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“ASSESSING CREDIBILITY”

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CULTURAL COMPETENCY



Cultural Competency, Implicit Bias, and the Assessment of Credibility

Michelle Alton

The assessment of a witness's credibility is recognized as being particularly difficult. As our understanding of what it means to be culturally competent develops, and the relationship between implicit bias and decision-making is further explored, it will be necessary to re-examine many foundational aspects of our justice system. This article provides a high-level discussion of how the assessment of credibility may benefit from a more focused examination from a culturally competent lens.

Cultural Competency and Implicit Bias

The term "cultural competency" is often used to refer to the skills, behaviours, attitudes, and knowledge that enables professionals to deliver services that are appropriate to a diverse range of clients.¹



Historically, cultural competency training has been outward focused, striving to increase an individual's understanding about different cultures and teaching the best ways for this culturally specific knowledge to be deployed. More recently, cultural competency training has evolved to focus on critical self-reflection, particularly with respect to one's own implicit biases.²

There is a growing body of research that supports a link between implicit bias and intuitive decision-making.³ Although implicit bias is not necessarily negative in every circumstance,⁴ in the specific context of judicial decision-making, intuition has been identified as the "chief source" of unwanted influences affecting decisions.⁵ Intuitive decision-making also risks decisions being made without an assessment of all relevant information.

While studies have shown that everyone, even judges, have implicit biases, research has also illustrated that steps can be taken to reduce or even eliminate the undesirable influence of intuition on decision-making.⁶

Some of the actions that have been shown to

help break the link between implicit bias and decision-making include:

- Providing training on implicit bias and cultural competency to promote awareness of the prevalence and impact of implicit biases;
- Altering decision-making conditions and encouraging the use of scripts, checklists, and other tools to encourage more deliberative decision-making; and
- Requiring the provision of written reasons.⁷

Assessing Credibility in a Culturally Competent Manner

Assessing a witness's credibility is often described as the most difficult task required of a decision-maker, particularly when the testimony of witnesses is diametrically opposed or there are cultural aspects to consider.⁸

The assessment of credibility has been recognized to be a highly individualistic exercise that is dependent on "intangibles".⁹ This is partly why it can be difficult for judges to articulate with precision the complex intermingling of their impressions after listening to and watching witnesses.¹⁰ It is also these characteristics that in part explain why appellate courts generally defer to a trial judge's credibility findings. However, it is also these qualities that make the assessment of credibility particularly vulnerable to the influence of implicit biases.

Courts have stressed that any assessment of credibility must avoid reliance on stereotypical impressions.¹¹ Like other parts of decision-making, the assessment of credibility can also be improved by taking direct action to promote deliberative decision-making.

Two aspects of the assessment of credibility that could specifically benefit from a focused examination from a culturally competent manner are:

- **The assessment of the reasonableness or plausibility of a witness's testimony.** Often, the reasonableness of a witness's testimony is evaluated with reference to the perspective of a "practical and informed person."¹² However, as our understanding of implicit

biases develops, it is important to critically assess the perspective being relied upon to inform this evaluation, including any personal assumptions or cultural factors which might impact the assessment in a particular situation. A focus on more deliberative decision-making, including ensuring that all the relevant information is obtained, can also help lessen the impact of any unwanted influences when evaluating plausibility.

- **The role of demeanour evidence.** A trial judge's findings on credibility are shown deference at least in part because the trial judge has the "overwhelming advantage" of seeing and hearing witnesses.¹³ However, there is also a growing and consistent appreciation of the potential unreliability of demeanour evidence. Specifically, it has been recognized that an assessment of credibility based on demeanour can be affected by several factors, including the culture of the witness, stereotypical attitudes, and the pressure and artificiality associated with testifying in a courtroom.¹⁴ In light of these concerns, many decision-makers have advised that demeanour evidence should be approached cautiously.¹⁵

As our understanding of implicit bias and its impact on decision-making grows, it is likely time to re-consider whether it is necessary to rely on demeanour evidence at all when assessing credibility. This assessment will require examination of how decision-makers actually use demeanour evidence in their decision-making, as well as consideration of the potential implications of rejecting reliance on this type of evidence.

The Role of Advocates

As the cultural competency of individuals within the justice system evolves, all members of the justice system will have important roles to play to support the required response to these changing societal norms and values. For advocates, the issue of how to best assess credibility in a culturally competent manner presents an

opportunity for opposing counsel to work together to provide the court with the best information available to consider these issues.

For a more in-depth look at this topic, please see, Michelle Alton, "*The Evolution of Impartiality and the Need for Cultural Competency when Assessing Credibility*", 35 Canadian Journal of Administrative Law & Practice 51 (March 2022). ▀

Notes

1. Pooja Parmar, "Reconciliation and Ethical Lawyering: Some Thoughts on Cultural Competence," (2019) 97-3 Canadian Bar Review 526, 2019 CanLII Docs 3803.
2. Jowsey, T., "Three zones of cultural competency: surface competency, bias twilight, and the confronting midnight zone," (2019) 19 BMC Medical Education 306.
3. See for example, Wistrich, Andrew J. and Rachlinski, Jeffrey John, Implicit Bias in Judicial Decision Making How It Affects Judgment and What Judges Can Do About It, Chapter 5 in Sarah E. Redfield, ed., *Enhancing Justice: Reducing Bias* (Chicago, Illinois: ABA Book Publishing, 2017) (Wistrich and Rachlinski). Intuitive decision-making operates outside of conscious awareness and involves relying upon one's first instinct, producing rapid, effortless, and confident judgments. In contrast, deliberative decision-making is of a higher order and is slower and more conscious – see Wistrich and Rachlinski, at p. 90.
4. See Anona Su, "A Proposal to Properly Address Implicit Bias in the Jury", (2020) 31 Hastings Women's LJ. 79 at p. 81.
5. Wistrich and Rachlinski at pp. 91. See also Melissa L. Breger, "Making the Invisible Visible: Exploring Implicit Bias, Judicial Diversity, and the Bench Trial", 53 University of Richmond Law Review 1039 [Breger] at p. 1055.
6. See for example, Wistrich and Rachlinski.
7. Wistrich and Rachlinski at pp. 105 – 119; Breger at p. 1057; David L. Faigman, Jerry Kang, Mark W. Bennett, Devon W. Carbado, Pamela Casey, Nilanjana Dasgupta, Rachel D. Godsil, Anthony G. Greenwald, Justin D. Levinson, and Jennifer Mnookin, "Implicit Bias in the Courtroom", (2012) 59 UCLA L. Rev. 1124 at p. 1132.
8. *R. v. S. (R.D.)*, 1997 CanLII 324 (SCC) at para. 128 and *Shaath v. Zarifa*, 2005 CanLII 25185 (ON SC) at para. 2 and.
9. *R. v. S. (R.D.)*, at para. 128.
10. *R. v. Gagnon*, 2006 SCC 17 at para. 20, positively quoted in *R. v. G.F.*, 2021 SCC 20 at para. 81.
11. *R. v. Khan*, 2019 ONSC 7397 (CanLII) at para. 44.
12. *Faryna v. Chorny*, 1951 CanLII 252 (BC CA) at p. 357.
13. *R. v. N.S.*, 2012 SCC 72, at para. 25, referencing *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 24. See also *White v. The King*, 1947 CanLII 1 (SCC), at p. 272 and *R. v. W. (R.)*, 1992 CanLII 56 (SCC) at p. 131.
14. *R. v. Rhavel*, 2015 ONCA 377 (CanLII) at para. 85. See also *R. v. McDougall*, 2009 CMAC 2 (CanLII) at para. 44 and *R. v. Ramos*, 2020 MBCA 111 at paras. 112 and 158.
15. For example, see *R. v. Hemsworth*, 2016 ONCA 85 CanLII at para. 45.