- *When the liar and recipient do not share the same values.* The liar will feel less guilt about lying and therefore reduced emotion surrounding the lie.
- *When there is no severe punishment for being caught lying.* Apprehension detection will be low, although there is the possibility of carelessness.

### How to improve our detection ability

Success in distinguishing between when a person is telling the truth or is lying is likely to be highest when:

- The lie is being told for the first time.
- The liar cannot exactly anticipate the questions that are going to be asked and when she is going to have to lie.
- There is a threat of severe punishment for lying.
- The questioner is truly open-minded and does not jump to conclusions quickly.
- The questioner knows how to encourage the witness to tell his story.
  - Experiments suggest that the more words spoken the better the chance of distinguishing lies from truthfulness.
  - Training in interview techniques can improve the ability of questioners to detect deceit.
- The questioner and witness come from the same cultural background and speak the same language.
- The questioner is aware of the difficulties of identifying the truthful, innocent person who is under suspicion.
  - A courteous and humane approach in tribunal proceedings is good practice and will reduce the truthful appellant's fear of being misbelieved and may increase the guilt felt by the liar.

Paradoxically, it seems that the tribunal is a relatively poor environment in which to make judgments about deceit from demeanour. Punishment for lying is rare, time may be limited for sensitive and protracted interrogation and, with an increasingly diverse population, the tribunal and appellant frequently come from different backgrounds, cultures and languages. Bearing in mind the difficulty of detecting deceit, tribunals should guard against too much weight being placed on demeanour as a guide to truth as compared with other forms of evidence. On the other hand, refining tribunals' interviewing techniques and exploring how, when and why truthfulness might be judged from demeanour may help to increase the accuracy of assessments of credibility.

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<sup>1</sup> *Onassis v Vergottis* [1968] 2 Lloyd's Reports, referred to by Lord Bingham at p 5.

<sup>2</sup> Eggleston *Evidence Proof and Probability* (1978) 155.

<sup>3</sup> Op cit p 8.

<sup>4</sup> See Professor Paul Ekman, *Telling Lies* (2001), and Daniel McNeill, *The Face* (1998).

<sup>5</sup> Ekman, op cit, p 57.