

Part II

Online Trial Hearings – In Particular, Evidence

A Judge's Perspective: Online Hearings, especially the Gathering and Assessment of Evidence

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A. *Online Examination of Witnesses: an Obstacle to Establishing their Truthfulness?*

The line of thought that still prevails today is that personal contact (in the same physical space) between judge and/or jury and the witness allows the judge to draw inferences concerning the honesty and reliability of the testimony from the witness's non-verbal behaviour. It is therefore commonly asserted that, in evaluating depositions, consideration is given to factors relating to the witnesses' demeanour, reactions, tone of voice, gestures, mimicry, blushing or pallor, or their evident nervousness. In short, the witness's non-verbal channel of communication is regarded as a reliable basis for making deductions about the honesty and trustworthiness of the deposition, and it has been said that "Immediacy is the key that decodes the deposition."¹

Within this line of reasoning, the wearing of a mask (a public health requirement during the pandemic) by a witness deposing in person undermines the postulate that observation of the witness's non-verbal behaviour is fundamental for establishing their credibility.

1 Pissarra, 'Audiências judiciais por teleconferência em processo civil' (2020) 1-4 *Revista de Direitos e Estudos Sociais*, 167 (176).

However, this epistemological supposition is far from being correct and workable, on the terms assumed by professionals in the judiciary and arbitration, and even by lawmakers.

In effect, immediacy cannot be seen as a kind of sensory experience that permits the judge, in the first place, not to be mistaken in his or her perceptions and, in the second place, to develop a kind of infallible and unaccountable intuition as to the honesty and reliability of testimony.

Mouraz Lopes has astutely observed that:

To 'take refuge' in the assertion that certain evidence does not need to be justified or validated because what was decided falls within the scope of the principle of immediacy is a way of evading the mandatory requirement that judgments must be supported by due grounds, and in particular the principle of full grounds.²

This author also points out that orality and immediacy offer essentially a technique for obtaining evidence and not a method for forming a judge's conviction. Once the information has been obtained from the production of evidence using immediacy, "the task of immediacy ceases at that moment and the judge's reasoning begins."³

It should be emphasised that the practice of detecting lies on the basis of non-verbal behaviour is informed by an array of incorrect social stereotypes, shared by judges and arbitrators. The underlying idea is the naive psychological view that a person who lies is under emotional pressure, and that their inner suffering is betrayed through channels unknown to them, and beyond their control.

The table below lists the indicators most often used for this purpose, indicating their effective relevance (scientifically determined through meta-analysis) for this purpose, as well as the social value attached to them.⁴

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- 2 Lopes, *A Fundamentação da Sentença no Sistema Penal Português: Legitimar, Diferenciar, Simplificar* (2011), 248.
 - 3 Lopes, *A Fundamentação da Sentença no Sistema Penal Português: Legitimar, Diferenciar, Simplificar* (2011), 251.
 - 4 Table taken from Vrij et al., 'Reading Lies: Nonverbal Communication and Deception' (2019) 70 *Annual Review of Psychology*, 295 (309).

Cues	Actual relationship	Assumed relationship
Vocal		
Hesitations (use of speech fillers, e.g., “ah,” “um,” “er,” “uh,” and “hmmm”)	.04	Associated with lying
Speech errors (grammatical errors, word or sentence repetition, false starts, sentence change, sentence incompletions, slips of the tongue, etc.)	.00	Associated with lying
High-pitched voice	.21	Associated with lying
Speech rate (number of spoken words in a certain period of time)	.07	No assumed relationship
Latency period (period of silence between question and answer)	.02	No assumed relationship
Pauses (silent, filled, or mixed)	.02	Associated with lying
Visual		
Gaze aversion (looking away from the conversation partner)	.03	Associated with lying
Smiles (smiling and laughing)	.00	No assumed relationship
Facial fidgeting (face touching or rubbing hair)	.08	Associated with lying
Self-fidgeting (touching, rubbing, or scratching body or face)	-.01	Associated with lying
Fidgeting (undifferentiated)	.16	Associated with lying
Illustrators (hand and arm movements designed to modify or supplement what is being said verbally)	-.14	No assumed relationship
Leg and foot movements	-.09	Associated with lying
Posture shifts (movements made to change seating position)	.05	Associated with lying
Head movements (head nods and head shakes)	-.02	Associated with lying
Eye blinks (blinking of the eyes)	.07	Associated with lying

This table was drawn up from a meta-analysis by Bella DePaulo (2003)⁵, and the correlations based on an article by Aldert Vrij (2008), two of the most comprehensive and scientifically credible sources in this field. A positive score indicates that the pointer, or cue, is more present when people lie, whilst a negative score indicates that the cue is less present when they lie. Relationships that are significant in percentage terms are indicated in bold; for scientific purposes, amplitudes of 0.20, 0.50 and 0.80 should be interpreted as describing, respectively, a small, medium and large effect.

It therefore follows from this analysis that the cues - socially assumed to be linked to deception and also with confirmed scientific relevance - that score highest (.21, .16 and -.14) are still classified as pointing to only a small effect, meaning they perform poorly as indicators of deception. DePaulo's meta-analysis presented a mean of just .27 in the thirteen most relevant cues. It flows from this that the relationship between non-verbal behaviour and the detection of deception is weak. As these authors emphasise 'Nonverbal lie detection is also a domain where many myths continue to exist: People typically overestimate the relationship between deception and nonverbal behavior and the ability to detect deceit by observing non-verbal behavior.'⁶

Several explanations can be advanced for this faint correlation between non-verbal cues and lying. In the first place, how people lie varies from individual to individual, and each individual will lie in a different way depending on the context and how much is at stake in the account (idiosyncratic behaviour). 'There is no dictionary of nonverbal cue meanings, because contextual factors involving encoders' intentions, their other verbal and nonverbal behaviors, other people (who they are and their behavior), and the setting will all affect meaning.'⁷ A liar may trigger nervous behaviour when what is at stake is important, but the same can happen with someone speaking honestly, out of the fear of not being believed. Secondly, in order to appear convincing, honest and lying speakers use similar non-verbal strategies (both seek to suppress signs of nervousness and instead give out signs they believe will create the impression of being honest, e.g. looking their interlocutor in the eyes and not fidgeting), but they use different verbal strategies (honest speakers are collaborative and employ the "*say it all*" strategy, whilst liars use the "**keep it simple**" strat-

5 The meta-analysis in question considered 116 studies, with 158 cues to deception.

6 Vrij et al., 'Reading Lies: Nonverbal Communication and Deception' (2019) 70 *Annual Review of Psychology*, 295 (297).

7 Hall, Horgan and Murphy, 'Nonverbal Communication' (2019) 70 *Annual Review of Psychology*, 271 (272).

egy and avoid mentioning details that might incriminate them), which explains why verbal content is a more reliable pointed to deceit than non-verbal behaviour. Thirdly, we tend unconsciously to mimic the non-verbal behaviour of our interlocutor, meaning that a suspect will tend to mimic the restless behaviour of his or her interrogator. Fourthly, a meta-analysis conducted in 2016 showed that training for investigators/judges centred on vocal and visual cues for detecting lies resulted in small improvements, whilst training focused on verbal content brought about moderate improvement.⁸ Fifthly, a meta-analysis conducted in 2006 pointed to a pitfall of paying attention only to visual cues: messages judged only on the basis of non-verbal cues generate a **lie bias**, i.e. a tendency to judge that the person questioned is lying. Because non-verbal stereotypes refer more to the behaviour of liars than to that of honest speakers (e.g. lack of eye contact and fidgeting/restlessness), the outcome generated is a lie bias. Once these stereotypes are created, several cognitive processes are activated so that stereotypes tend to endure, causing the questioner to interpret the behaviour of the person questioned in a way that does not correspond to reality (**illusory correlations**), e.g. when an observer is told that someone is lying, he will tend to overestimate the occurrence of aversion to eye contact. Sixthly, misconceptions about non-verbal lie detection are transmitted culturally, and stereotypes about lying are intended to discourage untruthfulness.⁹ In other words, by way of example, because lying is objectionable, someone who lies must exhibit emotional agitation/nervousness.

In short, researchers with scientific experience of detecting lies and truthfulness agree that 'there are no nonverbal behaviors that are present in all liars and are absent in all people who tell the truth. There are no nonverbal behaviors that are indicative of deception, such as **Pinocchio's**

8 The study in question is: Hauch et al., 'Does Training Improve the Detection of Deception? A Meta-Analysis' (2016) 43 *Communication Research*, 283. In the authors' words, 'Truth accuracy was only improved if verbal content cues to detect the truth were utilized, although this result should be interpreted with caution, because it could be due to a shift in response bias toward correctly detecting the truth. Training with verbal content cues yielded the highest training effect, whereas training with nonverbal cues, paraverbal cues, or feedback resulted in quite small or nonsignificant training effects. Therefore, researchers and practitioners should not base their trainings on these unreliable cues but focus on verbal content training.' (318)

9 Vrij et al., 'Reading Lies: Nonverbal Communication and Deception' (2019) 70 *Annual Review of Psychology*, 295 (304-311).

nose.’¹⁰ And when it is documented that facial expressions and gestures are related to lying, this relationship is faint, and often moderated by situational variables. What is said does not prevent non-verbal language (such as facial expressions, gaze pattern, posture, body movements) from transmitting interpersonal and social information, such as the witness's assessments, concerns and disposition concerning the situation. These non-verbal cues also signal their intentions and create impressions in courtroom observers.¹¹

Judges, like ordinary citizens, are often prey to misconceptions concerning cues to deceit (e.g. nervousness, an aversion to eye contact), concentrating on incorrect subjective cues. We find it difficult to see beyond deeply rooted stereotypes of this kind and are resistant to adjusting our convictions, even when science shows this to be necessary. What is more, multiple studies show that actual lie detection capability (including justice sector professionals), averages only 54%, in other words, only slightly above the level of chance.¹² Even when training is provided on objective

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- 10 Denault et al., ‘The Analysis of Nonverbal Communication: The Dangers of Pseudoscience in Security and Justice Contexts’ (2019) 30 *Anuario de Psicologia Jurídica*, 1.

In view of the authority of its authors and the analysis it makes of repeated practices lacking an adequate and sufficient scientific basis, this article contains what amounts to a manifesto against the pseudoscience of lie detection.

Denault, *L’Incidence de la Communication Non Verbale Lors de Procès: Une Menace à l’Intégrité du Système Judiciaire?* (2015), 160, states that the use in lie detection of concepts belonging to synergology, at variance with scientific consensus, amounts to a pseudoscience and a threat to the integrity of the judicial system.

To the same effect, concerning the relegation of non-verbal behaviour to a secondary role, cf. Bennett, ‘Unspringing The Witness Memory and Demeanor Trap: What Every Judge And Juror Needs to Know About Cognitive Psychology And Witness Credibility’ (2015) 64 *American University Law Review*, 1331.

- 11 Denault and Patterson, ‘Justice and Nonverbal Communication in a Post-pandemic World: An Evidence-Based Commentary and Cautionary Statement for Lawyers and Judges’ (2020) 45 *Journal of Nonverbal Behavior*, 1 (<https://link.springer.com/article/10.1007/s10919-020-00339-x>), accessed on 2021-02-08.
- 12 Vrij and Granhag, ‘Eliciting Cues to Deception and Truth: What Matters are the Questions Asked’ (2012) 1 *Journal of Applied Research in Memory and Cognition*, 110. In the meta-analysis conducted by Aldert Vrij, in 2008, concerning the combined lie detection ability in laymen, it was found that the average percentages were 63.41% for truth detection and 48.15% for lie detection, yielding a combined value (truth and lie) of 54.27% - cf. Aldert Vrij, *Detecting Lies and Deceit, Pitfalls and Opportunities* (2008), 187-188. The analysis of 24 studies on the detection capability of professionals, especially police officers, yielded an average figure of 55.91%.

indicators of lying, individuals only improve their detection skill to a level in the order of 57% or 58%¹³, showing that instruction programmes are not very effective.

There are also studies that demonstrate that the ability to assess correctly the veracity of testimony is not affected by the mode of presentation (live or video).¹⁴

A research project in 2016 sought to determine whether the witness's wearing of a chador was a hindrance to establishing the truth in court. The

In 2006, Bond and DePaulo conducted a meta-analysis of more than two hundred studies, concluding that the general level of accuracy in lie detection was 54%. In another meta-analysis from 2006, Aamodt and Custer, 'Who can best catch a liar? A meta-analysis of individual differences in detecting deception' (2006) 15 *The Forensic Examiner*, 6, the general level of accuracy in lie detection was 54.22%, whilst for police personnel and judges the figure was 55.51%. From looking at this type of research, Aamodt and Custer concluded that the overall experience of judges does not have a positive overall influence on their ability to detect lies –Reinhard *et al.*, 'Listening, Not Watching: Situational Familiarity and the Ability to Detect Deception' (2011) 101 *Journal of Personality and Social Psychology*, 467. Also to the effect that judges and police officers are not better able to detect lies than an average member of the public, cfr. Fuller, *High-Stakes, Real-World Deception: An Examination of the Process of Deception and Deception Detection Using Linguistic-Bases Cues* (2008), 10.

These studies are largely replicated in the study by Bogaard *et al.*, 'Strong, but Wrong: Lay People's and Police Officers' Beliefs about Verbal and Nonverbal Cues to Deception', *PLoS ONE* 11(6): e0156615. doi:10.1371/journal.pone.0156615, 2016.

In contrast, Ekman and O'Sullivan, conducted a study in 1991 demonstrating that a lie detection capability in secret service officers of 64% –Warren *et al.*, 'Detecting Deception from Emotional and Unemotional Cues' (2009) 33 *Journal of Nonverbal Behavior*, 59 (60).

As has been mentioned, the reasons for the poor level of lie detection divide into different kinds, and some of the most pertinent are: judicial professionals make use of incorrect subjective indicators, liars take precautions to disguise their behaviour, aware, as they are, of what segments of their statements are false, and there is no feedback from lie detection, meaning that practitioners are unable to hone their skills.

- 13 Fuller, *High-Stakes, Real-World Deception: An Examination of the Process of Deception and Deception Detection Using Linguistic-Bases Cues* (2008), 10. In 2003, Frank and Feeley published a meta-analysis of eleven studies of training in non-verbal lie detection, concluding that the group that underwent training achieved average accuracy of 58%, as against 54% for the untrained group – cf. Frank and Feeley, 'To Catch a Liar: Challenges to Research in Lie Detection Training' (2003) 31 *Journal of Applied Communication Research*, 58.
- 14 Landström, CCTV, *Live and Videotapes, How Presentation Mode Affects the Evaluation of Witnesses* (2008), 35 and 37.

study confirmed that when witnesses wore ordinary clothes, participants' success rate in gauging truthfulness was no better than chance. When witnesses wore a chador (revealing only their eyes) or hijabs (covering the hair and neck, but not the head), observers performed better than chance in detecting lies. The researchers advanced the hypothesis that, because they limited the quantity of visual information possible, the chador and the **hijab** forced participants to base their decisions on verbal cues. It was noted that, when witnesses wear a chador, some observers did not look at them, and limited themselves to listening to the witnesses. The conclusion that emerges from this study is that, when it comes to assessing non-verbal behaviour as a source for forming a conviction, **less is more**.¹⁵ Transposing these research findings to the context of the pandemic, it may be inferred that the wearing of a mask by a witness does not interfere with the most objective and valid criteria for assessing testimony, and has the effect of making the judge concentrate on these more reliable criteria, without being distracted by the more random subjective aspects deriving from non-verbal behaviour.

On the other hand, in situations where the testimony is unfaithful because it is based on **distorted memories** (due either to factors concerning the witness him or herself or to external factors)¹⁶, these lie detection methods prove utterly useless and ineffective to the precise extent that the verbal statement is not accompanied by physical reactions that might possibly be associated with untruthfulness.

In short, there are few scientifically validated non-verbal cues to deceit, and those that exist have only a faint relationship with lie detection and, above all, judges lack the ability and specific training to enable them to make effective and reliable use of the detection of those cues to deceit. Even when they undergo specific training, their ability does not greatly improve.

It follows that direct and in-person contact between judge and witness cannot be deemed to offer advantages that the psychology of testimony does not recognise. The formation of a conviction concerning the trustworthiness of a deposition is based, in the first place, on the **verbal channel of communication**¹⁷, and the non-verbal channel is of residual and uncertain relevance. As stated by Contreras Rojas,

15 Simon-Kerr, 'Unmasking Demeanor' (2020) 88 *Geo. Wash. L. Rev. Arguendo*, 171.

16 On this subject, de Sousa, *Prova Testemunhal, Noções de Psicologia do Testemunho* (2020), 38-48.

17 On this subject, cf. de Sousa, *Prova Testemunhal, Noções de Psicologia do Testemunho* (2020), 140-170 and 343-379.

all conclusions that are built on the use of subjective impressions will fail to pass the test of rational examination. This is why Taruffo has argued that 'that which cannot be grasped by reason does not exist for the purposes of correct evaluation of evidence'.¹⁸

It may be concluded from this that the physical presence of the witness before the judge/jury is not, as it turns out, so essential for the purposes of evaluating their oral evidence. The effective parameters for evaluating the witness are not significantly undermined if the witness is examined online or by video link.

B. Is the Trier of Fact's Decision Affected by the mode of the Witness's Presentation to the Court?

McLuhan wrote that "the medium is the message" (*Understanding Media*, 1964), seeking to stress that the technology through which communication is established is not just the form of communication, but actually determines the **content** of the communication. In other words, the medium influences the message we will receive, and the message is understood differently depending on the medium through which it is transmitted, meaning that media acts as extensions of human senses. McLuhan's argument is relevant to our analysis here because, as we shall see, the questioning of a witness (or the making of a statement by a defendant) online is not entirely neutral, from the point of view of the person judging.

Starting with more general research, the approach proposed by **construal level theory** suggests that people feel and experience their surroundings at the present moment. All that which is not present, "here" and "now", is distal and so constructed intellectually. In other words, when we move away from the direct experience of things, we have less information on them, and so we form more abstract (simpler and more prototypical) representations of psychologically distant realities, whilst persons/entities close to us present themselves in a more concrete and detailed way.¹⁹

A study conducted in 2012 found that individuals are naturally more inclined to practice deceit when they use a communication medium with low cue diversity (cues = physical presence, inflection of voice, gestures, words, numbers, figures), which influences behaviour by reducing social

18 Rojas, *La Valoración de la Prueba de Interrogatorio* (2015), 326-327.

19 Landström, CCTV, *Live and Videotapes, How Presentation Mode Affects the Evaluation of Witnesses* (2008), 7-8.

evaluation, permitting people to concern themselves less with their self-presentation and self-evaluation.²⁰ In other words, a person is more likely to lie in an interaction mediated by video than face to face, provided there is an opportunity of obtaining a personal gain.

Several studies of the social impact of media platforms on communication suggest that individuals who communicate from behind a screen tend to talk more rudely, aggressively and discourteously than they would in a face-to-face interaction.²¹

In research conducted outside a judicial setting, it was concluded that people tend to form less positive impressions of colleagues when the relationship is mediated by conference calls than in face-to-face interactions. Transposing this analysis to a judicial setting, the question posed is whether the telepresence of a witness hinders the creation of an emotional/empathic relationship with the participants in a court case. Some believe that the use of technology in this context can create a dehumanising barrier between the telepresent witness and the people in the courtroom, and "there is plentiful evidence that one effect of video is to present the person in a more rigid way to his or her audience."²² Observers tend to be more indulgent in assessing persons physically present targets more positively, than persons observed by video.²³

In a judicial setting, a significant number of studies have suggested that individuals who appear before the court by video link run the risk of harsher treatment by judges: an example of this is a study on the use of video conferencing in asylum cases, showing a significant increase in the likelihood of asylum being denied.²⁴

Children who testified via CCTV were assessed as less credible than children who testified in person, despite the children who testified by

20 Xu, Cenfetelli and Aquino, 'The Influence of Media Cue Multiplicity on Deceivers and Those Who Are Deceived' (2012) 106 *Journal of Business Ethics*, 337.

21 Gourdet *et al* "Court Appearances in Criminal Proceedings Through Telepresence", (https://www.rand.org/content/dam/rand/pubs/research_reports/RR3200/RR3222/RAND_RR3222.pdf), accessed on 2021-02-08.

22 Salyzyn, 'A New Lens: Reframing the Conversation about the Use of Video Conferencing in Civil Trials in Ontario' (2012) 50 *Osgoode Hall Law Journal*, 429 (447).

23 Landström, *CCTV, Live and Videotapes, How Presentation Mode Affects the Evaluation of Witnesses* (2008), 27-28.

24 Salyzyn, 'A New Lens: Reframing the Conversation about the Use of Video Conferencing in Civil Trials in Ontario' (2012) 50 *Osgoode Hall Law Journal*, 429 (447).

CCTV having done so more accurately.²⁵ The same study concluded that, in general, technology resulted in a more accurate testimony from children, and also that the use of technology does not reduce the judge's ability to assess the accuracy of the child's testimony.

Landström and Granhag conducted research in which they found that children who testified via CCTV were judged more negatively than children who testified in person. Children who testified away from the courtroom were considered less credible, honest, accurate, attractive, intelligent and confident in comparison to those who testified in person, who are judged to be more credible.²⁶ The reason for this different perception is attributed to the **vidiness effect**, whereby testimony that is emotionally interesting, provokes imagery and proximate in time and space, is deemed vivid. This type of testimony is considered more credible, attracts more attention and is better remembered than a non-vivid deposition. In-person testimony is perceived as more vivid than that produced by telepresent witnesses, as a result of spatial proximity.²⁷ In other words, the live testimony is more immediate and has more emotional impact on the person judging. However, it was also demonstrated that children who testified away from the courtroom displayed less anxiety and are able to provide fuller and more detailed testimony.²⁸ The more proximate the mode of presentation, the more difficult it was for children to testify.²⁹ In short, in-person deposition renders the child's testimony more credible, but it also causes the child greater stress.

In concluding her dissertation, Sara Landström stressed that the more proximate the mode of the witness's presentation, the more positively they will be perceived. Witnesses who appear away from the physical courtroom are perceived as telling less convincing stories, as being less

25 Salyzyn, 'A New Lens: Reframing the Conversation about the Use of Video Conferencing in Civil Trials in Ontario' (2012) 50 *Osgoode Hall Law Journal*, 429 (446).

26 Landström, *CCTV, Live and Videotapes, How Presentation Mode Affects the Evaluation of Witnesses* (2008), pp. 15 and 30

27 Havener, *Effects of Videoconferencing on Perception in the Courtroom* (2014), 6; Landström, *CCTV, Live and Videotapes, How Presentation Mode Affects the Evaluation of Witnesses* (2008), pp. 5-6.

28 Landström, *CCTV, Live and Videotapes, How Presentation Mode Affects the Evaluation of Witnesses* (2008), 14.

29 Landström, *CCTV, Live and Videotapes, How Presentation Mode Affects the Evaluation of Witnesses* (2008), 32.

honest, confident, natural and communicative.³⁰ Witnesses who testify in person have a stronger impact on judges than televised witnesses and, the stronger the impact, the more positive the assessment of the witness and the clearer the memory created by their testimony.³¹

Another study concluded that statements by accusers are assessed as more credible when made live than when presented by video, corroborating the vividness effect considered above.³²

In a study of the spontaneity of **confession**, participants classified the confession as less coercive when the camera was focused mainly on the suspect, more coercive when the camera focused equally on the suspect and the detective, and even more coercive when the camera focused predominantly on the detective. The camera angle influenced the judgement as to how voluntary the confession was, assigning more responsibility to the suspect to the extent to which he appeared more on the screen, creating a **camera perspective bias**. This bias may be a manifestation of illusory causation, which is the tendency that people have to assign causation unduly to a stimulus for the simple reason of it being more salient or perceptible in relation to the others. The best method for mitigating this bias is to give equal on-screen visibility to the detective and the suspect.³³ It was also demonstrated that the use of slow motion makes the viewers of a video more likely to perceive intention on the part of the agent. A jury that views a shooting in slow motion is more likely to consider that the shooter acted with malicious intent to kill.³⁴

Another study of bail hearings over a period of 15 years in Cook Country concluded that bail tended to be set higher for telepresent defendants than for those heard in person.³⁵

30 Landström, *CCTV, Live and Videotapes, How Presentation Mode Affects the Evaluation of Witnesses* (2008), 36. Also concluding that witnesses appearing in person are assessed more positively and as more honest, cf. Landström et al., 'Witnesses Appearing Live Versus on Video: Effects on Observers' Perception, Veracity Assessments and Memory' (2005) 19 *Appl. Cognit. Psychol.*, 913 (928-929).

31 Landström, *CCTV, Live and Videotapes, How Presentation Mode Affects the Evaluation of Witnesses* (2008), 39.

32 Landström et al., 'The emotional male victim: Effects of presentation mode on judged credibility' (2015) 56 *Scandinavian Journal of Psychology*, 99.

33 Havener, *Effects of videoconferencing on perception in the courtroom* (2014), 5.

34 Williams, 'The Noisy "Silent Witness": The Misperception and Misuse of Criminal Video Evidence' (2019) 94 *Indiana Law Journal*, 1651 (1672).

35 Dumoulin and Licoppe, 'Videoconferencing, New Public Management, and Organizational Reform in the Judiciary' (2016) 8 *Policy & Internet*, 313 (317) (<https://onlinelibrary.wiley.com/doi/abs/10.1002/poi3.124>), accessed on 2021-02-09;

The logistics involved in video conferencing also interferes in the mode of transmission of the message, and several studies have pointed to the following conclusions.

The **camera** must be positioned at an angle of 90° to the vertical plane (i.e., at the same level as the target), since diversion from this neutral camera position can have a biasing effect on the observers: heroes and villains are filmed from a low-angle shot so they look tall and powerful, whilst victims are filmed from a high-angle shot to make them look small and vulnerable.

Camera position can capture only the witness's face (close-up shot), or show him from the waist up (medium shot) or else give a whole body view (long shot). The first of these centres the observer's attentions on the witness's reaction, emotions and facial details. The second stresses body language and facial expressions, whilst the last serves to place the person portrayed in their setting. Researchers have concluded that children observed in medium shots were considered more credible than those filmed in close-up, and also that adults filmed in close-up create a less favourable impression than those filmed in medium shots.³⁶ Medium shots allow people to understand better and the conversation is more natural.³⁷ Children filmed in long shots were assessed more positively (more natural and relaxed) than children filmed in close-up, who were perceived as having to make more effort to think.³⁸

The **lighting** should be indirect in order to avoid hot spots, and light should fall on the face at an angle of between 45 and 60 degrees, in order to minimise shadows around the eyes and chin.³⁹ Daylight bulbs should be used rather than incandescent bulbs. Wall finishes, furniture and other accessories in the camera's field of view must be in neutral colours, and discreet blue and grey highlights work better with cameras. One basic principle to be observed is that the monitor image should be close to real size, meaning that a 50 to 60 inch screen is ideal for creating an image of

Williams, 'The Noisy "Silent Witness": The Misperception and Misuse of Criminal Video Evidence' (2019) 94 *Indiana Law Journal*, 1651 (1658).

36 Landström, *CCTV, Live and Videotapes, How Presentation Mode Affects the Evaluation of Witnesses* (2008), 18-19.

37 Vavonese et al., *How Video Changes the Conversation* (2020), 5.

38 Landström, *CCTV, Live and Videotapes, How Presentation Mode Affects the Evaluation of Witnesses* (2008), 34.

39 Center For Legal & Court Technology, *Best practices for using video teleconferencing for hearings and related proceedings*, (2014), 39-40, 56 (<https://www.acus.gov/research-projects/best-practices-using-video-teleconferencing-hearings>), accessed on 2021-02-09.

the same size that would correspond to the judge being physically present in the room.⁴⁰ There should be two cameras: one focused on the witness and another with a general view of where the witness is, to guard against the risk of the witness being influenced.

In short, factors such as lighting, sound, camera and monitor placement, image quality and connection quality affect the quality of the message and the interactions and the way in which remote interactions can mimic those that take place in person.

For as long as judges/juries continue to believe that the best way to testify is in person, the use of video conferencing will tend to undermine the witness's credibility, and telepresence will not be a neutral characteristic in the production of evidence.

Although existing studies offer plentiful pointers, more research is needed in this area in order to arrive at a better understanding of how the use of technology interferes in the way evidence is evaluated. In any case, judges, juries and arbitrators should be familiarised with the existing research findings and alerted to the potential adverse effects of oral evidence being provided remotely, and so take steps to neutralise these.

C. Online Hearings and the Right to a Fair Trial

It is important not to disregard the risks (referred to above) that can arise from trial hearings using video conferencing or equivalent technology. However, the growing introduction of technology in the justice system is only one of the facets of the deformalisation of justice, in a shift towards an increasingly informal system and greater flexibility in the procedural rules. One aspect of this is that the administration of justice is no longer so centred in the courtroom, and takes place in multiple locations, such as offices, mediation rooms and conciliation offices. Greater value is attached to the **authenticity of procedures**, whilst less weight is accorded to ritual and symbolic references. "Modern justice appears less concerned with the trauma of judicial ritual, albeit controlled by the defence and by being the public eye, than with the social normalisation taking place in the justiciable."⁴¹ Rigid adherence to ritual should today give way to flexible solutions and procedures, triggered and guided by the prevalence and observance of

40 Center For Legal & Court Technology, *Best practices for using video teleconferencing for hearings and related proceedings*, (2014), 51.

41 Garapon, *Bem Julgar, Ensaio Sobre o Ritual Judiciário* (1999), 269.

the underlying principles of the procedural system: the principle of equality, of adversarial process, procedural establishment of the facts, admissibility of evidence (cf. Art. 630 of the Portuguese Code of Civil Procedure), the right to a fair trial (Art. 20, para. 4, Constitution of the Portuguese Republic and Art. 6, Convention for the Protection of Human Rights and Fundamental Freedoms - ECHR).

Special relevance may here be assigned to the case law of the European Court of Human Rights (ECHR) on the holding of trials using video links. The ECHR has ruled that this form of participation in a trial is not in itself incompatible with the notion of a public and fair trial. However, the use of this measure should, in any case, serve a legitimate purpose and the procedures for the evidence thereby produced must be compatible with the requirements for ensuring a fair trial, as provided for in Article 6 ECHR. In particular, it must be ensured that the respondent/claimant is able to follow the proceedings and to be heard without technical impediments, and has to be provided with effective and confidential communication with his lawyer (ECHR, Application no. 45106/04, 5.10.2006, *Marcello Viola v. Italy*, ECLI:CE:ECHR:2006:1005JUD004510604, paras. 63-67; ECHR, Application no. 21272/03, 2.11.2010, *Sakbnovskiy v. Russia*, ECLI:CE:ECHR:2010:1102JUD002127203, para. 98; ECHR, Applications nos. 43183/06 and 27412/07, 1.3.2016, *Gorbunov and Gorbachev v. Russia*, ECLI:CE:ECHR:2016:0301JUD004318306, para. 37). In *Bivolaru v. România* (no. 2), (Application no. 66580/12, 2.10.2018, ECLI:CE:ECHR:2018:1002JUD006658012), the ECHR again asserted that questioning by video link is a form of participation in proceedings which, in itself, is not incompatible with the principle of fair and public trial. In this case, the respondent refused to be questioned by video link because domestic law did not permit it. The ECHR ruled that, although domestic law did not require a respondent who refused to appear by video link to state grounds for his position, there was no breach of Article 6 because that mode of questioning was offered to the respondent and constitutes an appropriate means of ensuring that he is heard directly and diligently. In *Saïdi v. France*, (Application no. 14647/89, 20.9.1993, ECLI:CE:ECHR:1993:0920JUD001464789), the ECHR ruled that Article 6 was breached because the respondent had no adequate opportunity, neither during the discovery phase nor during the trial, to question the witness (who testified anonymously in a drug trafficking case), it being the case that the right to question a witness is satisfied by the opportunity to formulate questions. In *Vronchenko v. Estonia* (Application no. 59632/09, 18.7.2013, ECLI:CE:ECHR:2013:0718JUD005963209), para. 65, the ECHR ruled that the national authorities acted in the child's best interests, in

not permitting the child, and presumed victim, to testify in person. Reproduction of the video recording containing the child's statements allowed the court and the respondent to observe the minor's behaviour and to assess, to a certain point, the credibility of the account given. However, considering the importance of the testimony in question, the ECHR ruled that the procedure followed was insufficient to ensure the respondent's right of defence, insofar as the respondent never had the opportunity to put questions to the victim, despite the authorities' wish not to bring in the witness to testify in person, and so, in this case, there was no strong evidence to corroborate the child's statement. The ECHR stressed that there was no need for a direct confrontation between the witness and the respondent in court, but that it should be asked whether questions could be put to the child, through the respondent's defence or even through a psychologist, in an environment controlled by the investigatory authorities and in a way that would not differ, materially, from an examination conducted by those authorities.

The ECHR has explained that the requirements for a fair trial are not necessarily the same in cases concerning civil rights and obligations: "the Contracting States have greater latitude when dealing with civil cases concerning civil rights and obligations than they have when dealing with criminal cases." (ECHR, no. 14448/88, 27.10.1993, *Dombo Beheer B.V. v. The Netherlands*, ECLI:CE:ECHR:1993:1027JUD001444888, para. 32; ECHR, no. 21920/93, 23.10.1996, *Levages Prestations Services v. France*, ECLI:CE:ECHR:1996:1023JUD002192093, para. 46). In *Moreira Ferreira v. Portugal* (Application no. 19867/12, 11.7.2017, ECLI:CE:ECHR:2017:0711JUD001986712), the ECHR declared that "The Court considers that the rights of persons accused of or charged with a criminal offence require greater protection than the rights of parties to civil proceedings. The principles and standards applicable to criminal proceedings must therefore be laid down with particular clarity and precision" (para. 67). In *Dlipak and Karakaya v. Turkey* (Application no. 7942/05, 4.3.2014, ECLI:CE:ECHR:2014:0304JUD000794205), the Court stated that neither the letter nor the spirit of Article 6 prevent a person from expressly or tacitly relinquishing the guarantees of a fair trial, and that any waiver of the right to take part in the trial must be formulated unambiguously and accompanied by safeguards proportional to its importance; waiver counter to an important public interest is not possible (para. 79).

In short, the legitimacy of the proceedings - and of the decision at which it is intended to arrive - derives, in the first place, from observance of underlying principles and not so much from the solemnity of the pro-

cedure. This solemnity serves to support the underlying principles of the procedure.

This is what Owen Dixon⁴² meant when he asked “*Who is the most important person in the courtroom?*”, explaining that it is not the judge, but rather the litigant who has lost his case and will have to leave court satisfied with the system in which he lost, satisfied that his case was judged fairly and impartially. As long as the use of technology permits justice to be done with this success, the defining features of the system will be preserved and upheld for the parties and the public.

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