

The Veil and the Myth of Pinocchio's nose

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- To examine the approach of the courts to “court users” who wear a veil.
- To assess whether the wearing of a veil actually interferes with the court process.

Prosecution witness

- R v Muktar
- Nottingham Magistrates' Court Nov 2001
- Defence application for complainant to remove veil.
- DJ refused the application but indicated would be deprived of opportunity to assess credibility.

Party to a claim

- SL petitioning for nullity of marriage on grounds forced into arranged marriage.
- SL v MJ [2006] EWHC 3743 (Fam)
- “The ability to observe a witness' demeanour and deportment during the giving of evidence is important and, in my view, essential to assess accuracy and credibility. It is a matter of extreme importance that witnesses in such sensitive cases as this should be permitted to present their case to the satisfaction of the court but also observing their religious observance of dress. In my view, the facility of screens and the ability, if at all possible, to list these cases before a female judge, would obviate the objections of litigants or witnesses subject to an assessment of the genuine nature of their unwillingness to appear before the court without the veil.”
- ~~SL gave evidence shielded from sight of male counsel.~~

Legal representative

- Nov 2006 Immigration Adjudicator George Glossop adjourned case as legal representative refused to remove veil.
- Referred to Hodge J as chair of Immigration Tribunal;
- “Immigration judges must exercise discretion on a case-by-case basis where a representative wishes to wear a veil. The representative in the recent case has appeared veiled previously at AIT hearings without difficulties. It is important to be sensitive in such cases. The presumption is that if a representative before an AIT tribunal wishes to wear a veil, has the agreement of his or her client and can be heard reasonably clearly by all parties to the proceedings, then the representative should be allowed to do so. “

Development of guidance – Equal Opportunities Benchbook

“For a witness or defendant, similarly, a sensitive request to remove a veil, with no sense of obligation or pressure, may be appropriate, but careful thought must be given to such a request. The very fact of appearing in a court or tribunal will be quite traumatic for many, and additional pressure may well have an adverse impact on the quality of evidence given... It is worth emphasising that while it may be more difficult in some cases to assess the evidence of a woman wearing a *niqab*, the experiences of judges in other cases have shown that it is often possible to do so, depending on all the circumstances– hence the need to give careful thought to whether the veil presents a true obstacle to the judicial task.”

Juror

- Blackfriars Crown Court, 19th March 2010 HHJ Marron QC
- Discharged juror from attempted murder as “desirable face could be seen.”

Witness

- AAN (Veil) [2014] UKUT 00102 (IAC)
- Afghani asylum seeker. Called sister to confirm his claim.
- No issue raised at hearing. Appeal subsequently dismissed as tribunal could not be satisfied it was sister.
- “In an increasingly multi-ethnic and culturally diverse society, we would emphasise that issues concerning attire and symbols motivated by religious belief and conviction must be handled by all judicial bodies with great tact and sensitivity. This will serve the twin goals of promoting fairness and avoiding insult or offence. The exercise to be carried out will not infrequently involve the striking of delicate balances. Tribunals should be considerate and respectful in their approach. They should also be resourceful and imaginative in their quest to explore and discover solutions”

Defendant

- R v D, Blackfriars Crown Court, HHJ Murphy
- D charged with witness intimidation
- At PCMH Judge raised question of veil.
- Adjourned for legal argument and expert evidence.
- Judgment handed down 16th September 2013.

Ruling

- D would be invited to remove veil for duration of trial.
- If she chose to testify she would be again invited to remove the veil.
- If she refused she would not be permitted to testify.
- In those circumstances the jury would be given a modified version of the failure to testify direction.

Rationale

- Accepted that it would be a limitation on her protected Article 9 right.
- Concluded that the qualification which exists which allows limitation to protect the rights of others includes the right of jurors.

“It is unfair to ask a juror to pass judgment on a person he cannot see. It is unfair to expect that juror to try and evaluate the evidence given by a person whom she cannot see. It is unfair to expect that juror to try and expect that juror to try and evaluate the evidence given by a person whom she cannot see, deprived of an essential tool for doing so: namely being able to see the demeanour of the witness; her reaction to being questioned; her reaction to other evidence as it is given. These are not trivial or superficial invasions of the procedure of the adversarial trial. At best they require a compromise of the quality of criminal justice delivered by the trial process. At worst they go to its very essence, and they may render it impotent to deliver a fair and just outcome.”

Outcome

- Trial commenced
- D did not testify
- Jury could not reach verdict
- Pleaded guilty prior to retrial

Some international perspectives

Canada

- NS v The Queen [2012] 3 S.C.R 726
- Complainant alleged sexual abuse by cousins.
- Defence application to remove veil.
- Judge at 1st instance made finding that she lacked sincerity of belief.
- Appealed to Superior Court of Justice – ruled she could wear veil but evidence could be excluded if impeded cross examination.
- Appeal and cross appeal to Court of Appeal. Permitted her to wear veil unless it could not be reconciled with rights of defendant to fair trial
- NS appealed to Supreme Court

Supreme Court

- Upheld Court of Appeal. Stated in criminal case balancing of rights would almost always favour removal of veil.

“Where the liberty of the accused is at stake, the witness’s evidence is central to the case and her credibility vital, the possibility of a wrongful conviction must weigh heavily in the balance, favouring the removal of the niqab” MacLachlan CJ

Dissenting judgment which agrees with approach but doubts outcome.

“not being able to see a witness’ whole face is only part of an imprecise measuring tool of credibility, we are left to wonder why we demand full “demeanour access” where religious belief prevents it. ”
Abella J

Similar approaches

- New Zealand

Police v Razmajoo [2005] DCR 408

- Australia

R v Anwar Sayed (unreported)

HHJ Deane said importance of evidence immaterial.

Should we place such importance on “demeanour”

“A Court of Appeal should never interfere unless that both the judgment ought not to stand and that the divergence of view between the trial judge and the Court of Appeal has not been occasioned by any demeanour of the witnesses or truer atmosphere of the trial (which may have eluded an appellate Court) or by any of those other advantages a trial judge possesses” Lord Pearce *Onassis v Vergatis*

Some judicial dissent?

“The great virtue...is usually said to be the opportunity it (the trial) gives to the judge to tell from the demeanour of the witness whether he or she is telling the truth. I think that this is overrated...it is the tableau which constitutes the big advantage, the text with the illustrations rather than the demeanour of a particular witness.”

Lord Devlin

“To rely on demeanour is in most cases to attach deviations from a norm when the truth is there is no norm”

Lord Bingham

Towards an objective assessment?

Research on the issue.

- Ekman and O' Sullivan (1991)
- 509 volunteers asked to look at 10 videos identify whether volunteer was lying or not.
- Included Judges, Police, Secret service, Students and Psychiatrists.

Results

Group	0 - 30	40 - 60	70 -100
Secret Service	0	47	53
Judges	9	57	34

No of Secret Service agents = 34
No of Judges = 110

Is there evidence to suggest deceit is detectable via demeanour at all?

- Vrij and others (2006)
 - Study of 73 nursing students. Asked to view a video of a theft. Interviewed twice. Once told to tell truth, other told to lie.
 - Number of factors examined;
 - i) Gaze aversion
 - ii) Smiling
 - iii) Arm and hand movement
 - iv) Scratching of hands/head etc
 - v)Foot and leg movements
 - vi) Speech hesitations
 - vii) Speech errors
 - vi) Latency period
 - vii) Speech rate
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Factors which could be accurately used to detect deceit

- More hand and finger gestures
- Slower speech
- More “ahs”
- Longer to answer

But cautioned issue is not “truthfulness” but “cognitive load.”

“Deception itself is not related to a unique pattern of specific behaviours...there is nothing like Pinocchio’s nose”

How accurate is factfinders understanding of assessment of demeanour?

- Vrij and Semin (2006) found 75% of professional investigators believed “gaze aversion” to be relevant.
- No evidence to support this.

Can other factors produce similar responses

- Keltner and Harker (1998) identified non-verbal characteristics for “shame”;
 - Gaze aversion
 - Lowered lip corners
 - Blushing
 - Constriction of posture
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- “Shame follows events where the individual violates rules of a moral nature which applies to core aspects of the self.”

A final question?

- A defendant is charged with a serious sexual offence against a child. He enters a “Not Guilty” plea. A trial date is fixed and the witness is given a date to attend court.
- One month prior to the trial, the defendant is involved in a serious accident, causing fractures to facial bones, burns to skin on face.
- Doctor says D fit to attend trial and testify but must wear face mask and bandages.
- D applies to adjourn so that jury have opportunity to see facial expressions when testifying.
- Would the application succeed.