

# Closed-Circuit Television Testimony: Liveness and Truth-telling

**Kathryn Leader**

A witness who gives evidence orally demonstrates, for good or ill, more about his or her credibility than a witness whose evidence is given in documentary form. Oral evidence is public; written evidence may not be. Oral evidence gives to the trial the atmosphere which, though intangible, is often critical to the jury's estimate of the witness. *Butera v DPP (Vic)* (1987)

The legal arena may be one of the few remaining cultural contexts in which live performance is still considered essential (Auslander 1999: 9).

## Introduction

The live presence of all trial participants in a shared space is a longstanding feature of the adversarial criminal jury trial. Along with this practice is the equally longstanding belief that live presence facilitates truth-seeking. Going back as far as the trials by ordeal where a witness's body was actually 'read' to reveal the truth, live presence has been believed, in various ways, to make the criminal trial safer and fairer. These ideas currently most commonly revolve around the concepts of *demeanour* and *confrontation*, where the participants' presence and their interaction will help indicate to the jury the truth of the matter. These beliefs are, however, largely implicit, contradictory

and generally vague: how and why it may be valuable has not been clearly articulated until recently. The advent of mediatised technology into the courtroom in the 20<sup>th</sup> century led to a renewed attempt to account for the value of live performance.

In this paper, I examine how arguments about the value of live performance (whether or not the term ‘performance’ is actually invoked) have been pivotal in debates about the use of closed-circuit television testimony (CCTV). I begin by defining CCTV testimony and examining its current use in courtrooms as a means of mediation for a ‘vulnerable witness’; that is, a witness who, in the view of the court, would be likely to find traditional modes of delivering testimony overly traumatic in legal opinion for a variety of reasons. I argue that the introduction of CCTV testimony has posed a challenge to deep-seated beliefs about the link between live presence and truth-telling because it is able to leave undisturbed, or replicate, all aspects of the fair trial (including the need for it to be open) with the sole exception of the absence of a witness’s body from the courtroom. This has provoked legal debate as to what is at stake in the live presence of bodies together in the same place.

Drawing on the work of performance theorist Philip Auslander (1987, 1999), I will analyse the extent to which CCTV testimony debate bears out Auslander’s claim regarding the ‘essential’ role of liveness in the legal arena. As I will show, the legal emphasis on empirical evidence to define the ‘essential’ role of live presence in various studies is problematic as it overlooks the importance of belief. I conclude that it is the beliefs concerning live presence that sustain the routine use of coercion in the trial and, ultimately, pose a potential stumbling block to the use of mediatised technology in the courtroom.

### **Methodology and Terminology**

The focus of this paper is to examine debate about CCTV testimony to illuminate the central role of live performance in the trial and the potential consequences this may have for mediatisation in the

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courtroom. As I note in my introduction, the most obvious difference between the use of CCTV testimony and evidence testing in a traditional trial is the absence of a witness's body from the courtroom. It is my contention that this 'absence' of the body has focused legal attention on the value of 'presence'. However, when a witness is absent from the courtroom they are still 'present' somewhere; it is simply that this is *not* in the courtroom. Consequently, the importance of what happens *in the courtroom* is as fundamental as what is happening at the remote site.<sup>1</sup>

The metaphor of the trial as theatre or performance is pervasive. Closer examination reveals that the metaphor involves more than an acknowledgment of shared features. In fact, more commonly, the more 'theatrical' a trial is deemed to be, the more it is believed to have strayed from some implicit belief of what it is meant to be or do. This attitude is in keeping with Elizabeth Burns' (1973) argument that a pejorative conception of 'theatricality' can only exist if there is an implicit dichotomy being made between natural and theatrical behaviour, for example, the trial is about truth-telling and high stakes, and the theatre is about artifice and entertainment. In other words, the theatre is about 'performing', and the trial is about 'not-performing' or behaving naturally.

Burns argues that the 'theatrical' is not a series of specific definable signs, but rather the 'double relationship between the theatre and social life'. For Burns (1973), theatrical practice is 'both formed by and helps to re-form and so conserve or change the values and norms of the society which supports it'. Theatre can therefore be conservative or transgressive but, in a relatively dialogic relationship, it both affects and is affected by society's collective consciousness. Following Burns, I argue that outside the discursive space of the theatre, behaviour that is a transgression of or deviation from convention — that stands out — is regarded as 'theatrical' or performative. While, the trial may seem 'theatrical' for laypersons because of shared conventions such as costume and staging, for legal practitioners the 'theatrical' is behaviour that deviates from habituated courtroom practice, for example, when a defendant 'acts up'

as opposed to behaving appropriately or naturally ('not-performing'). This means that legal practitioners will not necessarily *recognise* 'normal' courtroom behaviour as involving 'performance':

Behaviour is not [therefore] theatrical because it is of a certain kind but because the observer recognises certain patterns and sequences which are analogous to those with which he [or she] is familiar in the theatre. What anyone chooses to classify as performative involves a particular form of recognition' (Burns 1973: 3-4).

It is the mode of *reception* that determines and therefore shapes the construction of an event as performative. Consequently in this paper I will investigate legal discussion and debate about the value of live presence or orality when we reconfigure this language into the language of performance. Rather than seeing the role of performance in the trial as a form of embellishment (or a form of deviance), I argue that performance plays a constitutive role in the adversarial criminal jury trial. As I will outline, failure to recognise the crucial role of performance has potential consequences for the use of CCTV testimony.

### The Live Trial

Justice Underwood (2006), of the New South Wales (NSW) Supreme Court, argues that the live trial, where all participants must gather in the same place at the same time, is an outdated, costly and unnecessary historical inheritance (Underwood 2006: 166)<sup>2</sup>. Further, the emphasis on orality ought to be set aside as, historically, this was primarily for the benefit of an illiterate jury and is now outmoded. It would be far better, Underwood argues, to use depositions more freely as this would allow faster, cheaper disputes resolution. Yet, despite Underwood's criticism of the live adversarial trial, he makes it quite clear he is talking about non-criminal matters only. Underwood does not claim that this action would be appropriate in the criminal trial and does explain his reasons for this distinction.

Underwood's paper thus points to a longstanding belief among legal

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practitioners and laypersons that participants sharing the same space at the same time facilitate access to the truth and make the criminal trial safer. Yet the statutory evidence for this belief is available by implication only in Australia, with the value of live presence being inferred from the rules regarding depositions in place of witnesses in criminal and non-criminal matters. In non-criminal cases, a witness can submit a deposition in lieu of attending the courtroom if the distance they would have to travel would cause 'undue' difficulties in Australia. However, in criminal trials the only justification for non-attendance of a witness is if they are either dead or dying (*Criminal Procedure Act 1986 (NSW)*: ss 284-285). No explanation is given for this distinction between non-criminal and criminal process.<sup>3</sup> However, the NSW Law Reform Commission (1978), when investigating the rule against hearsay, specify that any discrepancy between criminal and non-criminal proceedings can be attributed to the need for a higher standard of proof in the criminal trial (NSW Law Reform Commission 1978: Chapter 6).<sup>4</sup> A witness's presence in the courtroom, then, is seen as essential in facilitating a fair outcome in an adversarial criminal trial.<sup>5</sup>

CCTV testimony is used when the judge has decided (on evidence argued by the prosecution, excepting the rare jurisdictions where it is assumed) that the presence of trial participants together in the same room may present impediments to a fair outcome. These impediments most often concern the concept of the 'vulnerable witness'. The vulnerable witness is a person deemed by the court as one who would be likely to find the space of the courtroom potentially traumatic to the extent that it would adversely affect his or her ability to give evidence. The most common usage of CCTV testimony occurs in Family Courts, and most rules regarding vulnerable witnesses extend from circumstances where children are witnesses.

The potential trauma of being in the courtroom is legally defined as the stress a complainant may experience when he or she has to share the same space as his/her alleged attacker. There is also the possibility of deliberate intimidation of a witness by the accused (ALRC 1997: 14.102). Another acknowledged source of stress is 'the trauma of a

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courtroom appearance' (NSWLRC 1994: 7.29). CCTV testimony is therefore posited as a way in which vulnerable witnesses are still able to give evidence cogently, without threat and the concomitant stress that may affect their testimony adversely.

Legal professor Louise Ellison points out: 'This represents a critical acceptance that in some cases traditional methods of proof taking and testing may militate against receipt of the best evidence potentially available' (2001: 7). The existence of CCTV testimony acknowledges that the circumstances of the live trial can be traumatic to the extent of being counter-productive for some trial participants. Yet the term 'vulnerable witness' demonstrates. Yet the term 'vulnerable witness' demonstrates that legal practitioners and scholars frame this resultant potential trauma as a shortcoming of the witness, not the trial process itself. A trial participant's weakness or 'vulnerability' makes him or her unsuited to the trial process. As such, they are the exception to the norm, and CCTV testimony is a special means to enable people to testify who may otherwise withdraw his/her complaint. However by defining these witnesses as 'exceptional', what is involved in what Ellison termed 'traditional methods of proof-testing'—and what I argue can be understood as the centrality of live performance—escapes scrutiny. So why is CCTV testimony only permissible in exceptional circumstances? Or, to reconfigure the question in the context of this paper, what is the value of the live performance in the trial?

Up until the 20<sup>th</sup> century, the necessity of a live or open trial was ostensibly so that witnesses, jury and judges could see and be seen, hear and be heard. This fulfils the prescription in Magna Carta that an accused has the right to face his or her accuser: more generally known as the principle of 'confrontation'. A more recent attempt to summarise what is at the core of traditional evidence testing is outlined by Jeremy Gans and Andrew Palmer (2004) in *Australian Principles of Evidence*:

This preference for oral testimony ... is probably based upon some or all of the following (questionable) beliefs:

A person is more likely to tell the truth if he or she testifies on oath, and subject to the threat of prosecution for perjury proceedings;

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Any falsehoods or inaccuracies in a person's account are more likely to be exposed if the person is subjected to cross-examination; and

The tribunal of fact will be better placed to decide whether or not the person is telling the truth if the person is in court so that his or her demeanour can be assessed (2004: 47).

Arguably, CCTV testimony offers a previously unforeseen alternative that meets all of the above criteria: a witness can see and be seen (albeit within a limited fashion as I shall detail later), hear and be heard immediately *without* being physically present in the courtroom. The witness is still under oath and must still account for his or her evidence. He or she must be in a designated place at a specific time. All that differs is the absence of his or her body from the courtroom, and the fact that he or she is no longer sharing the same space with the other trial participants. So how much is the live trial to do with bodies sharing the same space at the same time? What is this 'intangible' but 'critical' atmosphere of the trial?

### The Value of Live Presence

To explore these questions about the 'power' of live performance, I will draw on the work of performance theorist Philip Auslander (1987, 1996). Auslander interrogates the symbolic value of live performance in his book, *Liveness* (1996), in which a chapter is devoted to the criminal jury trial. He argues that the trial has proved particularly resistant to the introduction of mediatisation (such as closed-circuit television testimony) and claims that criminal trial procedure is 'rooted in an unexamined belief that live confrontation can somehow give rise to the truth in ways that recorded representations cannot' (1996: 128).

Auslander questions the dichotomy between the live and the mediated, claiming that this is an artificial (and unsustainable) construct, usually adopted by performance practitioners and theorists to valorise the 'purity' of the live through the concept of 'presence', and thereby to shore up theatre's value and viability in the face of film, television and new media (Auslander 1996, 1987). This notion

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of presence is expanded on in both *Liveness* and an article, 'Towards a Concept of the Political in Postmodern Theatre' (1987).

Auslander seeks to demythologise essentialist definitions of live performance, which credit it as having greater authenticity than mediated forms of cultural production. He points out that live presence has no quantifiable 'real' value; rather this value is only recognised in opposition to mediated forms. This is supported by the fact that legal argument about the value of live presence in the trial only becomes a subject of debate in the face of its potential replacement: in this case, CCTV testimony, which has led to the articulation of beliefs about the link between live presence and truth telling.

In the next section, I examine legal arguments for the importance of live presence in the trial in response to CCTV testimony. Because this does not necessarily interfere with the 'open' trial (because all witnesses can see and be seen, hear and be heard), the contemporary justifications for the value of live presence usually involve 'confrontation' and 'demeanour assessment'. Examining these concepts, I will interrogate how they point to embodied performance's central role in the trial. I will also show how this very centrality of performance facilitates the routine use of coercion and pressure involved in traditional means of evidence testing.

### Positive Intimidation: Confrontation

The principle or 'right' of confrontation is a well-established feature of common law. Derived from a clause in the Magna Carta, confrontation outlines the right of the defendant to be confronted with and to test the witnesses against him or her in open court. In the US, the right to 'confrontation' is explicitly outlined in the Sixth Amendment of the US Constitution. But does 'confrontation' explicitly mean face-to-face confrontation?

This question, and the related question of whether CCTV testimony therefore contravenes the principle of confrontation, was first tested in the US Supreme Court in the case of *Maryland v Craig* (1990).<sup>6</sup>



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Although the Supreme Court ultimately ruled in favour of CCTV testimony usage for vulnerable witnesses, the judges also made explicit that they believed that the ‘Confrontation Clause’ meant face-to-face confrontation and, therefore, CCTV testimony could only act as a substitute in exceptional cases involving vulnerable witnesses. Although CCTV testimony was permissible, it was certainly not preferable. The Supreme Court judges argued that the ‘ideal’ trial involved direct confrontation despite the drafters of the Sixth Amendment not being able to foresee such technological developments as remote but ‘live’ testimony.

A dissenting judge in the case, Justice Antonin Scalia, took this further and argued that the value of face to face testimony was so important that CCTV testimony was unacceptable and always contravened a defendant’s right to a fair trial: ‘[it is wrong because] the Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures that were thought to *assure* reliable evidence, undeniably among which was ‘face-to-face’ confrontation’ (*Maryland v Craig* 1990). For Scalia, when a witness is present, this does not mean that he or she will necessarily tell the truth, but rather that all the circumstances to ensure the best possible evidence are upheld.

Eilis Magner, an Australian legal academic specialising in Evidence Law, refines this idea further when she notes that effective cross-examination, in whatever guise is deemed suitable, is seen as the key to a fair trial (Magner 1995: 94). This is reflected in the hearsay rule, whereby lack of opportunity for cross-examination of testimony will usually lead to exclusion of this evidence from trial.<sup>7</sup> The fair trial therefore comes down to the importance of live cross-examination. This tells us that the spontaneity of a witness’s immediate response, and a privileging of the immediate evidence, is considered a more reliable indicator of the truth than, for example, a written statement. Louise Ellison comments:

A deep-seated belief that oral evidence is invariably best is also rooted in basic assumptions of adversarial theory regarding the optimal testing of informational sources. Great faith is specifically placed in

the capacity of cross-examination to expose the dishonest, mistaken, or unreliable witness, and to uncover inconsistency and inaccuracy (Ellison 2001: 11).

However, inextricably bound up with ‘confrontation’ is the controversial question of intimidation. In 2000, the NSW Attorney General’s Office released the report, *People with an Intellectual Disability and the Criminal Justice System*. While technically dealing with vulnerable witnesses, the report affirms that legal agents openly acknowledge that the courtroom is always a place of potential stress for a witness to some extent, and that this is a necessary part of the process and is only deemed problematic if the witness is ‘unduly’ intimidated (2000: 7.20). That is, general intimidation of a witness is regarded as an aid to the truth-telling mechanisms of the adversarial criminal trial.

This ‘positive’ intimidation is also the primary means of evidence-testing. Cross-examination is specifically designed to challenge and discomfort a witness. When a witness undergoes cross-examination successfully (that is, when they maintain their credibility and do not make any telling admissions that would point to whether or not they are telling the truth), it is more likely that he or she will be believed.<sup>8</sup>

Legal practitioners believe that some degree of intimidation will have a *positive* effect on reliability and function as a safeguard of truth-telling:

Some prosecutors say that a child’s evidence will be seen by a jury as less credible if not adduced in the traditional manner. In addition, some prosecutors are said to believe that the appearance of a visibly distressed child witness makes a jury more likely to convict (ALRC 1992: 14.105).

Visible distress can be regarded, it seems, as a marker of credibility.<sup>9</sup> Legal scholarship therefore clearly identifies the value of live presence as being synonymous with confrontation and ‘positive’ intimidation. Yet, ultimately, it is a jury’s *assessment* of a witness’s credibility that is of more consequence than any theoretical discussion about a witness’s honesty. This leads us to the next justification for the value of live presence: demeanour assessment.

## Reading the Body: Demeanour Assessment

Demeanour assessment is where the jury assesses the credibility of a witness through his/her appearance and manner as well as the content of his/her testimony. Although essential for juries making a decision, demeanour assessment is a highly controversial part of trial practice, with many legal practitioners and scholars including senior judges (in Australia at least) arguing that it is obsolete. For example, Underwood (2001) argues that, 'the idea that it is possible to sift the accurate oral account from the inaccurate oral account from the demeanour of the witness has long been discredited' (2001: 167; see also Kirby 2000).

Nevertheless, in Australia currently, an appeal cannot be mounted in a higher court to dispute a finding as to a witness's credibility that is based on the demeanour assessment of a lower court judge. '[W]here a case is decided upon a trial judge's findings based on assessment of a witness's credit or demeanour, the Appellate Court will not intervene. Not seeing the witness is said to 'put[s] the Appellate judges in a position of permanent disadvantage' (Porter 2001: 45).<sup>10</sup> Unless judges are in the room with the witness at the time, they are unable to make decisions based on credibility. This contradicts both Underwood's and Kirby's assertion that demeanour assessment has been long discredited.

The near impossibility of capturing such 'nuances' in the written transcripts of court proceedings bears out performance theorist's Peggy Phelan's claim that live performance is an event that 'disappears into memory, into the realm of invisibility where it eludes regulation and control' and is predicated the fundamental qualities of disappearance and unrepeatability (Phelan and Lane 1998: 8). The continued recognition of the role of demeanour assessment demonstrates, as Auslander asserted, that the law is an ontologically live practice (1996: 158), but valorisation of the live event does not explain why the live is privileged as more likely to access truth in this day and age. Can juries really assess whether someone is telling the truth through their demeanour on the stand? For a juror to believe this requires him or her to believe that there are certain relatively fixed signs that indicate honesty or dishonesty. This disregards the cultural context within which the signs of a 'performance' are interpreted.

## **Research Findings**

The concern that mediated testimony will be considered less 'authentic' by a jury is expressed in Taylor and Joudo's (2005) study which specifically targets legal practitioners. Taylor and Joudo found that legal practitioners worried whether remote testimony would dilute the impact of testimony on the jury. Undoubtedly part of the reason for this ambivalence is tradition. By linking the live trial with truth-telling, legal practitioners do not necessarily believe that the current trial process is flawless; however, it is a time-tested method which legal agents are (unsurprisingly) reluctant to alter unnecessarily. Yet the misgivings of legal practitioners with regard to CCTV testimony is to some extent supported by investigation into juror reception. Orcutt et al (2001), Eaton et al (2001) and Landstrom (2008) all returned findings in their studies showing that where jurors were asked to rate the credibility of a witness before them versus a witness testifying remotely, they uniformly found a witness's credibility to be reduced through the usage of CCTV testimony. The Orcutt study specifically noted that:

In summary, children testifying via CCTV were seen as less accurate, less honest, and less attractive than children who testified in open court, and jurors were less likely to convict the defendant when the child testified via CCTV. Jurors did not report feeling significantly less empathy for the defendant or the child. Thus, testimony via CCTV appeared to result in a more negative view of child witnesses as well as a small but significant decrease in the likelihood of conviction' (2001: 342).

One potential problem is the quality of the live feed itself. In 1994, the Australian Law Reform Commission drew attention to the potential problem of distortion of visual images, through an inability of the triers of fact (whether judge or jury) to assess the scale of the image, or through the inability for a trier of fact to see the remote room in its entirety. In the case of child witnesses, because it is often the case that their evidence-in-chief is allowed in video form, the jury and court may never *see* the witness in person. The report notes: 'CCTV may not permit the jury to see the size of the child and so it

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may leave the jury unaware of the vulnerability of the child as against the accused' (ALRC 1994).

If CCTV testimony ideally simulates, as best as possible, the experience of live evidence testing, it is fundamental that the quality of the recording and the circumstances in which it is recorded are also optimised. As David Tait's Justice Research group points out, the quality of the screen in the courtroom, its size, and a host of other small details are incredibly important in how a juror will interpret a witness, and how a witness may judge his/her experience of testifying.<sup>11</sup> However, along with potential technological defects, there is the question as to whether the presence of cameras alters witnesses' behaviour or alters jurors' assessment of their behaviour, which is also linked to the potential for the technology to 'theatricalise' the proceedings.

This potential alteration in a witness's behaviour can happen in two ways. Firstly, there is the claim that both the physical presence and use of technology will directly affect and distort the behaviour of those in the court causing the witness to 'act up', and rendering them less likely to be truthful or 'natural'. While this comment was about another form of mediatisation — the broadcasting of proceedings — the potential for 'acting up' is posited not only on the witness performing to the imagined audience, but also in relation to the immediate physical stress caused by the presence of cameras and/or the disruptive effects of screens in the courtroom.<sup>12</sup> Although cameras, according to some critics, may function as a behavioural trigger, the perceived risk that trial participants will 'act-up' presupposes that traditional methods of live evidence allow trial participants to be relatively 'natural'. This would contradict the concept of 'positive intimidation' referred to earlier in this paper and implies a lack of recognition of the particular kind of performance that takes place in the courtroom. As we have seen, attempts to assess what is problematic about CCTV testimony fail to also query what might be problematic about *live* testimony. Just as the value of live performance cannot be measured and definitively 'proven', studies to assess CCTV testimony's effects cannot clearly distinguish which are particular to CCTV testimony, and which may be more general reactions to any

form of cross-examination. As Orcutt et al observed:

[T]he reliable cues discriminating liars from truth-tellers are uncontrollable signs of arousal ... and are not signs of lying per se. Cues revealing fear and arousal can be useful in situations where a person should not show fear if he or she is being truthful. In a courtroom, however, a witness afraid of not being believed or a witness afraid of confronting an abuser may display a number of the same behaviours as a liar afraid of being caught (Orcutt et al 2001: 342).

This makes interpreting any findings difficult. Take for example David Tait's Justice Research Group's Gateways to Justice study in 2009:

... making (simulated) eye contact is valued highly both by the interviewer and the witness ... Conversely not making eye contact — resulting from the cameras being in the wrong position in the standard remote witness room — seemed to increase stress for the participants and made it harder to develop a rapport (2009: [4]).

Does this mean that more effective simulation of CCTV testimony will be able to provide this rapport or does the very need to simulate it mean that 'there continue[s] to be something special about physical proximity which should encourage us to maintain face-to-face contact for non-exceptional witnesses whatever alternatives technology offers us?' (Mulcahy 2008: 483).

I believe that what makes this question impossible to answer is that it, like most studies and most scholarship, overlooks the crucial importance of *belief* in the value of live testimony. In other words, it is not possible to answer Mulcahy's question posed above because it is not clear from any available study whether witnesses or jurors believe confrontation *does* make witnesses more truthful, or whether they are simply more likely to be believed because the jury *thinks* confrontation makes witnesses more truthful (a kind of circularity of belief). If jurors believe confrontation is useful or necessary to ascertaining a higher likelihood of truth-telling, they are less likely to doubt the veracity of a witness who testifies in person during such a study. This means that jurors will only confirm their own beliefs, rather than 'prove' the link

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between liveness and truth-telling.

This is also, arguably, what Auslander does not account for sufficiently. By concentrating on whether there is a 'real' distinction between the live and the mediated, he does not adequately address the role belief plays in maintaining this distinction. The difference between what is 'real' and what is *believed* to be 'real' is arguably not that important. Collective belief in the value of live performance is authentic in the sense that it becomes self-fulfilling. Consequently, when Auslander asserts that the trial's emphasis on the live is 'unexamined', he fails to account for the fact that live confrontation in the criminal jury trial has a symbolic (and real) value because we invest in the belief that it does. The transience of Performance Studies' object of study — what Peggy Phelan identified as the disappearance of live performance — can be overcome to some extent by recognising the value of the belief itself. That is, it is not about proving whether the live *is* magical, special or, in the above case, inherently more likely to facilitate the truth. What matters are the real effects of the collective belief that it will, in it *has*. So what are the real effects with regard to the usage of CCTV testimony?

One of the only things about which we may be relatively certain regarding CCTV testimony is that its usage (using real children's testimony rather than mock trials) resulted in vastly improved outcomes for the testifier — the child witness was much more able to cope with his or her surroundings, retain information and respond to questioning.<sup>13</sup> Witnesses felt less pressured without physical confrontation — either in terms of being in the court, in front of their accuser, or in front of an advocate cross-examining them. CCTV testimony usage can allow child witnesses, and others classed as 'vulnerable', to feel they are more able to come forward and testify, and this is explicitly why such technology was developed.

Yet as Stephen Odgers, President of the NSW Bar Council, observed when commenting on the automatic provision for CCTV outlined in a 2003 amendment:

Some Crown prosecutors would prefer it if complainants testify, partly

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because they might be concerned that a jury will draw an adverse comparison with an accused who does go in the witness box in front of them and testifies, and partly because I think they think that you'll get more empathy with a complainant who's actually in front of the jury, who they can see clearly, and assess their body language, particularly in response to cross examination (Odgers 2005).

Minimisation of confrontation is a double-edged sword. The lessening of trauma sustained by the witness is offset by the possibility that jurors are less likely to believe her if she is not present in the courtroom when testifying. This risks harming the complainant's chances of securing a conviction. As long as jurors and legal practitioners *believe* the ideal means to obtain the best evidence is 'live', minimising the burden of live performance via CCTV testimony risks harming a witness's credibility.

## Conclusion

While this paper has had a relatively narrow focus — that of CCTV testimony — in conclusion I would like to consider the role of CCTV testimony as part of a larger project of trial reform for 'vulnerable witnesses'. In NSW, significant reform addressing one category of vulnerable witnesses, sexual assault complainants, has resulted in an influx of new legislation. In response, in 2006 the NSW Bar Association held a meeting to educate barristers about the changes in sexual assault law. On arriving, each barrister received a thick booklet canvassing all the major reforms, which included provision for CCTV testimony, limitations on appropriate questioning, making sexual assault trials closed to the public, readmission of previous trial testimony via affidavit, and allowing a complainant a support person while they testified. After going through the amendments, a voice called out from the back of the room: 'Why bother having a trial?'

The barrister's question — why bother having a trial? — voices, in very blunt terms, the crux of the problem when it comes to technology and reform. This is not a matter of a lack of political will to change the law — law reform is not only possible in NSW, it has also occurred



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relatively frequently in recent times. For example, since 2003 there have been multiple changes to the *Criminal Procedure Act* 1986 (NSW) and the *Evidence Act* 1995 (NSW). These amendments include the automatic use of CCTV testimony for children and for sexual assault complainants. However, these reforms downplay the confrontational characteristics of the trial and, in so doing, seek to alter long-standing means of evidence-testing that are central to legal and popular belief as to the optimum means to obtain a just outcome.

While we believe that the live presence of witnesses aids credibility, we risk impairing the credibility of witnesses testifying remotely. Debates about CCTV testimony and authenticity expose the centrality of 'liveness' to the trial, as well as the concomitant problems that associations between authenticity and this liveness may carry with it. The term 'vulnerable witnesses', therefore, becomes problematic as questions are posed that are broader than simply how to deal with a small and 'exceptional' group of witnesses.<sup>14</sup> Instead of treating vulnerable witness's trial experiences as exceptional, effective reform needs to address the entrenched association between liveness, confrontation and truth-telling. Ultimately, the undervaluing of the importance of live performance to the trial potentially impedes effective technological reform. As Linda Mulcahy elegantly expresses it:

[P]erhaps the dynamics of the adversarial trial are such that rather than creating special categories of witness deserving of attention, we should awaken to the fact that most witnesses could be labelled vulnerable (2008: 489).

## Notes

- 1 While the complexity of the spatial dynamics and sociological implications of the courtroom are also of considerable importance, it is beyond the scope of this paper to attend to them in more detail. I have elsewhere published a detailed account of the sociological implications of the courtroom space drawing upon the work of Foucault and Bourdieu. I argue that 'presence' in the courtroom necessarily involves participation in a highly complex performative space involving significant degrees of coercion. Please see

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Leader (2007). Other important works are Mohr (1999) and Radul (2007), of which the latter specifically discusses the impact of mediatisation on the architecture of the courtroom.

- 2 'The process of a modern trial is not something that has been designed, or recently redesigned, to achieve the best result for parties in dispute. Rather, its adversarial nature and characteristics of continuity and orality have arisen from an historic scenario that, by and large, no longer exists. Yet, as I have observed, curiously, this process is seldom questioned' (2006: 166).
- 3 In criminal proceedings 'the court is not to find the case of the prosecution proved unless it is satisfied that it has been proved beyond reasonable doubt', whereas in civil cases 'the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities'. In civil cases, the prosecution case succeeds if it is proved on the balance of probabilities. Inversely, in criminal trials, a defendant's case succeeds (eg they are acquitted) if *their* case is proved on the balance of probabilities (*Evidence Act 1995 (NSW)* ss 140, 141).
- 4 '[b]ecause liberty and reputation are at stake, it is accepted that the law should be tender to the rights of the accused, and be more ready to risk the acquittal of the guilty than the conviction of the innocent. A well-known example is the higher standard of proof demanded in criminal cases' (NSW LRC 1978, Chapter 6).
- 5 As evidence law expert Eilis Magner comments: 'the presumption that evidence given in a common law trial should be offered in oral form is enshrined in the common law' (1995: 70).
- 6 In this case, the defendant had been found guilty of child sexual assault at his initial trial. The complainant had given testimony through one-way CCTV transmission where the court could see the complainant, but she could not see them. This was because, her counsel argued, the complainant was a vulnerable witness. The defendant's conviction was then overturned by the Maryland Appeal Court who argued that his right to face-to-face confrontation had been violated. The Supreme Court judges, however, reinstated the defendant's conviction, confirming CCTV testimony as acceptable in the exceptional circumstances of a vulnerable witness.

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- 7 Louise Ellison (2001) notes the close relation of the preference for confrontation and the Hearsay rule. The Hearsay rule is the requirement that any evidence must be sufficiently tested before being deemed admissible in court. Consequently, statements made that cannot be sufficiently tested — such as second-hand reports of what someone may have said — are excluded under its provisions.
- 8 In the United Kingdom in 2005 Roberts et al posed the question: ‘if special measures *are* an unmitigated ‘good thing’ with no undesirable side effects, why stop at especially vulnerable or intimidated witnesses as meritorious candidates for assistance? After all, few people positively relish the prospect of searching forensic examination in the witness box, and those who have sampled the experience self-report alarmingly high levels of anxiety, fear and feelings of intimidation’ (Roberts 2005: 269 n 19).
- 9 This is supported by Justice Scalia’s comments in *Maryland v Craig*: ‘Unwillingness cannot be a valid excuse under the Confrontation Clause, whose very object is to place the witness under the sometimes hostile glare of the defendant. That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult’ (*Maryland v Craig* 1990).
- 10 This is reflected in the findings of a New Zealand Law Commission Report: ‘the demeanour displayed by witnesses and the manner in which they present their testimony are traditionally regarded as relevant to assessing truthfulness. This has contributed to the reluctance of appellate courts to interfere with first instance findings of fact based on a determination of truthfulness. However, a determination of truthfulness by reference to demeanour has a subjective basis which will inevitably reflect the values, experience and cultural norms of the fact-finder’ (1997: 38).
- 11 As Mulcahy has noted, a major flaw in the development of CCTV testimony has been that ‘[CCTV testimony] facility provisions appear to pay little heed to the goal of rendering live link [CCTV testimony] as close as possible to live performance within the courtroom’ (2008: 480).
- 12 As far back as 1937, the introduction of press photography was thought to potentially impair the seriousness of the proceedings: ‘Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the courtroom during sessions of the court or recesses between sessions, and the broadcasting of court proceedings are calculated

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to detract from the essential dignity of the proceedings, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted' (ABA 1937: Canon 35). See also Frank (1987).

- 13 See Orcutt (2008), Taylor and Joudo (2005), Cashmore and Trimboli (2006) amongst others.
- 14 As Linda Mulcahy observes, it could be argued 'The move towards separation of vulnerable witnesses from the rest of the court in the criminal justice system represents nothing more than a pragmatic solution to a discrete problem when there is in fact a systemic failing in the adjudicatory model employed' (2008: 489). Indeed, the category of 'vulnerable witness' is ever-expanding, encompassing domestic abuse complainants, sexual assault complainants, and potentially also those with learning or language difficulties, physical disabilities and those who are non-native English speakers.

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