Uniform Evidence Law: Principles and Practice

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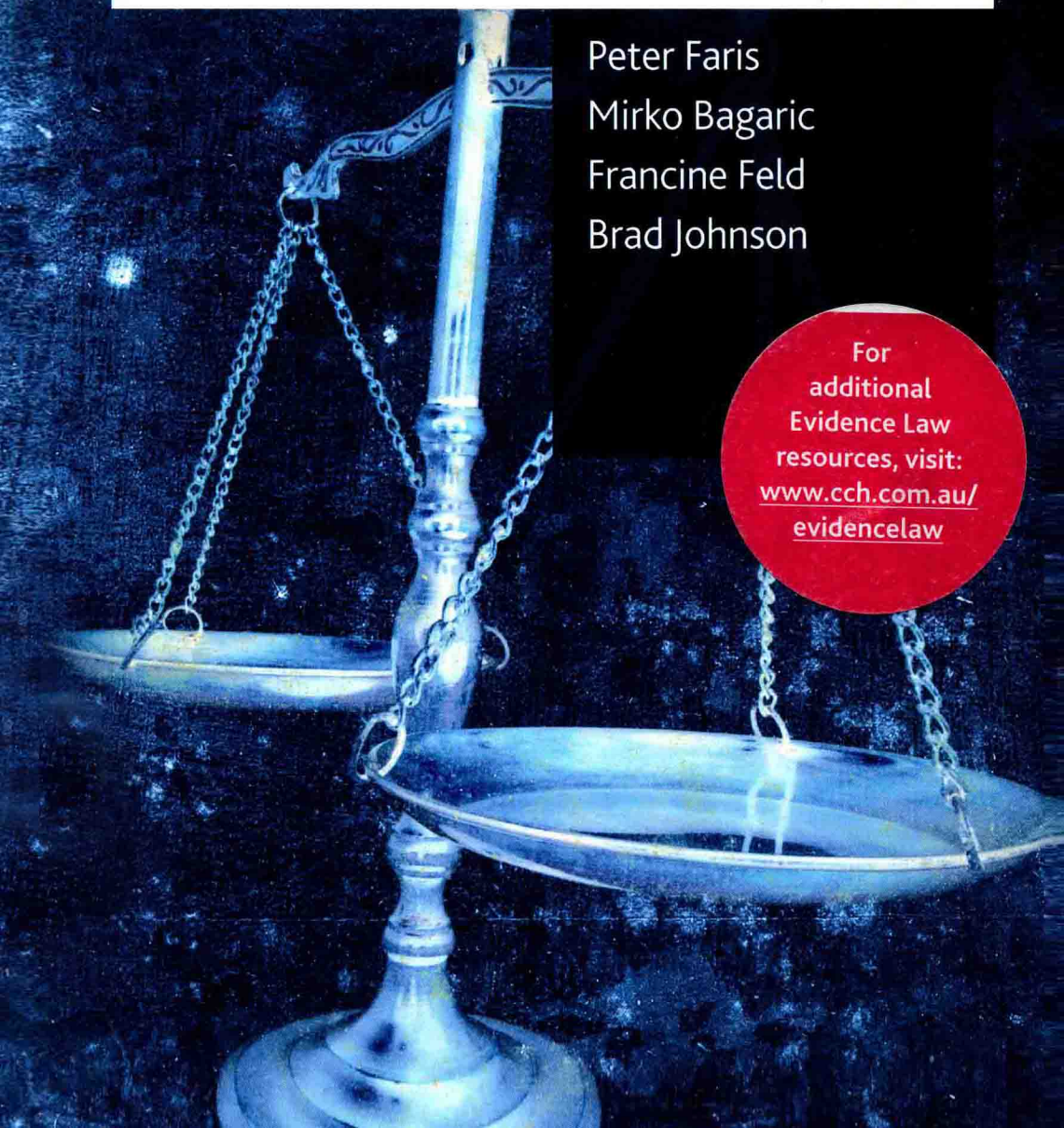
Peter Faris
Mirko Bagaric
Francine Feld
Brad Johnson



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CCH AUSTRALIA LIMITED
Sydney, NSW 2001
Ryde
300 Fax: (02) 9857 1600
Phone: 1 300 300 224 Fax: 1 300 306 224
www.cch.com.au
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Preface

Uniform Evidence Law: Principles and Practice provides an overarching and detailed analysis of evidence law as it applies in the New South Wales, Victoria, Tasmania, Australian Capital Territory and Commonwealth jurisdictions.

The book explains and critically evaluates the principles and rules governing the admissibility of evidence. It demystifies evidence law by clearly explaining its often conflicting rationales and discusses the manner in which the various parts of the Uniform Evidence Law intersect and regulate the admissibility of evidence.

The book also analyses policy and criminological considerations underpinning evidence law and suggests how the law should be reformed to make it more coherent and principled.

The law is stated as at 1 May 2011.

Mirko Bagaric

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About the Authors

Peter Faris

Peter Faris is a leading Melbourne criminal defence lawyer and Queens Counsel (QC). He has been a QC for over 25 years. He is the former chairman of the National Crime Authority (now the Australian Crime Commission). He is also the founder of the Central Australian Aboriginal Legal Service in Alice Springs and the Fitzroy Legal Service. He is a regular media commentator on legal and social justice issues and author of books on evidence and bail.

Mirko Bagaric

Mirko Bagaric is a professor of law at Deakin University and a practicising lawyer. He is the author of over 20 books and 100 articles published in referred journals. His areas of interest include criminal law, evidence, sentencing, human rights and moral philosophy.

Francine Feld

Francine Feld is a lecturer of law at University of Western Sydney and a barrister admitted to practice in New South Wales. Her areas of interest include evidence law, criminal procedure, comparative law and legal philosophy.

Brad Johnson

Brad Johnson is a lecturer in evidence and sentencing law at Deakin University. His main area of research is expert evidence.

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CHAPTER 1

THE NATURE OF EVIDENCE LAW AND THE UNIFORM EVIDENCE ACTS

The recognition by the common law of the injustice of adhering rigidly to the rule applied by the trial judge in the trial of the appellants is illustrated by the large number of "exceptions" recognised in particular circumstances. This has produced an unacceptably complex set of "rules". They are difficult for judges and trial counsel to remember and to apply with accuracy in the often stressful circumstances of a trial. Clearly, there is a need for a simpler set of rules that observe concepts rather than the wilderness of instances acknowledged by the courts in their so-called "exceptions".

Nicholls and Coates v The Queen [2005] HCA 1, [203], Kirby J

¶1.1 The nature of evidence law

Evidence law is the branch of law that defines the type of information that can be received by a court in order to assist the decision maker (either a judge or juror) to decide a matter in issue in a case.

Information that can be received for this purpose is called 'admissible'. Information that is excluded from such an inquiry is called 'inadmissible' — it does not form part of the relevant inquiry. Thus, evidence law is largely concerned with distinguishing admissible from inadmissible information.

The process of distinguishing between admissible and inadmissible data is not something that is unique to the legal system. People do it as part of their everyday affairs. Normally it is intuitive. Despite this, there are several principles that most people adopt.

For example, if the inquiry relates to who won the 100m male sprint at the 2000 Sydney Olympics there is an almost infinite number of sources that could be potentially invoked to ascertain the answer. These include interviewing participants in the event, speaking to spectators, reading newspapers the day following the event or watching television footage and reports of the event. Depending on the source that is used different answers may be obtained. Spectators may have a different recollection

to participants and to newspaper reports. If this is the case, a decision must then be made on which information seems to be the most credible.

A similar process occurs where a person is trying to ascertain the exact time that a morning train is scheduled to leave a railway station. To ascertain this time, the person can seek to consult friends and work colleagues, look for information in a newspaper, telephone, a public transport customer service centre or try to get the information from the internet. Again, different avenues of inquiry could lead to conflicting results and the individual will need to make the decision on the basis of which source seems most reliable.

Although it is possible to get different answers in relation to both of the above questions, the starting point in each case is to discern the information that one will use to assist with the inquiry. While this can come from a number of different sources, the sources that are rationally invoked are finite.

For example, in relation to the 2000 Sydney Olympics example people will not attempt to get the answer by consulting newspapers printed before the event and it would be pointless asking people who obviously have no knowledge of the event. To ascertain the morning train timetable, it would be illogical to speak to people that have no familiarity with the public transport system.

Evidence law consists of rules that the legal system prescribes for resolving factual disagreements. It is thus the formalisation of the fact finding inquiry that individuals perform as part of their everyday lives.

Historically, evidence law is mainly a creature of common law. Evidence law is technical and complex. It has been criticised for being illogical and itself being devoid of an evidential foundation. It is largely for this reason that several Australian jurisdictions (New South Wales, Tasmania, Victoria and the Commonwealth jurisdiction) have enacted the *Uniform Evidence Act* which abolishes most of the common law on evidence and gives it a legislative footing. In this book the *Uniform Evidence Act* is referred to as the 'Act'.

Prior to examining and evaluating the Act, an overview of some of the complexities and shortcomings of evidence law, which acted as the catalyst for the Act, will be provided. This is relevant not simply from a historical perspective but also, as we shall see, because many of the complexities and shortcomings that plagued the common law of evidence continue today — and arguably have been made worse by the Act. Finally, an explanation of the objectives of evidence law will be provided.

¶1.2 The objectives of evidence law — truth, discipline, protection

1.2.1 Evidence law is procedural, not substantive

Before considering the *objectives* of evidence law, it is important to consider in more detail the *nature* of evidence law. Broadly, there are two types of rules of evidence. First, there are rules that regulate matters of process concerning how evidence can be

given and who can give the evidence. Thus, there are rules dealing with matters such as competence and compellability of witnesses and the reception of material in the form of documents and physical objects, such as weapons used to commit criminal offences.

Secondly, and this is generally the more complex area, there are rules that prescribe what sort of information can be received by the courts to resolve issues in dispute. The most overarching rule is that only *relevant* evidence may be adduced. There are also many other rules designed to exclude the reception of specific forms of evidence — examples, are the rules against *hearsay* and *similar fact evidence*.

The key distinction between the rules of evidence and other areas of the law is that evidence law is not a substantive area of law. Unlike, for example, the criminal law, tort law or the law of contracts it does not create legal rights or duties. Evidence law is procedural in nature. It serves to lay down the process by which substantive legal issues can be determined. The existence of evidence law is dependent on the existence of substantive areas of law. If there were no substantive areas of law (and there was no possibility of disputation concerning the rights and duties created by these areas of law) it would be futile having a law of evidence. The same cannot be said of another area of law: a tort system of liability would still make sense and be functional in a world devoid of criminal law, contract law, and so on — and *vice versa*.

Although evidence law does not have a life of its own it is crucial to the operation of substantive law. A flawed system of evidence law has the potential to fundamentally undermine the operation of substantive law and create injustice. The manner in which the rules of evidence can best ensure that substantive law achieves its goals is obvious. Any substantive area of law will be best placed to achieve its goal if the law achieves accurate results. Thus, laws designed to provide for workers' compensation work best if in fact only workers are compensated; laws aimed to punish burglars operate best if in fact only burglars are punished pursuant to such laws, and so on. There would be little point in having a body of substantive criminal law if when it got to the trial stage the factual inquiry had so many distortions that most guilty people were acquitted and most innocent individuals were convicted.

1.2.2 Truth is an important objective

Thus, the most obvious function of the law of evidence is to ascertain the truth. This was a view propounded approximately two centuries ago. According to Jeremy Bentham, the ultimate aim of the law of evidence is to ensure the rectitude (righteousness) of decision making.[1] On this view, the rules of evidence should be designed to reach the true or correct outcome pursuant to the substantive law.

Hence it is not surprising that one of the key pillars upon which the rules of evidence are based is the reliability principle. In the criminal law domain, where the rules of evidence operate most acutely, it aims to ensure that the guilty are convicted and the innocent are acquitted. The reliability principle underpins a number of rules which

1 Jeremy Bentham, *The Works of Jeremy Bentham, Vol 5 (Rationale of Judicial Evidence)* (1827).

supposedly enhance the accuracy of the outcome. Thus, for example, hearsay evidence is often excluded and information which is inherently unreliable, such as identification evidence, is often ruled inadmissible.

However the law has not gone down the path of pursing truth as the only or ultimate ends of evidence law. Two other broad aims which attenuate the search for the truth are the 'disciplinary principle' and the 'protective principle'.

1.2.3 Disciplinary principle — arguably flawed

The 'disciplinary principle' leads to the exclusion of certain forms of 'wrongly' obtained evidence. Thus, in some cases admissions and illegally obtained evidence are excluded in a bid to discourage law enforcement officers from adopting inappropriate practices in the detection and investigation of crime. This also has the additional benefit that the community is seen not to condone unfair tactics employed against suspects.[2]

The strongest expression of the disciplinary principle is found in the form of a discretion to exclude improperly or illegally obtained evidence. As we shall see in Ch 14, this discretion is rarely exercised to exclude evidence and hence the importance of the disciplinary principle is diminishing. However, in rare cases the principle also operates in a reverse manner, such that parties who act unfairly can be compelled to disclose evidence that would otherwise come within an exclusionary rule. This arises in the context of legal professional privilege, which is discussed further in Ch 13.

It is not clear whether the disciplinary principle should shape evidence law. Arguably, the disciplinary aim should be abandoned because the law of evidence is an ineffective vehicle for achieving such ends. If a police officer beats up a suspect in order to force a conviction, exclusion of the admission does not constitute a disciplinary measure against the police officer. The police officer suffers no tangible detriment whatsoever. He or she may be displeased that the case has been weakened, but his or her job is not to punish criminals; merely to detect crime and to investigate the case. Police are not meant to have a personal stake in the case — and if they do, they are misguided.

Police who resort to illegal means to obtain evidence should be charged with a criminal offence or face internal disciplinary proceedings. Where less drastic, but nevertheless inappropriate, means are used to obtain evidence (such as providing an inducement) the police officer should be counselled at work. Again, this is not an objective that can be secured by the law of evidence, it is a workplace issue.

Moreover, the reception of unfairly obtained evidence does not entail that the community endorses the means used to obtain the evidence. It is simply a reflection of the fact that we should always maximise whatever resources we have at our disposal to

2 This principle was central to the reasoning of the House of Lords in *A (FC) and others (FC) (Appellants) v Secretary of State for the Home Department (Respondent)* (2004) *A and others (Appellants) (FC) and others v Secretary of State for the Home Department (Respondent) (Conjoined Appeals)* [2005] UKHL 71 where it held that information that may have been obtained by the use of torture is not admissible against accused being tried for terrorist offences.

make the community as best as it can be — it is simply making the most of a bad thing rather than compounding the problem.

The message that it is unacceptable to use inappropriate means to obtain evidence can be communicated in a number of (more effective) ways than by excluding the evidence from court proceedings. The most effective and direct means of signalling this disapproval is by punishing the transgressor, through criminal or civil (including workplace mechanisms) proceedings, depending on the nature of the breach.

1.2.4 Protective principle

Another objective that shapes evidence law is the 'protective principle', which requires that parties to litigation should be treated fairly and protected from possible prejudices. This has its strongest expression in the criminal law, given that accused persons have the most at stake in the system of justice. Moreover, the acts they are accused of often attract social opprobrium (criticism). This principle finds its strongest expression in rules prohibiting the admission of the prior criminal convictions of an accused, especially those which are of a similar nature to the offence with which the accused is charged. Accused people also are accorded the right to remain silent and to not give evidence in the case against them.

Despite the intuitive appeal of the protective principle some empirical data suggests that decision makers are not necessarily influenced by extraneous considerations that portray the accused in a negative light. For example, a study in New Zealand analysed the decision-making processes of 48 juries. A number of interesting matters emerged, including that there were only 19 of the 48 trials in which individual jurors overtly raised arguments based upon sympathy or prejudice during deliberations. However, such sentiments rarely played an important role in the ultimate decision:

> "[When feelings of sympathy or prejudice were raised] they were routinely overridden by the remainder of the jury who ultimately persuaded or pressured them to accept the majority approach. As a result, there were only six cases in which feelings of sympathy or prejudice were identified as having affected the outcome of the trial in some way: three resulted in a hung jury; one in a questionable verdict; and two in a verdict which was justifiable but arrived at by dubious reasoning."[3]

This finding is supported by another study which showed that an 'old previous conviction was found to have little or no effect on jury decisions'. Surprisingly, magistrates were more influenced by prior convictions than jurors.

However, where the previous conviction is similar to the charged offence or the prior criminality involves serious criminality this increases the likelihood of the conviction.[4]

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3 Warren Young et all, 'The Effectiveness and Efficiency of Jury Decision-Making' (2000) *Criminal Law Journal* 89. 97. For a contrary view, see Penny Darbyshire et all, 'What Can the English Legal System Learn From Jury Research Published up to 2001?': http://www.kingston.ac.uk/~ku00596/elsres01.pdf. A striking point to emerge from this research is the inability of jurors to comprehend even basic judicial directions.

4 Sally Lyody-Bostock, 'The Effects on Juries on Hearing About the Defendant's Previous Criminal Record: A Simulation Study' (2000) *Criminal Law Review* 734.

The weight of the research data indicates that prejudgments as a result of prejudicial information about an accused are often readily formed and cannot be reversed by directions from the trial judge in directing the jury to cast away their preconceived views and determine the case strictly on the basis of the evidence presented at the trial. It appears that the human mind is such that memories cannot be selectively erased and emotional dispositions cannot be negated on command.

James Ogloff and Neil Vidmar tested a pool of 121 graduates to ascertain the impact of adverse media publicity on potential jurors, and discovered that, while they were unable to determine the exact psychological mechanism involved, exposure to television and print media biased potential jurors and the level of bias was the greatest when potential jurors were exposed to both forms of media.[5] Most potential jurors were not aware of their bias, thereby making it more difficult to eliminate.

In a further study Geoffrey Kramer et al observed the ineffectiveness of directions in eradicating juror bias.[6] The exact reason is, again, unclear. However, it has been suggested that if jurors are unaware that they are biased, logical instructions are unlikely to overcome their emotional sentiments.[7]

On the basis of current research and knowledge in this area, the logical guiding assumption is that the level of pre-judgment and the difficulty in erasing it is directly proportional to the amount of adverse prejudicial material that is admitted against an accused.[8] Accordingly, rules of evidence that prohibit prejudicial information being tendered against an accused should be interpreted strictly.

1.2.5 Other objectives of evidence law

In addition to the above three objectives, there are also miscellaneous ideals and objectives which shape the rules of evidence. As we shall see in Ch 3, in some cases relatives of an accused are excused from having to give evidence against the accused. The rationale for this appears to be the recognition that loyalty is an important virtue which should be given some expression in the law. Also, in Ch 14 we shall see that communications between lawyers and their clients are generally not admissible. There

5 James Ogloff and Neil Vidmar, 'The Impact of Pre-trial Publicity on Jurors' (1994) 18 *Law and Behaviour* (1994) 507.

6 Geoffrey P Kramer et al, 'Pre-trial publicity, judicial remedies and jury bias' (1990) 14 *Law and Human Behaviour* 409.

7 James Ogloff and Neil Vidmar, 'The Impact of Pre-trial Publicity on Jurors' (1994) 18 *Law and Behaviour* (1994) 507, 522. As noted above, the weight of evidence supports the contention that it is difficult if not impossible to eradicate jury bias (see Phoebe Ellsworth in Reid Hastie (ed), *Inside the Juror: The Psychology of the Juror in Decision Making* (1993); Nancy M Steblay et al, 'The effects of pre-trial publicity on juror verdicts: A meta-analytic review' (1999) 23 *Law and Human Behaviour*, 219; J D Lieberman and Jamie Arndt. 'Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failure of Instructions to Disregard Pre-trial Publicity and Other Inadmissible Evidence' (2000) 6 *Psychology Public Policy and Law* (677). For a contrary suggestion, see Michael Chesterman et al, Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales (Justice Foundation NSW, 2001).

8 See further, Allan Ardill, 'The right to a fair trial: prejudicial pre-trial media publicity' (2000) 25 *Alternative Law Journal* 1; Craig Burgess, 'Can Dr Death Receive a Fair Trial (2007) 7 *QUTLJ* 16.

is no clear rationale for this, but reasons that have been advanced include the desirability of fostering trust between lawyers and clients.

Thus, evidence law has a number of objectives. There is no ranking of their respective importance and often the objectives conflict. It is for this reason that outcomes of evidence based inquires are often unpredictable and seemingly complex.

¶1.3 Looking forward to reform of evidence law

After discussing the difficulties and shortcomings of evidence law in this book it is suggested that the future direction of reform should be guided by a clear methodology and underlying premise. The merits of this approach can only be assessed after a thorough understanding of evidence law. However, the approach is set out at this point to provide readers with a framework for critically evaluating the current law. The suggested approach to developing evidence law is as follows:

1. The current state of evidence law is unsatisfactory — it is replete with complex, vague and often seemingly contradictory rules
2. There is no empirical evidence (nor unchallengeable intuitive basis) to support the bulk of the rules
3. The process of incremental change to a fundamentally flawed system will not fix existing distortions and anomalies — painting a crumbling house is a wasted task
4. Reform, as opposed to change, can only occur if the current system is fundamentally reshaped. There is no 'evidence' that the current system is based on a verifiable body of knowledge
5. The starting point with any system is to ascertain the objective that it seeks to achieve
6. The aim of evidence law should be to ascertain the truth
7. If commentators wish to urge for other goals, the onus is on them to:
   (i) *prove* why those goals are desirable
   (ii) *prove* how evidence law can achieve those goals, and
   (iii) establish why these goals are important enough to trump the search for the truth.
8. The fundamental rule of evidence is that any information that is relevant to the inquiry at hand is admissible[9]
9. Information should only be excluded if there is 'evidence' that it will tend to frustrate the search for the truth, for example, because it belongs to a class of information which evidence shows is inherently unreliable

9 Section 190 of the Act in fact allows for the waiver of most of the rules of evidence, especially in civil proceedings.

10. There is little firm evidence to suggest that any class of information will distort the search for the truth, apart from information that is demonstrably prejudicial to an accused

11. Unless, and until such evidence is forthcoming, we naturally revert to the default position — all relevant evidence is admissible, and

12. This methodology and, in particular, the demand for evidence before a rule of exclusion is adopted, might seem to be setting the bar too high. This is commensurate with the importance of the institution that is evidence law. The price for getting it wrong not only in terms of wrongful convictions, but also wrongful acquittals, is high.

A defining aspect of evidence law and court procedure is that the fundamental processes have remained unchanged for centuries. Scientific advances have not penetrated the court room. In the not too distant future, there is a prospect that pioneering research into human credibility will be adapted into court room settings, thereby making many of the rules of evidence redundant.

For example, research suggests that functional magnetic resonance imaging may provide a means for distinguishing between honest and dishonest witnesses. Scientific analysis shows that significant activation of five brain regions occurs during lying compared with telling the truth. These areas included the right inferior frontal, right orbito frontal, right middle frontal, left middle temporal and right anterior cingulated areas.[10]

There are also external tell-tale signs of lying. Evidence suggests that the normal signals that courts commonly associate with a positive demeanour are flawed. People are bad at detecting lies. Myths about lying include that people who cannot look you in the eye are lying and that pleasant facial expressions are associated with the truth.[11] One recent study showed that 'most people are lousy lie detectors, with few individuals able to spot duplicity more than 50% of the time'.[12] The study by University of California Psychology Professor, Paul Ekman, revealed that when people lie they provide a cluster of verbal and nonverbal clues. The clues are mainly found in parts of the face and derive from the fact that musculature of the face is directly connected to the areas of the brain that process emotion. Neurological studies even suggest that genuine emotions travel different pathways through the brain than insincere ones. These clues often last no more than a quarter of a second and hence are lost to the untrained eye.[13]

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10 Frank Kozel, et al, 'A Replication Study of the Neural Correlates of Deception' (2004) *Behavioural Neuroscience (2004)* 118.

11 Peter O'Shea, 'Assessing the Credibility of Witnesses', paper delivered at National Judicial Orientation Programme, Brighton Le Sands, October 2001.

12 Ekman's study is discussed in James Geary, 'How to spot a liar' (2000) 155(10) *Time*.

13 James Geary, 'How to spot a liar' (2000) 155(10) *Time*; Jonathon Knight, 'The Truth about lying' (2004) 428 *Nature* 692. See more recently, Mark Bouton, *How to Spot Lies Like the FBI* (2010).

