Identification Evidence

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This paper is written from the defence perspective. It endeavours to state the law of New South Wales as at 1 March 2017.

1. WHAT IS IDENTIFICATION EVIDENCE UNDER THE EVIDENCE ACT?

Evidence Act definition

The Evidence Act Dictionary defines "identification evidence" in the following terms:

> ***"identification evidence"*** *means evidence that is:*
>
> *(a) an assertion by a person to the effect that a defendant was, or resembles (visually, aurally or otherwise) a person who was, present at or near a place where:*
>
> *(i) the offence for which the defendant is being prosecuted was committed, or*
>
> *(ii) an act connected to that offence was done,*
>
> *at or about the time at which the offence was committed or the act was done, being an assertion that is based wholly or partly on what the person making the assertion saw, heard or otherwise perceived at that place and time, or*
>
> *(b) a report (whether oral or in writing) of such an assertion.*

Note that section 113 of the Evidence Act states that "This Part [i.e. Part 3.9 – ss. 113-116 inclusive] applies only in a criminal proceeding."

Criminal proceeding" is defined in the Dictionary of the Evidence Act in the following terms:

> ***"criminal proceeding"*** *means a prosecution for an offence and includes:*
>
> *(a) a proceeding for the committal of a person for trial or sentence for an offence, and*
>
> *(b) a proceeding relating to bail,*
>
> *but does not include a prosecution for an offence that is a prescribed taxation offence within the meaning of Part III of the Taxation Administration Act 1953 of the Commonwealth.*

What is caught by the Evidence Act definitions?

The provisions of the Act DO apply:

(i) In a "criminal proceeding" as that term is defined by the Evidence Act Dictionary.
(ii) To the defendant in criminal proceedings (but not to other persons)
(iii) To acts of identification of the defendant [or to use the language of the definition – "reports (whether oral or in writing) of such an assertion."] –
(iv) To recognition evidence
(v) To voice identification evidence of the defendant.
(vi) To evidence of resemblance

What is not caught by the Evidence Act definitions?

The provisions of the Act DO NOT apply:

(i) In civil proceedings
(ii) To persons other than the defendant
(iii) To inanimate objects
(iv) To evidence of negative identification
(v) To evidence of failure to identify
(vi) To description evidence that falls short of recognition evidence
(vii) To voice identification of a person other than the defendant.
(viii) CCTV footage (unaccompanied by any assertion to the effect that the person in the footage is the defendant).
(ix) An assertion to the effect that a particular person was introduced as having a particular name (see *Trudgett v R* [2008] NSWCCA 62, 70 NSWLR 696, 182 A Crim R 253)
(x) DNA evidence
(xi) Fingerprint evidence

2. VISUAL IDENTIFICATION EVIDENCE

Evidence Act s.114(1) defines visual identification evidence in the following terms

> *(1) In this section:*
>
> *"visual identification evidence" means identification evidence relating to an identification based* ***wholly or partly on what a person saw*** *but* ***does not include picture identification evidence.***

The section creates a rebuttable presumption that such evidence is inadmissible when led by the prosecution unless certain criteria are met. Note that he prohibition only applies to the prosecution and not to the accused or a co-accused. The relevant parts of the section read as follows:

> *(2) Visual identification evidence adduced by the prosecutor is not admissible unless:*

(a) an identification parade that included the defendant was held before the identification was made, or

(b) it would not have been reasonable to have held such a parade, or

(c) the defendant refused to take part in such a parade,

and the identification was made without the person who made it having been intentionally influenced to identify the defendant.

(3) Without limiting the matters that may be taken into account by the court in determining whether it was reasonable to hold an identification parade, it is to take into account:

(a) the kind of offence, and the gravity of the offence, concerned, and

(b) the importance of the evidence, and

(c) the practicality of holding an identification parade having regard, among other things:

(i) if the defendant failed to cooperate in the conduct of the parade-to the manner and extent of, and the reason (if any) for, the failure, and

(ii) in any case-to whether the identification was made at or about the time of the commission of the offence, and

(d) the appropriateness of holding an identification parade having regard, among other things, to the relationship (if any) between the defendant and the person who made the identification.

(4) It is presumed that it would not have been reasonable to have held an identification parade if it would have been unfair to the defendant for such a parade to have been held.

(5) If:

(a) the defendant refused to take part in an identification parade unless a lawyer acting for the defendant, or another person chosen by the defendant, was present while it was being held, and

(b) there were, at the time when the parade was to have been conducted, reasonable grounds to believe that it was not reasonably practicable for such a lawyer or person to be present,

it is presumed that it would not have been reasonable to have held an identification parade at that time.

(6) In determining whether it was reasonable to have held an identification parade, the court is not to take into account the availability of pictures or photographs that could be used in making identifications.

IDENTIFICATION PARADES

What is an "identification parade"?

The term "identification parade" is not defined in either the Evidence Act Dictionary or section 115 of the Evidence Act. In essence, an identification parade involves the suspect standing in a line or "parade" with a number of other people of similar appearance and for all people standing. Odgers (12th Edition) states "Broadly interpreted, it [i.e. identification parade] would mean any group of people (including the person who subsequently became the defendant), utilised for the purposes of a witness attempting to identify someone involved in a crime."

It should be noted that the Commonwealth Crimes Act sections 3ZM, 3ZN and 3ZP outline a number of criteria to ensure the fairness of any identification parade held in respect of Commonwealth offences including minimum number of participants (9), the need for persons to have reasonable resemblance in height, age and general appearance, participants not to have visible features that are markedly different from the suspect, no person to be dressed in a way that obviously distinguishes them from other suspects, identification parade must be videotaped if practicable, safeguards for juveniles etc. Whilst none of the above is binding in the context of NSW law, it is worthwhile to consider these issues as a basis for considering potential grounds for cross-examination in any challenge on the grounds that the witness has been intentionally influenced [s.114(2)] to identify the defendant and / or as to the inherent impropriety of any identification parade for the purposes of Evidence Act s.138.

Tactical Considerations – Agreeing to Participate in an Identification Parade?

It is important to remember that each case will obviously turn on its own facts, and what follows does not amount to a blanket recommendation to agree to participate in an identification parade. Individual practitioners need to make a judgment call on a case by case basis.

Some defence practitioners will advise their client to agree to participate in an identification parade. This is because police will typically have no system or regime in place for organising for participants to enter into an identification parade. This is particularly so in country towns.

Agreeing to an identification parade (at least initially) will have the effect of putting the onus on the prosecution to demonstrate that it was not reasonable to hold an identification parade in the event that they wish to rely upon picture identification evidence gleaned while the defendant is in custody. This is so by virtue of the Evidence Act which renders picture identification evidence inadmissible if, when the pictures were examined the defendant was in custody of a police officer of the police force investigating the commission of the offence with which the defendant has been charged, unless:

- The defendant refused to participate in an identification parade [s.115(5)(a)]; or
- The defendant's appearance had changed significantly between time of offence and time of custody [s.115(5)(b)]; or
- It would not have been reasonable to hold an identification parade including the defendant [s.115(5)(c)]
- See also s.115(6) which refers to back to the reasonableness of holding an identification parade as per s.114(3) – (6) inclusive.

The chief advantage therefore of agreeing to participate in an identification parade is that it may render critical picture identification evidence inadmissible.

Informing the Police of a Decision to Participate in an Identification Parade

In the event that a decision is made to participate in an identification parade, the practitioner at the police station should stipulate certain conditions to the investigating police (take a good file note of what you said) such as:

- Some basic agreement as to similarity of the other participants in the parade such as height, weight, build, complexion, presence or absence of facial hair, length of hair.
- Absence of any distinctive physical differences between participants and the defendant (e.g. facial scars, marks, tattoos, etc).
- An absence of distinctive difference in clothing (e.g. a parade of participants wearing clothing consistent with being council workers or building site workers and your client standing in line in a green tracksuit).

For further guidance on this point see the discussion under the Heading "Challenging the Identification Array" below.

Make it plain to police that you wish to be present at the identification parade, and you wish to view the other participants and confer with your client before participating. This will allow the practitioner to check the fairness of the array, and advise the client to withdraw consent to participating in the identification parade if it appears to be unfair.

At the Identification Parade

Ask the police to videotape the identification parade (they may raise privacy concerns regarding the other participants), or at least videotape the witness viewing the parade. This will present an accurate record of any hesitation etc that the witness experiences. Take notes. Examine the area in which the parade is to be conducted – Chester Porter QC tells a great "war story" about moving an umbrella that was behind his client shortly before the witness entered the room, only to have the witness identify the wrong person (who now had the umbrella positioned behind them).

***R v Penny* (1997) 91 A Crim R 288**

This is a single judge decision of the Supreme Court of Western Australia. It involved the accused (an Aboriginal male) taking up a position on a railway platform and allowing the identifying witness to view the people present on the railway platform in an endeavour to identify the accused. The accused sought to have the evidence of the

identification parade excluded as there was no photographic or video record of the other participants in the identification parade, or the conduct of it, and the accused asserted that he was thereby unduly prejudiced as he was unable to show to the jury the full circumstances of the identification. His Honour Wallwork J made the following remarks in excluding the evidence:

At 289:

> *"It was agreed for the prosecution that no video film or still pictures were taken of the persons present on the platform at any time during the procedure. It was contended for Mr Penny that if a video had been taken of the procedure, or even still pictures at or about the time of the identification, teh jury would have been better able to judge whether or not the procedure was fair. It is said that because no such photographic material is available, the jury would have to make a choice from differing accounts given by the persons who were present at the procedure. This is unfair to Mr Penny and I should therefore exclude it from the trial."*

At 299:

> *"In this case there was no proper identification parade conducted. Additionally, there were no photographs taken of the persons on the relevant platform and no video of what happened. Due to the lack of photographic evidence and the lack of proper note-taking at the time, the evidence as to the number of persons on the platform and their description which is available to the jury, is not as reliable as it could have been. In my view, if the identification evidence from the railway station was to go to the jury, Mr Penny would be in the position where he could not properly defend himself. This is despite the well intentioned efforts of the police officers who should have been aware of the correct procedures to be followed. The police officers in this case did not try to arrange an appropriate identification parade. In any event, at the least, in my view, the proceedings should have been videotaped or photographed."*
>
> *"In all the circumstances I am satisfied that to admit the evidence concerning the identification process at the Perth Railway Station would result in unfairness and prejudice to Mr Penny. In the words of Gibbs CJ in Alexander, the police officers failed, "...to take every precaution reasonably available to guard against the miscarriage of justice that can occur, and in fact have occurred, because of honest but mistaken evidence of identification..."*

The reference to Gibbs CJ in *Alexander* above can be found at *Alexander v R (*1981) 145 CLR 395 at 401. The relevant "purple passage" is extracted later in this paper under the heading "Common Law Regarding Identification Parades Prior to the Evidence Act"

The above decision is not the subject of any comment in the NSW jurisdiction. It has been considered and referred to on occasion in WA, but has never been specifically affirmed anywhere. Obviously, it is of persuasive value only. It is best to run this argument using this authority in conjunction with a consideration of Alexander.

R v Adamson **NSWCCA 26/11/92 unrep.**

This matter concerned three civilian witnesses attending a courthouse on the instructions of the police to see if they could identify an offender from an armed robbery. The accused was attending court that day in relation to another matter. The civilian witnesses all sat together though they denied conferring or influencing each other. All three identified the accused. A re-trial was ordered by the NSWCCA due to inadequate trial directions concerning identification evidence. During the course of dealing with the matter, the following remarks were made by Gleeson CJ at 1-2:

> *"...as Sully J has observed, the appellant was identified, at a courthouse, in circumstances where there was no way in which the jury could assess whether there were other people present of comparable appearance and, if so, how many there were. For all that appears from the evidence, the appellant, on the occasion when he was identified, might, by reason of his age, build, manner of dress, and other appearance, have been conspicuous in his surroundings as by far the most likely person to answer the description that had been given to the police. There is an obvious reason why, in an ordinary identification parade, steps are taken to ensure that the suspect does not stand out from the group in which he is placed. The persons involved in the parade should so far as possible consist of persons who resemble the suspect in age, height, general appearance and position in life."*

Potential Conflict for the Practitioner?

All of the above of course raises the risk that the legal practitioner may become a witness in the hearing or trial. Individual practitioners will have to make their own decisions about servicing the legal needs of their client at the police station in the hope of securing evidentiary advantage as opposed to having eventually handing over the file to another practitioner as you have become a witness to some irregularity or unfairness or are in a position to offer evidence the effect of which is that the efforts of the police were not reasonable in the circumstances.

Reasonableness of Holding Identification Parade

The Evidence Act outlines a number of non-exhaustive criteria for assessing whether it is reasonable for police to hold an identification parade in s114(3)-(6) inclusive.

In addition the case law offers insights into the reasonableness or otherwise of the holding of an identification parade. The following cases are of assistance:

Walford v DPP (NSW) [2012] NSWCA 290, (2012) 217 A Crim R 555

This case considered the interpretation of the wording of Section 144(2)(a) of the Evidence Act 1995 (NSW), and in particular the words presumptively requiring an identification parade to be held "..before the identification was made." In this matter the witness identified the accused immediately and reported this fact to police very shortly thereafter. This act of identification was objected to in the hearing of the matter in the Local Court. The Magistrate at first instance held that the evidence was inadmissible as prior ot the giving of this evidence in court an identification parade had

not been held. ON appeal to the Supreme Court Common Law Division it was held that the words “the identification” in the section referred to the act of identification, and not the giving of the visual identification evidence in court.

R v Thomasen [1999] ACTSC 112. This case concerned an allegation that the accused had assaulted a hotel patron with a glass to the face. Within minutes of the alleged assault (and before the police arrived) the accused was identified by a witness to hotel staff as the perpetrator of the offence. Miles CJ held that in those circumstances it would have been unreasonable to hold an identification parade.

R v D [2008] ACTSC 82. This case involved a person being assaulted by a juvenile. Both victim and accused had attended the same primary school. The assault occurred four years after the leaving that primary school. The victim immediately returned to his workplace and nominated the accused as his assailant to a number of workmates. The next day he attended the police station and nominated the accused to the police. Penfold J held that in the circumstances it would not have been reasonable for police to have conducted an identification parade.

***DPP v Donald & Anor* [1999] NSWSC 949**. This was an appeal to the Supreme Court against the decision of a magistrate to exclude visual identification evidence due to failure to hold an identification parade. The facts were that the victim was robbed on or about 12 November 1998. The victim then saw the defendants on 28 November 1998 whilst she was driving her car and reported that sighting to the police. The defendants were charged. The police relied upon the evidence of the victim’s identification of 28 November 1998 and did not hold and identification parade. Bell J accepted the submission on behalf of the DPP that the holding of an identification parade in those circumstances “might be said to have been contaminated by her earlier identification.” (see [11]).

Ilioski v R [2006] NSWCCA 164. This matter involved a brawl outside a club involving the use of a knife. The witness was told by an unidentified security guard that nobody had formally identified the person being spoken to by police. Police had arrived only a short time after the incident. The witness then went forward to speak to police, identifying the accused as the offender. The identification by the witness was part of the investigation process and was necessary to effect the arrest (see Alexander v R (1981) 145 CLR 395 at 400, 409-401, 429-430, 437, R v Carusi (1997) 92 A Crim R 52 at 57-60. At the time of his arrest the accused had a black eye and was suffering significant bruising. Police were trying to bring a significant disturbance involving several people under control at the time of the accused’s arrest and would have experienced considerable practical difficulty in organising an identification parade at the time. Adams J (Hunt AJA and Latham J concurring) held that it would not have been reasonable for police to conduct an identification parade in those circumstances. The court noted at [123] “The test proposed by s.114 is whether it would have been unreasonable, not that it would have been impossible, to arrange an identification parade.”

***R v Buchanan* (2004) 152 A Crim R 302, [2004] NSWSC 816**. This matter involved an alleged murder at Long Bay gaol. The key Crown witness was an inmate at the gaol. The police showed their key witness a video array containing the photograph of every inmate housed in the wing on the relevant day. Police did not conduct an identification

parade due to daily changes in prison population, the need to protect their witness whilst in custody and the presumed reluctance of inmates to participate in an identification parade. Buddin J held that it was unreasonable to hold an identification parade in the circumstances. He cited the decision in Leroy and Graham [2000] NSWCCA 302 with approval, noting in particular that the test considers what is "reasonable", not what is "possible."

***R v Leroy & Graham* [2000] NSWCCA 302.** This case involved an allegation of a number of members of a Sydney based football team engaging in a brawl at a registered club in the Foster-Tuncurry area. Leroy had his photograph taken by police on the night of the alleged offence but were released by police. Graham was not a suspect until after he had left the area. The next day a civilian witness attended the football carnival and took a number of group photographs of the subject team, posing as a local journalist. Leroy and Graham were in a number of these photographs. Two civilian witnesses identified them from these photographs and later from an array of photographs of the team members. The team returned to Sydney within days of the incident and before all suspects and their names were known to police. Police eventually obtained photographs of all members of the team and placed them in an array to be shown to witnesses. Police had thirteen (13) civilian witnesses to the brawl. There were logistical difficulties in arranging identification parades for so many suspects and so many witnesses, particularly as the witnesses were from the Foster-Tuncurry area and the suspects were from an area in Sydney. On appeal, the court was of the view that it would not have been reasonable to hold identification parades. Dunford J noted at [20] (Stein and Simpson JJ concurring) that "…it must be borne in mind that the touchstone in s 114(2)(b) is whether it would not have been "reasonable", not whether it would not have been "possible" to have held an identification parade."

***R v Ford* NSWSC 22 April 1998 unrep., BC9801410**.

This case concerned a murder in a prison yard at Goulburn gaol. Two witnesses for the Crown identified the accused as the offender. Barr J held that it was not reasonable to hold an identification parade due to the distinctive appearance of the accused (a Filipino with closely cropped hair and a rat's tail at the back) and because each of the two witnesses had a prior familiarity with the accused as fellow inmates of the gaol.

***Peterson (a Pseudonym) v The Queen* [2014] VSCA 111**

In this case it was held that it was not reasonable for police to hold an identification parade in circumstances where the witness had already identified the accused from a Facebook photograph. For the dangers inherent in a "Facebook identification" see Peek J in *Strauss v Police* [2013] 3 SASC 3, 115 SASR 90 at [12]-[37].

***Dickman v The Queen* [2015] VSCA 311**

This case held that it was relevant to take into account the logistical difficulties face by investigating police in organising an identification parade. In this case the witness lived in Germany, the investigating police were in Victoria, and the suspect lived in South Australia.

Refusal to Participate in Identification Parade

There is no requirement under NSW law to record the refusal of the suspect to participate in an identification parade, as such refusal does not amount to an admission – see ***A (a Child)* (2000) 115 A Crim R 1**, [2000] NSWSC 627. This is in sharp contrast to Commonwealth law which requires such refusal to be video and / or audio recorded – see Crimes Act 1914 (Cth) ss.3ZM(3) and (4).

***R v Massey* [2009] ACTCA 12.**

It does not amount to a refusal to participate in an identification parade for a suspect to simply assert that they do not wish to speak to police in circumstances where police have not offered the suspect an opportunity to participate in an identification parade.

***R v Sarlija* [2009] ACTSC 127**

It does not amount to a refusal to participate in an identification parade if the suspect states that they wish to seek legal advice. However, police are not required to wait indefinitely for an unequivocal answer.

Penfold J at [16]-[17]:

> *[16] Clearly, a police officer cannot force a suspect to give a final answer about taking part in an identification parade. Even if Constable Cameron had approached Mr Sarlija or his lawyer on any or all of the occasions mentioned above, he would not necessarily have got a more definite answer than had previously been given. Equally clearly, a suspect cannot be allowed to stymie a police investigation indefinitely by refusing or failing to give an unequivocal answer to a request to take part in an identification parade. This means that at some point after a request is made, a police officer must, despite the absence of an unequivocal answer to that request, be entitled to treat a suspect as having refused to take part in an identification parade. It is impossible to lay down any general rules for when the police officer is able to do that, but I note that the accurate identification of offenders is promoted by the earliest possible use of whatever identification methods are legitimately available to investigating officers; from this I conclude that the time the police officer needs to allow to the suspect will not be very long. On the other hand, concluding that the police officer need not give an extended time for a suspect to respond is not the same as concluding that a police officer need not make any effort to clarify a suspect's position.*
>
> *[17] In this case, it seems to me that it was not enough for Constable Cameron to ask once but then, without taking any further steps to seek an answer even when he had ready access to Mr Sarlija, to assume a refusal. A second request from Constable Cameron made at a point when he could reasonably have expected that Mr Sarlija would have spoken to his lawyers, and possibly including advice to Mr Sarlija that a failure to respond within a specified time would be treated as a refusal, might well have been sufficient in the circumstances."*

R v Darwiche (2006) 166 A Crim R 28, [2006] NSWSC 924

In this matter the accused was offered an opportunity to participate in an identification parade. The offer was made to the accused on two separate occasions, each being on a different date. On both occasions the accused's legal representative indicated that the accused wished to make an "informed decision" and see the material relied upon by police as to why the accused was a suspect. On both occasions police declined to provide the material. Bell J regarded the accused's position as amounting ot a refusal to participate in an identification parade.

Bell J stated at [34]:

> *"[34 … I consider that the accused had refused to take part in an identification parade on 1 March and 29 March 2004, when on each occasion he was offered the opportunity to participate in one. The verb "refuse" is defined in the Oxford English Dictionary, 2nd ed, as "to decline to take or accept (something offered or presented); to reject the offer (a thing)". I consider that the accused declined to accept the offer to participate in an identification parade and that this constituted a refusal for the purposes of subs (5)(a). The fact that he indicated that if certain conditions were met he might take a different stance does not mean that the stance taken at the time the offer was made did not constitute a refusal. My conclusion that the accused's conduct constituted a refusal for the purposes of subs (5)(a) is reinforced by the terms of s 114(5): The conduct of a defendant in declining to take part in an identification unless that defendant's lawyer or another person is present is treated for the purposes of subparagraph (a) as a refusal."*

Further Considerations Regarding Failure to Hold an Identification Parade

It is suggested that the following additional matters should also be considered when considering whether to seek to exclude visual identification evidence on the grounds that the police did not hold an identification parade:

- The extent, if any, to which the defendant has already been identified by the witness in the investigatory stage of the proceedings.
- The degree of prior familiarity (if any) between the defendant and the witness
- The time of day or night that the defendant was in custody.
- The number of hours in custody.
- Whether the police made any efforts to obtain volunteers to participate in an identification parade.
- Whether the local police station or Local Area Command had any system in place for obtaining the services of such volunteers at the time
- If so, how effective was the system
- If not, why was no such system in place
- The recent (or long since past) nature of any efforts to have a system in place to recruit such volunteers.
- Any appeal to the general public to assist in the conduct of such an identification parade.

In the context of country Aboriginal Legal Service offices I can recall two specific attempts by police to demonstrate that it was unreasonable for police to hold an identification parade in respect of an Aboriginal offender. These were:

(i) Evidence from a police Aboriginal Community Liaison officer (ACLO) to the effect that he had often made enquiries in the past on behalf of police seeking Aboriginal volunteers to participate in an identification parade. Such efforts had always failed.

(ii) A call made over the airwaves of a public radio station in a small country town for young males from the Aboriginal community to assist police in the conduct of an identification parade.

Failure of police to pursue such avenues may characterise their efforts failing to establish the unreasonableness of holding an identification parade.

Common Law Regarding Identification Parades Prior to the Evidence Act

It is important to have some acquaintance with the common law prior to the introduction of the Evidence Act, as many of the common law principles have either found their way into the Evidence Act or appear to have had some influence in the drafting of the provisions. By understanding some foundational common law, you will have a better understanding of the policy and principles that underpin the provisions of the Evidence Act. This will aid your arguments in any voir dire. In particular the following passages may be of assistance regarding identification parades:

***Alexander v The Queen* (1981) 145 CLR 395**

Gibbs CJ at 399 – 400:

> *"The safest and most satisfactory way of ensuring that a witness makes an accurate identification is by arranging for the witness to pick out from a group the person whom he saw on the occasion relevant to the crime. If an identification parade is held for that purpose, it goes without saying that precautions must be taken to ensure that no prompting, suggestion or hint is given to the witness that any particular member of the group is the suspect. For example, it would be unfair and improper to show to a witness, before the identification parade was held, a single photograph of a person who was said to be the suspect, and it would be unsafe to act on evidence of identification given in those circumstances: Reg. v. Russell (1977) 2 NZLR 20, at p 27 . Indeed, where a suspect had been arrested, and it was intended to ask a witness to attempt to identify him at an identification parade, it would be unfair to show the witness, before the parade, a number of photographs including that of the suspect: R. v. Goss (1923) 17 Cr App R 196; R. v. Haslam (1925) 19 Cr App R 59."…*

Gibbs CJ at 400:

> *"…The value of holding an identification parade is not only that, if properly carried out, it provides the most reliable method of identification, but also that it is necessarily held in the presence of the accused, who is thereby enabled to observe, and later bring to light, any unfairness in the way in which the parade*

> *was conducted, or any weakness in the way in which the witness made the identification."…*

Gibbs CJ at 400-401:

> *"…There are, however, two grounds of objection to the proof of identification by means of police photographs. In the first place, the accused will of necessity be absent when the identification is made, and has no means of knowing whether there was any unfairness in the process or whether the witness was convincing in the way in which he made the identification. Secondly, the production in evidence at the trial of photographs coming from the possession of the police is very likely to suggest to the jury that the person photographed had a police record, probably for offences of the kind in question."*
>
> *"For these reasons, it is most undesirable that police officers who have arrested a person on a charge of having committed a crime should arrange for potential witnesses to identify that person except at a properly conducted identification parade. Similarly, speaking generally, an identification parade should, wherever possible, be held when it is desired that a witness should identify a person who is firmly suspected to be the offender."*

Gibbs CJ at 404:

> *"In a case such as the present it seems to me proper for a trial judge, in deciding how he should exercise his discretion, to take into consideration that it is the duty of police officers investigating crime to take every precaution reasonably available to guard against the miscarriages of justice that can occur, and have in fact occurred, because of honest but mistaken evidence of identification, and that for this reason "only in exceptional cases should photographs be used at a stage when some particular person is directly suspected by the police and they are able to arrange an identification parade or some other satisfactory alternative means whereby the witness can be asked directly to identify the suspected person": Reg. v. Russell (1977) 2 NZLR, at p 28."*

IN COURT OR "DOCK" IDENTIFICATION

In court identification evidence sought to be led by the prosecution will be captured by section 114 of the Evidence Act. This in effect prohibits the leading of such evidence unless there has been an identification parade already held, or if the prosecution has satisfied the court that it would not have been reasonable to have held an identification parade at any time, including at a time proximate to the trial.

It is suggested by the writer that even if all other provisions of section 114 had been complied with, an attempt to lead in court identification by the prosecution would necessarily fail as the prosecution would have to satisfy the court that [to quote the concluding words of s.114(2)] "…the identification was made without the person who made it having been intentionally influenced to identify the defendant." Given the accused's position in the dock of the court how can the prosecution show the absence of any influence upon the witness in that regard?

Fadel v Regina [2017] NSWCCA 134

This case involved an in court identification of the accused by a prosecution witness. The facts involved a fracas between members of two neighbouring families. The witness (a member of one of the families) gave evidence that he recognised the person who was arrested and taken away by police was the person who had committed an offence rusting in the infliction of grievous bodily harm. He recognised him as one of a number of brothers that lived next door, but could not name him. He saw him arrested and taken away by police. Other evidence from police disclosed that it was the accused who who had been arrested. The witness, in his evidence in chief, answered in a non-responsive manner to the effect that the person "I am positive it is that man there." (referring to the accused in the dock).

The trial Judge gave directions immediately to the effect that the evidence should be disregarded, and outlined the difficulties associated with in-court identification.

The NSWCCA held that there was no need to discharge the jury, and the directions of the trial judge were sufficient in the circumstances

***Aslett v R* [2009] NSWCCA 188**

This decision dealt with the circumstance of a Crown witness identifying the accused during the course of the witness's evidence in the trial. The accused, of course was sitting in the dock. The witness had never previously identified the accused. Trial counsel for the accused asked that the jury be discharged. The application was refused. Later, the trial Judge gave directions that on appeal were considered to be inadequate. Kirby J (Allsop P and Johnson J concurring) made the following remarks at [56]:

> *"The trial Judge, in determining that the matter should proceed, did not advert to these issues or recognise the prejudice associated with them. If the trial were to proceed, it was important that the jury be immediately told that the in-court identification was of no value on the identification issue (as the witness must inevitably point out the person who is on trial), that being a direction suggested by the bench book. It was also important that such a direction should be repeated and emphasised in the summing up."*

***Jamal* (2000) 116 A Crim R 45; [2000] FCA 1195**

This decision dealt with weak identification evidence from two witnesses who had selected the accused from photographic arrays prior to giving evidence in court. Each witness was then permitted to give evidence that was "supplementary" to that earlier identification by identifying the accused in the dock of the court. It is the writer's humble view that this decision failed to properly consider the concluding words of s.114(2). None of the decided cases appear to consider them directly.

***R v Tahere* [1999] NSWCCA 170**

In this case, the witness identified the accused for the first time in the dock in court. He had previously failed to identify the accused from a photographic array. The question

arose on appeal as to whether such an identification was admissible given the provisions of s.114(2)(b) of the Evidence Act – that is, whether it would have been unreasonable to hold an identification parade. There was evidence to the effect that the police experienced difficulties organising an identification parade at the time of the accused's arrest, and again some sixteen days later. However there was no evidence of any efforts or any difficulties in organising an identification parade at a time proximate to the trial. His Honour Spigelman CJ (Adams and Studdert JJ concurring) stated:

> *"[31] The issue of visual identification evidence arose during the course of the trial. There was no evidence before the Court that the particular circumstances of unfairness present on the night of the offence, or any other basis for a finding of unreasonableness, were also present at a time reasonably proximate to the trial."*
>
> *"[32] Counsel for the appellant submitted that it did not appear that his Honour turned his mind to the question of whether or not it was reasonable to hold an identification parade. There is no transcript before this Court of the submissions made when the objection was taken to the in-court identification. Nor is there a separate judgment on this matter. On the basis of the material before this Court, the Crown has not established that at the time of the trial or at a time reasonably proximate to the time of the trial: "It would not have been reasonable to have held" an identification parade. On that basis, s114(2) operates in accordance with its terms and the visual identification evidence was not admissible."*

***Regina v Le (*2002) 130 A Crim R 256; [2002] NSWCCA 193.**

In this matter evidence of in court identification was led by the accused's counsel cross-examining a prosecution witness (it seems that was achieved through an unexpected answer from the witness). The trial judge refused to discharge the jury. This was held to be correct on appeal. It is of interest to note that as the evidence was led by the defence, the provisions of s.114 of the Evidence Act did not apply, as those provisions refer to evidence led by the prosecution.

***R v Taufua* NSWCCA 27 August 1996 unrep.**

In this case Barr J (Priestley AP, James J concurring) held that the provisions of s.114 of the Evidence Act applied to in court identification.

***Alexander v The Queen* (1981) 145 CLR 395**

This case discusses the common law position preceding the Evidence Act. As such, readers should note that the provisions of section 114 now apply to override the common law in this area, however, it is worthwhile to understand the common law concerns regarding in court identification in order to better understand the policy and principle underlying the Evidence Act provisions.

Gibbs CJ at 399:

> *"Evidence given by a witness identifying an accused as the person whom he saw at the scene of the crime or in circumstances connected with the crime will generally be of very little value if the witness has not seen the accused since the events in question and is asked to identify him for the first time in the dock, at least when the witness has not, by reason of previous knowledge or association, become familiar with the appearance of the accused. The reasons for this were explained in Davies and Cody v. The King [1937] HCA 27; (1937) 57 CLR 170, at pp 181-182. In particular there is the danger that the witness will too readily come to believe, without any true recollection, that the man charged is the man whom he had previously seen, particularly if his own memory has become dim and there is some resemblance between the two men. The courts in England and Australia have long recognized the danger of acting upon evidence of identification made in those circumstances. It has accordingly become established practice for a witness to be asked to identify the accused at the earliest possible opportunity after the event, and for evidence to be given of that act of identification. Such evidence is, in practice, given not only by the person who made the identification but also by persons who saw it made."*

Mason J at 426-427:

> *"Traditionally it has been accepted that a witness identifies the accused at the trial as the person whom he observed at the scene of, or in connexion with, the crime. This "in court" identification, sometimes described as primary evidence, is of little probative value when made by a witness who has no prior knowledge of the accused, because at the trial circumstances conspire to compel the witness to identify the accused in the dock."*

Davies & Cody v The King **(1937) 57 CLR 555**

Similarly, this decision of the High Court precedes the Evidence Act. It is a foundational authority on this area of the law. In a joint judgment the Court stated (at 182):

The Court at 182 (Latham CJ, Rich, Dixon, Evatt and McTiernan JJ):

> *"Similarly, if a witness is shown a single person and he knows that that person is suspected of or charged with the crime, his natural inclination to think that there is probably some reason for the arrest will tend to prevent an independent reliance upon his own recollection when he is asked whether he can identify him. This tendency will be greatly increased if he is shown the person actually in the dock charged with the very crime in question."*

IN COURT COMPARISON BETWEEN OFFENDER PHOTGRAPH AND THE ACCUSED

Mundarra Doolan Smith v The Queen **(2001) 206 CLR 650; (2001) 125 A Crim R 10; [2001] HCA 50.**

This case involved a bank robbery. The prosecution had security camera photos from the scene. Police gave evidence that they recognised the accused as one of the offenders shown in the security camera photos. There was no suggestion that the physical appearance of the accused had materially changed between the time of the robbery and the time of the trial. By the time the jury came to consider their verdicts they had spent as much time observing the accused in court as the police had spent with the accused in their prior dealings with him. The High Court therefore took the view that the police were in no better position than the jury to compare (and purportedly recognise) the person in the photographs with the accused. The evidence of police officers purportedly recognising the accused as the person in the security photographs was therefore held to be irrelevant.

Gleeson CJ, Gaudron, Gummow and Hayne JJ held:

> *"[9] There was no suggestion that the physical appearance of the appellant had changed materially between the time when the photographs were taken and the time of the trial, or that the police, by reason of their previous observations of the appellant, were at some advantage in recognising the person in the photographs. It was acknowledged by counsel, in the course of argument in this Court, that, by the time the evidence had concluded, the jurors had probably spent more time in the presence of the appellant than had the police witnesses before they gave their evidence. The police witnesses were in no better position to make a comparison between the appellant and the person in the photographs than the jurors or, for that matter, some member of the public who had been sitting in court observing the proceedings. If such a member of the public had been called as a witness, the same question of relevance would have arisen. Thus, not only was the issue that was raised a very narrow issue, the data available to the jury for its resolution was no different in any significant way from the data upon which the police officers based their asserted conclusion. The police officers' conclusions and the jury's conclusion both depended upon combining their observation of the appellant's appearance with their observation of the photographs. (Having regard to the quality of the photographs we saw, it is not clear that the jury could not have compared them with the accused)."*
>
> [10]…..
>
> *"[11] Because the witness's assertion of identity was founded on material no different from the material available to the jury from its own observation, the witness's assertion that he recognised the appellant is not evidence that could rationally affect the assessment by the jury of the question we have identified. The fact that someone else has reached a conclusion about the identity of the accused and the person in the picture does not provide any logical basis for affecting the jury's assessment of the probability of the existence of that fact when the conclusion is based only on material that is not different in any substantial way from what is available to the jury. The process of reasoning from one fact (the depiction of a man in the security photographs) taken with another fact (the observed appearance of the accused) to the conclusion (that one is the depiction of the other) is neither assisted, nor hindered, by knowing that some other person has, or has not, arrived at that conclusion. Indeed, if the*

assessment of probability is affected by that knowledge, it is not by any process of reasoning, but by the decision-maker permitting substitution of the view of another, for the decision-maker's own conclusion."

"[12] In this case the evidence of the police was irrelevant and should not have been received. No question of admissibility had to be considered."

"[13] This is not to say that it will never be relevant for a witness to give evidence that the witness recognises who is depicted in a photograph. The obvious case in which that will be relevant is where the witness deposes to having identified someone from a photograph, or collection of photographs, shown to the witness and the identity of the person depicted is proved in some other way[4]. Difficulties may arise, however, when the photograph which is used for identification and is tendered in evidence is, as was the case here, a photograph taken of an incident which is the subject-matter of the proceeding. Even in such a case, a witness's evidence of recognition of the person depicted may be relevant."

"[14] Sometimes the facts in issue will extend beyond the narrow question whether the accused is the person depicted in the photograph. In R v Goodall[5], the questions included whether the accused owned a jacket of the kind that the offender depicted in security photographs of a robbery was shown to be wearing. A jacket, which was tendered in evidence, had been found with other incriminating items. Two police officers gave evidence that they had seen the accused wearing this kind of jacket before the robbery. They gave further evidence that the man who was depicted in the security photograph was the accused, and that he was wearing a jacket of the kind they had seen him wearing before the robbery. The evidence was, therefore, relevant to link the accused to the jacket. It went beyond the bare assertion of recognition of the person on trial as the person shown in the photograph."

"[15] In other cases, the evidence of identification will be relevant because it goes to an issue about the presence or absence of some identifying feature other than one apparent from observing the accused on trial and the photograph which is said to depict the accused. Thus, if it is suggested that the appearance of the accused, at trial, differs in some significant way from the accused's appearance at the time of the offence, evidence from someone who knew how the accused looked at the time of the offence, that the picture depicted the accused as he or she appeared at that time, would not be irrelevant[6]. Or if it is suggested that there is some distinctive feature revealed by the photographs (as, for example, a manner of walking) which would not be apparent to the jury in court, evidence both of that fact and the witness's conclusion of identity would not be irrelevant[7]. Similarly, if, as was the case in R v Tipene[8], there is an issue whether photographs of different incidents depict the same person, evidence given about the identity of the person depicted may not be irrelevant."

"[16] Of course in any such case, further questions of admissibility would then arise. Those questions would very likely include questions about the application of the opinion rule (s 76) and the questions presented by the general discretion to exclude evidence under s 135, and the direction, in s 137, to exclude

> *prejudicial evidence. It is, however, not necessary to consider those questions in this matter. Answers to them may depend, in part, upon the precise nature and form of the evidence."*

***R v Beattie* (2001) 127 A Crim R 250; [2001] NSWCCA 502**

This decision of the NSWCCA was handed down in the months following the decision in *Mundarra Doolan Smith v R* above. The case comments on it and summarises the relevant principles.

Mason P, (Sully and Levine JJ concurring):

> *"[20] What is clear from the reasons of the majority in the High Court is that there is a primary enquiry in matters such as the present: is the evidence of the witnesses who viewed the video relevant? If, and only if, that question is answered in the affirmative does one turn to further questions about the application of the opinion rule, the discretion to exclude evidence under s135 of the Evidence Act and the direction to exclude prejudicial evidence under s137 of the Evidence Act."…*
>
> *"…[22] The High Court decision treats as irrelevant and therefore inadmissible evidence of police witnesses identifying a suspect from pictures taken by a security camera, notwithstanding that such identification is based upon their prior acquaintance with the suspect if, at the time the police evidence is tendered, the police witnesses were in no better position than the jurors to make the relevant comparison…."*

CROWD IDENTIFICATION

Police will sometimes take a witness to a public place (including a courthouse foyer) where they know or believe an offender will be present.

The admissibility of this type of evidence will depend on whether police are still engaged in the detection process, and / or to what extent it was reasonably practicable to hold an identification parade, and whether the witness was intentionally influenced to identify the accused. In that regard, consideration should be given to the provisions of s.114 of the Evidence Act concerning visual identification evidence (and in particular s.114(2)(b)) as well as the common law as referred to in *R v Carusi* (1997) 92 A Crim R 52 and cases cited therein. This case is discussed under the heading "Picture Identification Evidence – The Detection Process" below, but the principles have equal application to crowd identification either before or after the defendant is in custody.

For a discussion as to case law assisting the exclusion of such evidence see *R v Penny* (1997) 91 A Crim R 288 and to *Alexander v R* therein earlier in this paper under the heading "At the Identification Parade". See also *R v Adamson* NSWCCA 26/11/92 per Gleeson CJ at pp.1-2 under the same heading.

VISUAL IDENTIFICATION EVIDENCE CHECKLIST

To re-cast the above in checklist form concerning visual identification evidence

1. **Visual identification evidence** is **based wholly or partly on what the witness saw**, but **does not include picture identification evidence** [s.114(1)].
2. **Visual identification evidence** led by the prosecution identifying the defendant **is inadmissible** [s.114(2)]; **unless**
3. **An identification parade including the defendant** was utilised by the police [s.114(2)(a)]; **or**
4. It would **not have been reasonable** to have **held such a parade** [s.114(2)(b)]; **or**
5. **Defendant refused to participate** in a parade [s.114(2)(c)].
6. **AND** the **identification** was made **without the person being intentionally influenced** to identify the defendant [concluding words of s.114(2)].
7. Consideration of **whether it was reasonable to hold an identification parade** includes the **non-exhaustive list of considerations** referred to in the section, **namely**
8. **Subsection (3)** – kind and gravity of offence, importance of the evidence, practicality of holding parade, manner, extent and reason for defendant's failure to co-operate, whether identification was at or about time of offence, appropriateness of holding identification parade including nature of relationship if any between witness and defendant ; **and**
9. **Subsection (4)** – **presumed unreasonable if** it would have been **unfair to hold** such an identification parade; and
10. **Subsection (5)** – If **defendant refused** to participate **unless lawyer or person chosen by defendant present and** reasonable grounds to believe it was **not reasonably practicable for person to be there**, then **presumed not reasonable** to hold identification parade; **and**
11. **Availability of picture identification evidence to be ignored** in determining reasonableness of holding identification parade [s.114(6)].
12. **Challenging the array -** Consider challenging the admissibility of the evidence if the array of participants was such that it the process was unfair – s.137 of the Evidence Act – see under the heading "Challenging the Array"

3. PICTURE IDENTIFICATION EVIDENCE

What is "Picture Identification Evidence"?

Evidence Act ss.115(1) and (10) define picture identification evidence in the following terms

> *(1) In this section:*
> *"picture identification evidence" means identification evidence relating to an identification made wholly or partly by the person who made the identification examining pictures kept for the use of police officers.*
> …..
> *(10) In this section:*
> *(a) a reference to a picture includes a reference to a photograph, and*

(b) a reference to making a picture includes a reference to taking a photograph.

When is Picture Identification Evidence Admissible?

Relevant provisions of section 115 of the Evidence Act governing admissibility of picture identification evidence are set out below:

(2) Picture identification evidence adduced by the prosecutor is not admissible if the pictures examined suggest that they are pictures of persons in police custody.

(3) Subject to subsection (4), picture identification evidence adduced by the prosecutor is not admissible if:

(a) when the pictures were examined, the defendant was in the custody of a police officer of the police force investigating the commission of the offence with which the defendant has been charged, and

(b) the picture of the defendant that was examined was made before the defendant was taken into that police custody.

(4) Subsection (3) does not apply if:

(a) the defendant's appearance had changed significantly between the time when the offence was committed and the time when the defendant was taken into that custody, or

(b) it was not reasonably practicable to make a picture of the defendant after the defendant was taken into that custody.

(5) Picture identification evidence adduced by the prosecutor is not admissible if, when the pictures were examined, the defendant was in the custody of a police officer of the police force investigating the commission of the offence with which the defendant has been charged, unless:

(a) the defendant refused to take part in an identification parade, or

(b) the defendant's appearance had changed significantly between the time when the offence was committed and the time when the defendant was taken into that custody, or

(c) it would not have been reasonable to have held an identification parade that included the defendant.

(6) Sections 114 (3), (4), (5) and (6) apply in determining, for the purposes of subsection (5) (c) of this section, whether it would have been reasonable to have held an identification parade.

(8) This section does not render inadmissible picture identification evidence adduced by the prosecutor that contradicts or qualifies picture identification evidence adduced by the defendant.

(9) This section applies in addition to section 114.

It is important to note that not all the various subsections of s.115 have relevant operation all of the time. For example subsections (3)–(6) inclusive ONLY deal with

evidence led by the prosecution and then only in the circumstance when the defendant is in custody and are not of blanket application. There are differences in the way the admissibility of picture identification evidence will be dealt with depending on whether the evidence is obtaining during the course of the “detection process”, and / or whether the evidence is gathered, before, during or after the defendant is in the custody of a police officer who is a member of the police force investigating the matter.

PICTURES SUGGESTING PERSONS IN CUSTODY

Section 115(2) renders such evidence inadmissible if the pictures suggest that they are pictures of persons in police custody. Most obviously this includes pictures involving defendants holding “name boards” under their chins whilst being photographed. Police have sought to comply with this provision of the Evidence Act by recording offender photographs against a plain background. An experienced practitioner will realise (as perhaps will a perceptive juror) that these photos are almost inevitably taken in a police charge room against a non-descript painted wall in an area set aside specifically for the purpose of obtaining such photographs. Often all the photographs will have the same or similar non-descript wall behind them. Notwithstanding this “sameness” you should expect such photographs to be admitted.

“PICTURE IDENTIFICATION EVIDENCE” – THE DETECTION PROCESS

Police will often have little or no idea who it is they are looking for in relation to an alleged offence. When there is little or no evidence available as to the identity of the offender other than a description, police will often have available witnesses browse through a series of offender photographs from the area where the offence is alleged to have taken place in the hope that somebody will be identified. Often evidence derived in this way will constitute the entirety of the evidence linking an accused person to an alleged offence. Alternatively, the investigation may be ongoing, and police may have sound forensic reasons for not wishing to alert a suspect that he or she is under suspicion.

With the exception of s.115(2), which concerns pictures that suggest that they are pictures of persons in police custody, the balance of the provisions of the Evidence Act section 115 do not have any practical application to this type of evidence. The drafting of the Evidence Act provisions at s.115(3)-(6) inclusive clearly contemplate evidence gathered at the time police have the defendant in custody. Note that Evidence Act s.114(1) provides a definition of “visual identification evidence” that explicitly excludes “picture identification evidence” from the definition.

The above distinction is reflected in the common law that preceded the introduction of the Evidence Act. It is worthwhile for defence practitioners who did not practice before the introduction of the Evidence Act to consider this common law in order to gain a more complete understanding of the distinctions between the investigatory and evidentiary aspects of picture identification evidence. In this regard see the decisions of *R v Carusi* (1997) 92 A Crim R 52 and cases cited therein including *Alexander v R* (1981) 145 CLR 395 and *R v Russell* [1977] 2 NZLR 20.

R v Carusi **(1997) 92 A Crim R 52**

Hunt CJ at CL, (Newman and Ireland JJ concurring) 64-65:

> *"...I reject the appellant's submission that evidence of identification from photographs should always be excluded if at the time when they were shown to the witness it was reasonable and practicable, or reasonably open to the police, to request the suspected person to participate in an identification parade. The distinction drawn in the English cases between an identification made before the accused is arrested and one made after that event has already been decisively rejected in Alexander's Case."*
>
> *"In my judgment, there is no rigid rule excluding the use of photographs in relation to a person who is under suspicion but who has not been taken into custody. Nevertheless, a primary issue in most cases will be whether it was necessary at that stage in that particular case to show photographs to that particular witness in order to know who to arrest and charge. Until the police have such knowledge, the detection process (to adopt the language of Stephen J) is not complete, and the usual "Christie" discretion* [read now Evidence Act s.137 – author's note] *will need to be exercised in relation to the evidence of that witness. It is the necessity to use the photographs in such circumstances which plays an important part in the balancing exercise involved in the exercise of that discretion. The accused will have a harder task in persuading the exercise of the judge's discretion to exclude such evidence if the police did not then know that he was the person to arrest and charge, notwithstanding that it may at that time have been reasonable and practicable to have requested him to participate in such a parade. On the other hand, if it was reasonable and practicable for the police to hold an identification parade, and if the police knew at that stage that the accused was the person to arrest and charge, the Crown will have a harder task in resisting the exercise of the trial judge's discretion to exclude such evidence, but it remains a discretionary matter nevertheless and the appellant's more rigid proposition cannot stand.[69]"*
>
> *"There are well recognized considerations which would incline a trial judge to permit evidence to be given of identification from photographs notwithstanding that the police already knew at that time that he was the person to arrest and charge - such as where it would be inappropriate in relation to the police investigation to reveal to the accused that he is under suspicion; where the accused has refused to participate in an identification parade or has failed to co-operate when the parade is conducted; where, by reason of the unusual physical appearance of the accused it is not reasonably practicable in the circumstances to produce a sufficient number of other persons of a roughly similar physical appearance to stand with the accused in such a parade; where the physical appearance of the accused is materially different to what it was at the time when he is alleged to have committed the offence; where the accused cannot within a reasonable time be located; where there are other exigencies of time which would make it impracticable to conduct an identification parade; where the witness is unwilling to participate in viewing the parade; and where the witness is unable reasonably so to participate. That list is not intended to be exhaustive.[70]"*

"PICTURE IDENTIFICATION EVIDENCE" – THE EVIDENTIARY STAGE

Picture Identification Evidence - Before the Defendant is in Custody

The requirements set out in s.115 (3)–(6) inclusive concerning the need for the pictures to be examined at the time the defendant was in custody; i.e. that the picture be a current picture unless the appearance of the defendant has changed significantly since the time of the offence, and that the defendant refused to participate in an identification parade, or alternatively that it was not reasonable to conduct such a parade **only apply in the event that the defendant was in custody at the time the pictures were examined.**

Picture identification evidence before the defendant was in custody is therefore governed by s.115(2) concerning the pictures not suggesting that the pictures are of persons in custody and the preceding common law. This may lead to an application to exclude the picture identification evidence pursuant to section 137 of the Evidence Act. In this regard see *R v Carusi* (1997) 92 A Crim R 52 and cases discussed therein above under the heading Picture Identification Evidence – The Detection Process.

Pictures Identification Evidence - At the Time the Defendant is in Custody

Assuming that the pictures otherwise comply with s.115(2), the admissibility of picture identification evidence led by the prosecution is governed by subsections (3)-(6) inclusive of section 115 of the Evidence Act. These provisions are outlined earlier in this paper under the heading "When is Picture Identification Admissible?"

Picture Identification Evidence - After the Defendant is in Custody

Similarly to picture identification evidence before the defendant was in custody, the provisions of s.115(3)-(6) concerning picture identification evidence led by the prosecution apply only at the time that the defendant was in custody of a police officer who was part of the police force investigating the matter.

Note that s.115(2) concerning the need for pictures not to suggest that the persons are in custody still has application at this stage.

Again, considerations of the type outlined in *R v Carusi* (1997) 92 A Crim R 52 and cases discussed therein will apply (discussed about under the heading "Picture Identification Evidence – The Detection Process").

R v Brett McKellar [2000] NSWCCA 523

(Howie J, Fitzgerald JA, Whealy J concurring)

In this matter the accused was arrested for unrelated matters 11 days after a robbery had occurred. During the time that the accused was in custody for other matters he was asked if he would participate in an identification parade in relation to the robbery matter, which he agreed to do. Police had difficulty arranging an identification parade at that time. The accused was released to bail in relation to the other matters. Police continued to make efforts to organise an identification parade in the following days

after release to bail of the accused. 24 days after the robbery and 13 days after the accused had been released to bail the police showed an array of photographs to three witnesses. The photograph of the accused was one taken some five years before the robbery offence.

The NSWCCA held that the provisions of s.115(5) were not applicable as the defendant was not in custody at the time the witnesses were shown the photographic array (see [31] and [32]). It had submitted on behalf of the appellant that the term *"in the custody of a police officer"* in s.115(5) should be read as meaning "some kind of legal power or influence over the person." This submission was rejected. The court took the view that the term in context meant "under physical restraint".

WATCHING THE PICTURE IDENIFICATION EVIDENCE DVD

Police will typically video tape their witness viewing the array of photographs. This is now typically done by presenting to the witness a PowerPoint presentation of 12 photographs.

Police who conduct the presentation for the witness fill out certain standard forms which record in writing various responses to questions asked or comments made during the course of the presentation. Always demand to see these forms if they are not served with the brief.

ALWAYS watch the DVD. Police will often not fill out everything on the form, or record the witness' reaction without the appropriate emphasis as to the witness' doubts as to the correctness of their identification. Witnesses who appear certain when giving their evidence in court will very often express either a momentary uncertainty as to the identification of the accused, or alternatively show a momentary uncertainty as to some other person in the array who is not the accused. Such hesitations and uncertainties are not always clear from the written word – it may simply be a case of hesitation, body language (leaning forward to look at another member of the array more closely) or a doubtful tone of voice when purporting to positively identify someone. Beware of police who try to "talk up" the degree of certainty experienced by the witness – this is also often a matter of body language or tone of voice.

Further, defence practitioners should be aware of investigating police who will routinely assert to suspects at interview that the suspect has been "positively identified" by a witness or number of witnesses. Police will routinely present the barest and most hesitant identification as a "positive identification" in the hope of eliciting admissions. Be sure to advise your client in a timely manner about the real possibility of this sort of tactic by police. If you first have carriage of the matter after the interview, check the DVD for possible bases of challenging the admissibility of the interview due to the misrepresentation of the evidence on the picture identification DVD.

If you haven't got the DVD - get it. Not watching it may well amount to professional negligence in your duty as a defence advocate.

***COMMON LAW RE PICTURE IDENTIFICATION EVIDENCE PRECEDING THE EVIDENCE ACT* – the “Rogues’ Gallery Effect” and the “Displacement Effect”.**

Again, some basic knowledge of the common law preceding the Evidence Act will be of assistance in developing arguments concerning admissibility of evidence, or formulating themes for cross-examination. With respect to the passages below, it should be borne in mind that police now commonly videotape the process of the witness viewing a photographic array, such that the process can later be examined by the defence partitioner and scrutinised by the court.

***Alexander v The Queen* (1981) 145 CLR 395**

Gibbs CJ at 400-401:

> “…There are, however, two grounds of objection to the proof of identification by means of police photographs. In the first place, the accused will of necessity be absent when the identification is made, and has no means of knowing whether there was any unfairness in the process or whether the witness was convincing in the way in which he made the identification. Secondly, the production in evidence at the trial of photographs coming from the possession of the police is very likely to suggest to the jury that the person photographed had a police record, probably for offences of the kind in question.”

Stephen J at 409:

> “The use of photo-identification in the evidentiary process involves three further factors of a quite different kind which apply only to its use in that process. Unlike the case of an identification parade, an accused whose identity as the offender is sought to be proved at his trial by evidence of previous photo-identification is likely to know nothing at first hand of the way in which the identifying witness earlier identified his photograph as that of the offender. He must rely upon cross-examination of prosecution witnesses for knowledge of the conditions of identification and of what safeguards were taken against error on the part of the identifying witness. Again, by what may be called the "rogues' gallery" effect, evidence that the police had in their possession and showed to the identifying witness photographs of the accused may often strongly suggest to a jury that the accused has a criminal record, perhaps even a propensity to commit a crime of the kind with which he is charged. Their production in evidence, or even reference to their existence, may then be highly prejudicial to an accused. Lastly, there is the "displacement" effect. Having been shown a photograph, the memory of it may be more clearly retained than the memory of the original sighting of the offender and may, accordingly, displace that original memory. Any subsequent face-to-face identification, in court or in an identification parade, may, on the identifying witness's part, in truth involve a matching of the man so identified with the remembered photograph, which has displaced in his memory his recollection of the original sighting.”

PICTURE IDENTIFICATION EVIDENCE CHECKLIST

To re-cast the above in checklist form concerning picture identification evidence:

Checklist Before the Defendant in Custody

1. The **pictures cannot suggest that the persons are in custody** [s.115(2)] – if they do, challenge on the basis of this section.
2. Consider whether the police are merely at the "detection process" stage or "evidentiary stage" – refer to R v Carusi (1997) 92 A Crim R 52 and cases cited therein.
3. Consider challenge on the basis of ss.137 and / or s.138 of the Evidence Act – specifically consider challenging the array of photographs shown to the witness.

Checklist for the Defendant in Custody

1. The **pictures cannot suggest that the persons are in custody** [s.115(2)] – if they do, challenge on the basis of this section.
2. **Picture identification evidence** led by the prosecution is **inadmissible if the defendant** was **in** the **custody of a police officer investigating the offence** [s.115(5)] **unless**
3. The defendant **refused to participate in an ID parade** [s.115(5)(a)]; **or**
4. The defendant's **appearance has changed significantly** between time of offence and time taken into custody [s.115(5)(b)]; **or**
5. It would **not have been reasonable to hold an ID parade** including the defendant [s.115(5)(c)].
6. **Even then**, police **cannot use an old picture** [s.115(3)(a) and (b)]; **unless**
7. The defendant's **appearance has changed significantly** between time of offence and time taken into custody [s.115(4)(a)]; **or**
8. It **would not have been reasonably practicable to make a picture** of the defendant **after** the defendant was **taken into that custody** [s.115(4)(b)].
9. Consider challenging the array of photographs show to the identifying witness – see under the heading "Challenging the Array" below.

Checklist After the Defendant in Custody

1. The **pictures cannot suggest that the persons are in custody** [s.115(2)] - – if they do, challenge on the basis of this section.
2. Consider whether the police are merely at the "detection process" stage or "evidentiary stage" – refer to R v Carusi (1997) 92 A Crim R 52 and cases cited therein. Given that the defendant has been charged and bailed (or remanded) there can be few of the considerations on foot as per the defendant before custody. There is a much stronger argument here in offering the defendant an opportunity for an identification parade as per common law and Evidence Act requirements rather than permitting police to resort to pictures. Specifically, consider whether it was reasonable to offer an identification parade notwithstanding the defendant was no longer in custody.
3. Consider challenge on the basis of ss.137 and / or s.138 of the Evidence Act – specifically, consider challenging the array (discussed immediately below).

4. THE ARRAY OF PHOTOGRAPHS

Defence practitioners should be mindful of the need to ensure the fairness of any array, whether presented by way of identification parade or photographic array. Participants in the array or identification parade should be of generally similar height, weight, racial appearance, clothing and have no obviously visible difference in physical features (e.g. tattoos, scars etc.). A simple exercise in "checking" for fairness of the array is to look at the initial description of the suspect (as opposed to a description of your client) provided by the witness and make a quick list of features that you regard as obvious – e.g. Aboriginal, shoulder length dark hair, moustache, unshaven. Then check how many of the other participants in the identification parade or photographic array share those same features. If all or the significant majority of participants share those features then the array is likely to be considered fair, in not, it may be regarded as unfair.

***R v Nguyen* [2003] NSWSC 1068**

This case shows the need to ensure similarity with the description of the offender in order to ensure the fairness of the array.

Buddin J at [14](xxi):

> *"It is axiomatic that the photographs selected for inclusion in the array should be totally consistent with the original description provided by the witness of the suspect's physical features and any other identifiable features, including the clothing worn by him or her. It therefore follows that very considerable care needs to be taken to ensure not only that the original description itself is accurately recorded, but that the details of it are comprehensive and that they are obtained as close in point of time to the incident, as circumstances permit."*

***R v Skaf, Ghanem and Hajeid* [2004] NSWCCA 74**

The Court (Mason P, Wood CJ at CL, Sully J) at [124]:

> *"In R v Nathan Lee (NSWCCA, unrep. 5 May 1997) Cole JA (with whom Dowd and Sperling JJ agreed on this matter) said:*
>
> > *'It is not a satisfactory basis of challenge to identification evidence to seek to render it tenuous by seeking to exclude from the array of photographs produced all those with a feature or features different to the precise description previously given to police. Whilst the photographs must bear a relationship to the description given, it is always a matter of judgment whether they constitute an appropriate and sufficient panel from which any selection may be made.'*
>
> *We agree."*

5. CHALLENGING THE ARRAY

A worthy technique for challenging an array through cross examining the identifying witness on an unfair array is to take the witness to each feature referred to in their

evidence or statement. Invite them to "cross out" or remove from the array any person whom they regard as not having a specific feature that they have referred to. If at the conclusion of the cross examination they are left with only one or close to one person left in the array, and that person is the accused, this represents powerful evidence that the array is unfair.

A consideration of the provisions of Crimes Act 1914(Cth) and in particular s.3ZM, 3ZN and 3ZP will also be of assistance in formulating ideas in this regard, even though those provisions have of course no application with respect to state matters.

In practical terms it is worth considering whether or not the array that was presented to the witness was compiled by the Police Photographic Identification Unit or not. This part of the NSW police has a database full of suspect / offender photographs on a database. Investigating police can make a request by email citing a range of characteristics of the suspect and seeking an array of persons of similar appearance. The police Photographic Identification Unit will then access their database to produce the array of photographs that is then sent back. This array will later be served as part of your brief of evidence in the event that the defendant is charged. Generally, there will be a statement in the brief from someone from this unit if they have been involved in the preparation of the array. The benefit of having the array compiled by the Photographic Identification Unit is that the array is generally exceedingly fair and carefully prepared.

Beware of any brief that has within it an array of photographs and no statement from the Photographic Identification Unit. This will mean that the array has been prepared locally – probably by the OIC in the matter. The array is more likely to be of poor quality and may even be the product of either conscious or unconscious bias on the part of police. They are far more open to challenge.

***R v Blick* (2000) 111 A Crim R 326, [2000] NSWCCA 61**

This case concerned a robbery where the victim described the offender as a man with a goatee beard. The victim was shown an array of twelve (12) photographs including the accused. The photographic array contained only one photo of a person with a goatee beard, that being the accused. The witness identified the photograph of the accused as the offender. The trial judge allowed the evidence of picture identification. On appeal, the court held that there could have been only one outcome in regard to the application of section 137 of the Evidence Act, that being the exclusion of the evidence. Mr Blick's conviction was quashed on appeal. This case has since been applied in a number of subsequent decisions including the following – *R v Jones (No.4)* [2007] NSWSC 1154, *R v Suteski (No.4)* (2002) 128 A Crim R 262; [2002] NSWCCA 262, *R v Kirby* (2000) 112 A Crim R 551; [2000] NSWCCA 192, *R v Marshall* (2000) 113 A Crim R 190; [2000] NSWCCA 210.

6. RECOGNITON EVIDENCE

Evidence to the effect that the witness saw a person that they had some prior familiarity with is often referred to as "recognition evidence". Recognition evidence falls within the Evidence Act definition of "identification evidence". This has most recently been made plain by the decision of *Trudgett v R* [2008] NSWCCA 62 at [31] in the judgment

of Spigelman CJ (Hulme and Latham JJ concurring). It should be noted however, that earlier authority (such as *R v Gee* (2000) 113 A Crim R 376 at [37]-[38]) held hat recognition evidence was outside the definition of identification evidence found in the Dictionary to the Evidence Act.

***Trudgett v R* [2008] NSWCCA 62**

Spigelman CJ (Hulme and Latham JJ concurring):

> *"[23] In order to determine whether the definition of identification evidence extends to recognition evidence, it is appropriate to focus on the words:*
>
> > *"… being an assertion that is based wholly or partly on what the person making the assertion saw, heard or otherwise perceived at that place and time."*
>
> *"[24] Recognition evidence is not "wholly" based on what the witness perceived at the time of the offence. However, it may be "partly" so based."*
>
> *"[25] The distinction between "recognition" and "identification" was recognised in Davies and Cody v The King (1937) 57 CLR 170 where the High Court said in a joint judgment at 181:*
>
> > *"It is almost unnecessary to say that the amount of care and the nature of the precautions which should be taken when a potential witness is brought to identify an accused or suspected person must vary according to the familiarity of the witness with that person. It would be ridiculous … to deny the value or reliability of the identification if the witness' knowledge of the prisoner arose from long and close association or from every day intercourse in business affairs."*
>
> *"[26] However, this analysis does not suggest that witnesses cannot err when purporting to recognise a person that they have known intimately and/or for a long time. I note particularly the observations of Lord Widgery CJ in R v Turnbull [1977] QB 224 at 228:*
>
> > *"Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."*
> > *(See also Smith v The Queen [2001] HCA 50; (2001) 206 CLR 650 at [55].)"*
>
> *"[27] I note that the joint judgment in Domican v The Queen (1992) 173 CLR 555 referred to Turnbull with approval. (See at 561, fn 18.) Furthermore, consistently with the whole of the analysis in Turnbull at 228 (not just the part I have extracted), the High Court considered a list of relevant circumstances at 565 which commenced as follows:*

> *"The adequacy of the warning has to be evaluated by reference to the nature of the relationship between the witness and the person identified ..."*
>
> *This indicates that a warning may be appropriate in a recognition case."*

"[29] Plainly, recognition evidence does not suffer from all of the defects of identification evidence. However, it does share with such evidence the danger that a witness will propound his or her conclusion with force and conviction. Furthermore, both forms are also likely to be given special weight by a jury, even where its reliability is dubious."

"[30] Generally speaking, recognition evidence will be more reliable than identification evidence strictly so called. For example, the displacement effect and the rogues gallery effect would not appear to be material. That is not, however, sufficient to exclude it from the Dictionary definition and from s 116 as a category. Section 116 does not turn on any issue of reliability (cf s 165)."

"[31] In my opinion, the Crown submission, that recognition evidence does not fall within the definition of "identification evidence" at all, should be rejected. (See also Gardiner v R [2006] NSWCCA 190; (2006) 162 A Crim R 233 at [68]–[69].)"

***Gardiner v R* (2006) 162 A Crim R 233; [2006] NSWCCA 190**

This case concerned firearms offences. Police conducted a search on a commercial storage facility, finding the firearms. Two staff of the storage company gave evidence; one concerning the accused entering into the lease and gaining a swipe card to access the facility, and the other concerning the accused making rental payments for the storage.

McClennan CJ at CL, (James and Simpson JJ concurring):

> *"[68] Although in my opinion falling within the definition of identification evidence, the evidence of both Mr Herrity and Ms Windows is appropriately described as recognition evidence. It is evidence of seeing someone they knew, not evidence that a person who they observed and who was presently unknown to them was the defendant."*
>
> *"[69] As identification evidence the trial judge was obliged to give consideration to s 116 and the need for the jury to exercise appropriate caution. In an exchange with counsel his Honour indicated that he would tell the jury that they needed to be very careful about the evidence. However, complaint is made that his Honour failed to do as he intended and that he gave directions which were calculated to encourage the jury to accept the evidence uncritically."*

7. DESCRIPTION EVIDENCE

R v Taufua **NSWCCA 12 August 1996 unrep**

This case concerned the evidence of a witness who had seen a man in the vicinity of a robbery. The man observed was with a person who was known to be one of the offenders in the robbery. The man that the witness described to police was ultimately charged and stood trial. The witness was permitted over objection to identify in the dock the man he had earlier described in court. (This dock identification was later held to be inadmissible on appeal). The prior description did not amount to identification evidence under the Evidence Act definition without further linking that description to the alleged offender.

Barr J (Priestley AP and James J concurring):

> *"His evidence was of seeing a man in the circumstances I have mentioned whom he had seen a number of times before. The man's appearance was like the appellant's (if the jury should think that Mr Little's description corresponded with their own observations). That was evidence of circumstances consistent with the appellant's being the second man, but it did not identify him. Without the question and answer objected to there was nothing to link the evidence of what Mr Little saw at the railway station with the appellant as opposed to anybody else of that general description. That link was necessary before the evidence could be described as identification evidence - cf. the definition in the dictionary."*

8. CROSS-RACIAL IDENTIFICATION

There is no requirement that a direction be given in the event that a witness is identifying an alleged offender who is a member of a different racial group than the witness.

Carr v R **[2005] NSWCCA 439**

In this case Hodgson JA, (McClennan CJ at CL, and Barr J concurring) stated:

> *"[30] As regards the submissions concerning identification of a person from another racial group, the trial judge did, following submissions by the appellant's then counsel, direct the jury's attention to the fact that Dr Sammut's selection of a photograph of the appellant was a case of one man identifying by photograph another man of a different racial group. In my opinion, there was no necessity for the trial judge to go on and say this made identification more doubtful because it is more difficult for a member of one race to identify an individual of another racial group. I am doubtful whether it would have been appropriate to say this, although it might have been appropriate to say words to the effect that the jury might consider that it was more difficult for a member of one race to identify an individual of another racial group. In any event, in my opinion what the trial judge said was sufficient to raise for the consideration of the jury the question whether the jury considered this to be a matter relevant to*

> *the reliability of Dr Sammut's identification of the appellant. In fact, the appellant's counsel did not ask for any further direction after that."*

***R v Inamata* (2003) 137 A Crim R510, [2003] NSWCCA 19**

In this case Buddin J, (Handley JA and Sully J concurring) stated:

> *"[35] The final complaint is that "His Honour should have warned the jury of the dangers of cross-racial identification." Reliance is placed upon this Court's decision in **R v Taliai**, CCA unreported, 11 April 1997. It is not apparent that that decision in fact authorises such a proposition. It would in any event have been very obvious to the jury that the various witnesses were purporting to identify a person of a different race. I am not persuaded that such a consideration required inclusion in any warning in the circumstances of the present case."*

***R v Dodd* (2002) 135 A Crim R 32, [2002] NSWCCA 418**

In this case Sully J (Meagher JA and Sperling J concurring) stated:

> *"[31] The written submissions put in for the appellant contend that "his Honour should have warned the jury of the dangers of cross-racial identification". The written submissions refer to a decision of this Court: **R v Taliai** [NSW CCA, 11 April 1997, unreported]. I have read the relevant portions of the judgment of Sheller JA, who delivered the principal judgment. There is nothing in what is there said to suggest that it is a fixed and immutable principle that in a case of the present character it must always be assumed that there has been some danger of cross-racial identification, with a concomitant need to given some specific directions on that topic."*

***R v Taliai* NSW CCA, 11 April 1997, unreported.**

This case is correctly interpreted by the above cases. Don't waste your timing tracking it down in the hope that it might reveal something helpful – it won't.

9. VOICE IDENTIFICATION

***R v Adler* (2000) 116 A Crim R 38, [2000] NSWCCA 357**

This case is authority for the proposition that there is no threshold issue (other than section 55 relevance) for the admission of voice identification evidence. This alters the common law approach prior to the introduction of the *Evidence Act 1995 (NSW)*. A prior familiarity with the voice or some distinctive feature of the voice is no longer required.

***Bulejcik v R* (1996) 185 CLR 375; (1996) 86 A Crim R 467; [1995] HCA 54**

In this case the jury were permitted to compare the voice of the offender recorded on a listening device to the voice of the accused in court for the purposes of determining

whether the accused was the offender. The High Court of Australia regarded this as permissible.

***Korgbara v R* (2007) 170 A Crim R 568; [2007] NSWCCA 84**

In this case the NSWCCA (McColl JA, James J concurring, Grove J dissenting) determined that it was permissible for a jury to compare the voice of the accused when speaking in an English language with the voice of the offender speaking in a foreign language for the purposes of determining whether the accused was the offender. Such a course was permissible without the need for expert evidence.

***R v Leung & Anor* (1999) 47 NSWLR 405; [1999] NSWCCA 287**

In this case the Crown called an interpreter who had interpreted telephone intercepts in a foreign language. Prior to giving evidence he also listened to the ERISP interviews with the two co-accused; one interview being in the foreign language and the other in English. The interpreter gave evidence identifying both accused as persons speaking in the telephone intercepts. In resisting the appeals against conviction, the Crown argued that the interpreter was an ad hoc expert. The decision has since become authority for the proposition that a witness can become and 'ad hoc expert" for the purposes of making a voice identification. Simpson J (Spigelman and Sperling JJ relevantly agreeing) stated at [47]:

> "[44] Voice comparison is not necessarily a question for expert evidence, although it may be. If the two sets of tape recordings in the present case had been in English, it would have been open to the Crown to have left it to the jury to make their own comparison and assessment of whether the voices on the DAT tapes (or any of them) corresponded to either of the voices on the police tapes. That course theoretically remained open but would have left the jury with a task immeasurably more difficult, given the reasonable assumption that no member of the jury understood either of the Chinese languages involved. The jury would, truly, have been comparing voices only, without the intrusion of language and speech patterns that are part of voice identification."

This decision has since been affirmed in *Li v Regina ; Regina v Li* (2003) 139 A Crim R 281; [2003] NSWCCA 290 (another decision concerning an interpreter as an ad hoc expert), *R v Gao* [2003] NSWCCA 390, and *R v Riscuta and Niga* [2003] NSWCCA 6.

***Irani v R* [2008] NSWCCA 217**

This case involved a police officer as an ad hoc voice identification expert. The police officer had spent "about two months" listening to recordings and preparing transcripts including sometimes with the assistance of a police informant who had told the police officer the identity of the person whose voice it was. The police officer purported to immediately recognised the voices of the appellant and his co-offender upon their arrest. The evidence was held to be admissible.

***Nasrallah v R, R v Nasrallah* [2015] NSWCCA 188**

This case involved a police officer listening to 21 intercepted telephone calls and 178 recorded calls made by the accused from gaol after he was remanded in custody bail refused. It was held that the opinion of the police officer should not have been admitted as that of an ad hoc expert for voice identification purposes as *"his assertion of identity was founded on material no different from the material available to the jury. To that extent his opinion was irrelevant and should not have been received for the reason explained by the High Court in Smith v R [2001] HCA 50; 206 CLR 650 at [10] to [12]."*

***Nguyen v R* [2017] NSWCCA 4**

The distinguishing feature between admissibility of an opinion on the basis of ad hoc expertise in voice identification and simply leaving the evidence to be considered by the tribunal of fact will turn on whether the witness is in no better position than the tribunal of fact would be to consier the available evidence.

Basten JA at [28]-[29]:

> *"[28] ….On one view, adopted by Wigmore, evidence should not be admitted of a comparison which can equally be undertaken by the jury, having before them the same evidence as that relied on by the witness. That principle appears to have been incorporated into the concept of relevance identified by the High Court in Smith. That is, in such circumstances, the views of the witness, assuming that he or she brings no specialised expertise to the task, are irrelevant, and may indeed be prejudicial if the witness is clothed in some apparent authority, described by the appellant as "the white coat effect"."*
>
> *"[29] That constraint should properly be acknowledged and should apply whether or not the witness is clothed in any apparent but insubstantial authority: the test should be whether what the witness has done is different in degree from that which the jury could do in undertaking the necessary comparative exercise. That constraint, however, does not apply in the present case. It was clear that Constable Van der Hout, had spent far longer in familiarising himself with the voices on the tapes than the jury could be expected to do. Nor was he clothed in any apparent expertise or authority, beyond the legitimate knowledge acquired by that exercise."*
>
> *"[30] The factual element in that assessment may be tested by reference to the approach adopted by counsel for the accused at the trial. If the jury were in a similar position to the officer in comparing the recordings, counsel would have been in an identical position. Had there been some apparent flaw in the approach adopted by the officer, it could thus readily have been revealed by cross-examination, and, to the extent necessary, by replaying the tapes….."*

10. IDENTIFICATION OF OBJECTS

***R v Clout* (1995) 41 NSWLR 312**

This case is the foundational authority on the point in NSW.

Kirby A-CJ at 320-321:

> *"A question thus arises as to whether the warning required in the identification of a human being should be extended to the identification of a crucial inanimate object. No authority binding on this Court governs the subject. A natural inclination is not to extend unnecessarily warnings never previously conceived as necessary, the absence of which may occasion the failure of a lengthy trial otherwise impeccably conducted by the trial judge."*
>
> *"Where the evidence of identification of an object is peripheral to the major issue fought at the trial one could perhaps resist, with integrity, the extension of the judicial warning obligation to warn the jury. But where, as here, the critical issue posed by the judge to the jury — central to the Crown's case and to the accused's defence — was the identification of the semi-trailer described by Messrs Green and Guest with that of the appellant, the need for a warning becomes obvious. The fact that the identifying link between the accused and the crime is not an aspect of human physiognomy can scarcely be determinative. In several cases, objects (such as clothing) have been vital to establishing identification of the accused as the offender: see, eg, Pitkin v The Queen (1995) 69ALJR 612; 130 ALR 35, where, amongst other things the description of the clothing worn by the offender (black football shorts" and a "white t-shirt ...with red striping across it") was part of the identifying evidence. Similarly warnings had been required in the identification of objects as those used in the commission of an offence. The fundamental problem is the same, and in one sense more acute, in the case of the identification of objects as in the case of the identification of humans. Every human is distinct and unique in appearance. Differences exist even between identical twins. But objects, such as knives or trucks will typically, today, be mass-produced, bearing similarity to thousands of other virtually identical objects. The general warning about the dangers of convicting accused persons upon identification evidence need to bring to the notice of juries at least the following:*
>
> 1. *The fallibility of human memory;*
> 2. *The risks of convicting persons upon the basis of identification evidence and the injustices which have occurred in the past from such mistakes;*
> 3. *The danger of contamination of memory by facts later discovered;*
> 4. *The high importance of securing an early record of the uncontaminated recall of the witness before the passage of time to prevent later elaboration or distortion in the retelling of the event; and*
> 5. *The specific danger that memory may sometimes become enlarged (even quite innocently) to include matters which the observer expects, or is expected to recall."*

R v Lowe **(1997) 98 A Crim R 300**

This case affirmed the earlier decision of Clout above, but distinguished it the facts considered in the present case. Hunt CJ at CL specifically cited the above passage in *Clout* at 315. His Honour later made the following obiter remarks:

> *"I see no distinction in principle between visual, voice and object identification. I am satisfied that a warning as to the danger of convicting should be given where the identification relates to an inanimate object, such as the clothing worn by the offender or a weapon used by him in the commission of the crime, and where that evidence represents a significant part of the proof of the guilt of the accused. Just as with voice identification, object identification is not a distinct category of evidence."*
>
> *"It should not be overlooked, however, that the purpose of giving identification warnings is to ensure that the jury is made aware of the potential unreliability of identification evidence which they may not otherwise have appreciated. When it comes to the matters "of significance" which may reasonably be regarded as undermining the reliability of the identification evidence, and which the judge is obliged to bring to the jury's attention, the propensity for identification evidence to be unreliable differs to some extent where it relates to objects rather than persons. For example, the difficulties in describing a person's face and in retrospectively estimating that person's height, weight and age are less likely to affect a description or an estimate of an inanimate object. Whereas the possibility of mistake plays the greater part in relation to the identification of a person, the lack of distinctiveness will usually play the greater part in relation to the identification of an inanimate object. But there are nevertheless many difficulties which arise in common with both types of identification evidence, such as Kirby P has referred to in Clout -- although, with respect, I would not myself so confidently assert that a number of injustices have occurred in the past from mistakes made in relation to the identification of inanimate objects."*

11. ACT OF IDENTIFICATION

Prior to the introduction of the Evidence Act there was some tension in the case law as to whether evidence of the "act of identification" by a witness was admissible. This would typically arise where a police officer was present when a witness picked out a particular photograph or person but could either no longer remember which person had been picked, or had become an unfavourable witness.

It is now clear that such evidence is admissible given the Dictionary definition of "identification evidence" which includes within it the words of paragraph (b) which are*"…(b) a report (whether oral or in writing) of such an assertion."*

Such evidence is still the subject of the provisions of section 66 of the Evidence Act, particularly regarding evidence being "fresh in the memory". The evidence that must be "fresh in the memory" is the enabling event (e.g. the robbery NOT the day that the witness went to the police station to look at the photos) that caused the witness to be

able compare the person seen with the image in the photograph or person in the identification parade, not the statement to police matching the person seen at the enabling event with what is presented to the witness at the police station. Picking a person from a photograph two years after witnessing a crime committed, for example, would not be evidence that is "fresh in the memory" for the purposes of section 66 of the Evidence Act.

For a more detailed examination of this area of the law see *R v Barbaro & Rovere* (2000) 112 A Crim R 551; [2000] NSWCCA 192, *R v Gee* [2000] NSWCCA 198, *R v Taousanis* [2001] NSWSC 74 and *DPP v Nicholls* (2001) 123 A Crim R 66.

12. NEGATIVE IDENTIFICATION AND FAILURE TO POSITIVELY IDENTIFY

For the purposes of this paper, "negative identification" refers to evidence of a witness giving evidence to the effect that they saw someone other than the accused as the person who committed the offence, or was involved in it. "Failure to positively identify" for the purposes of this paper will refer to evidence that notwithstanding the presence of the accused within the identification parade or photographic array, the witness failed to nominate any person as the one who committed the crime."

As negative identification evidence and failure to positively identify do not fall within the definitions in the Evidence Act, they are not covered by the provisions relating to identification evidence.

***Kanaan v R* [2006] NSWCCA 109**

This case concerned negative identification.

The Court (Hunt AJA, Buddin and Hoeben JJ):

> *"[132]….Where the identification evidence favours the Crown case, s 116 requires a warning that there is a special need for caution before accepting that evidence but, where the identification evidence favours the defence, s 165(2) requires or permits (according to whether or not a request is made) only a warning that the evidence may be unreliable and of the need for caution in determining whether to accept the evidence and the weight to be given to it. What was intended by way of tempering the identification evidence warning, in our view, is that a direction should be given in relation to negative identification evidence which brings home to the jury the consequences of their finding in relation to the negative identification evidence in question."*
>
> *"[133] What is required in relation to negative identification evidence is, therefore, that the trial judge ensures by appropriate directions that the jury understands that:*
>
> *(1) as the Crown must establish beyond reasonable doubt that it was the accused who committed the offence charged or who was involved in its commission (as the case may be), the negative identification evidence raises a doubt as to that fact,*

> *(2) the Crown must eliminate such doubt in order to succeed in establishing that fact, and*
> *(3) if there remains a reasonable possibility that the negative identification evidence is correct, the Crown case against the accused must fail."*

This decision has since been cited with approval in *Ilioski v R* [2006] NSWCCA 164 at [128].

It is suggested by the writer that in the event that a witness fails to nominate anybody from an array of photographs or an identification parade, then the defence should ask for the above directions to be adapted to that evidentiary circumstance.

13. INFLUENCED IDENTICATION EVIDENCE / INCRIMINATING IDENTIFICATION

In the event that any identification evidence sought to be led by the prosecution has been obtained by means of incriminating circumstances or other circumstances that suggest that the identifying witness has been influenced in some way, the defence should challenge such evidence by invoking Evidence Act s.114(2) with respect to visual identification evidence and ss.137 and 138 of the Evidence Act in relation to any form of identification evidence.

With respect to visual identification evidence, the concluding words of s.114(2) of the Evidence Act requires that "the identification was made without the person who made it having been intentionally influenced to identify the defendant." This applies with respect to all visual identification evidence, regardless of the reasonableness of holding an identification parade, or whether the defendant refused to participate in an identification parade etc.

The classic authority in terms of identification evidence being obtained in circumstances that tended to suggest that the person was suspected of committing the offence being investigated arose in the High Court of Australia decision of *Davies & Cody v The King* (1937) 57 CLR 170.

Davies & Cody v The King (1937) 57 CLR 170

In this matter witnesses variously identified the accused in the dock during committal, or were shown the accused alone when in custody. The court delivered a joint judgement, stating (at 182):

> *"…if a witness whose previous knowledge of the accused man has not made him familiar with his appearance has been shown the accused alone as a suspect and has on that occasion first identified him, the liability to mistake is so increased as to make it unsafe to convict the accused unless his identity is further proved by other evidence direct or circumstantial. Where that further evidence consists in or includes other witnesses whose identification has been of the same kind, the number of witnesses, their opportunities of obtaining an impression or knowledge of the prisoner and other circumstances in the case must be taken into account by the court of criminal appeal for the purpose of*

> *deciding whether on the whole case the possibility of error is so substantial as to make the conviction unsafe."*

R v To **(2002) 131 A Crim R 264; [2002] NSWCCA 247**

In this case, two of three witnesses who attended an identification parade were told by police that a suspect would be present within the identification parade. This was not considered as amounting to an intentional influencing of the witnesses to select someone from the identification parade.

R v Mundine **[2008] NSWCCA 55**

In this case an eyewitness was shown "an offender CD from the Surry Hills police that shows some of the local offenders". The CD contained "predominantly Aboriginal males" (the defendant was Aboriginal). The witness was then told not to assume that all the men depicted had criminal records. This was considered to "ameliorate or nullify" the prejudice to the accused (Simpson J at [41], McClennan CJ at CL, Grove J concurring).

14. CROSS-EXAMINING ON IDENTIFICATION EVIDENCE

Everything following under this heading (in italics) is reproduced from an earlier paper written on the same topic by John Stratton SC. It is reproduced with his kind permission:

What follows are some ideas about cross-examining a witness who identifies the accused. There should be a number of distinct parts to the cross-examination.

Circumstances of Observation

The first part is the cross-examination about the circumstances of the initial observation. It corresponds to with the sorts of matters referred to in Domican (1992) 173 CLR 555. The sorts of matters that you might want to ask about (say in an armed robbery case) are:

- *You had never seen the robber before?*
- *You only saw him for a limited amount of time?*
- *You were very scared at the time?*
- *You were having to look at not just this robber but the other robbers as well?*
- *You were also concentrating on the gun that one of them was holding?*

The Initial Description

The second part is the initial description given by the witness to the police. At this stage (unless the description of the robber uncannily matches that of your client) you are trying to emphasise that the first description is important because usually it is given before the witness is shown photographs of the defendant. The sorts of questions you might want to ask are:

- *When you went to the police station to make your statement the police were very patient with you?*
- *You were doing the best you could to tell the police everything that you remembered to help them catch the robber?*
- *In particular, you gave the police the best description of the robber that you could?*
- *This was your description "...about 5 feet 6 inches, medium build, dark shoulder length hair, olive skin, wearing white runners, blue jeans, a grey jacket, sunglasses and a beanie."*
- *That was the best description you could give.*

The Act of Identification

The third part is the identification process. There are a number of different approaches which can be taken, not all of which will be appropriate to the particular case. One is, the issue of what the witness' expectation was when he/she went to the identification process:

- *When you went to the police station, you understood that a photo of the man the police suspected would be among the photos that you were shown?*
- *You understood that your role was to select the photograph that most looked like the robber?*

The next strand that can be taken is how the photo of the accused was selected. You need to go back to the original description of the robber, and compare it with the photo of the accused, which the witness selected. There is always some artificiality about this, in that often the way we recognise faces cannot easily be described in words. You might ask:

- *This was your original description of the robber, "...about 5 feet 6 inches, medium build, 25-30 years old, dark shoulder length hair, olive skin, wearing white runners, blue jeans, a grey jacket, sunglasses and a beanie."*
- *You told us that when you spoke to the police that was the most complete description you could give.*
- *Which of those features enabled you to say, that photo is the photo of the robber?*

Another strand on this topic is to attempt to show that the photo spread was unfair. You are trying to show that from the point of view of the identifying witness, amny of the photos in the photo spread were automatically disqualified. You might ask:

- *Do you agree that the people in photos 1, 2 and 3 appear to be much younger than 25-30 years old?*
- *So from your description of the robber, you were able to immediately disqualify photos 1, 2 and 3 as being the robber?*
- *Do you agree that the people in photos 4, 5 and 7 have quite thin builds?*
- *So you where able to disqualify the people in photos 4, 5 and 7 immediately?*
- *Do you agree that eh people in photos 8, 9 and 10 appear to have fair complexions?*

- *So you were able to disqualify the people in photographs 8, 9, and 10 immediately?*
- *So the only photo which you would not immediately disqualify was photo number 6?*

Finally, if there are any differences between the initial description and the photo of the accused selected, the witness should be asked about those differences.

You Could Be Mistaken?

The fourth part of the cross-examination is to attempt to sum up any favourable answers you have already received and attempt to extract a concession that the witness could be mistaken. Try to make it seem to the witness that unless he / she agrees with you he / she is being unreasonable. You could ask something like this:

- *You have told us that you only saw the robbers for a few minutes?*
- *You have told us that during the robbery you were very scared?*
- *You have told us that you had never seen the robber before?*
- *You were not shown the photo files until a month after the robbery?*
- *Is it possible that you are mistaken?*

If the witness won't concede the possibility, I think the best tack is not to argue with them, but try to make the witness look unreasonable. For example:

- *You could be mistaken?*
- *You could not make a mistake in identification?*
- *In identifying people, you are infallible?*

Cross-Examining the Police Witness

The other side of the coin is cross-examining the police officer who conducted the identification process.

It is very important to get access to the exact words used by the civilian identification witness when the photo of your client was selected. If at all possible, try to get a look at the police notebook where the words should be recorded. [Editor's note: In the more modern context since this passage was written, this now means WATCH THE DVD and LOOK AT THE FORMS filled out by the police officer. There is often something more in the DVD that what is written on the forms.]

You can also get from the police witness support for the idea of a "fair spread". You could ask questions like these:

- *You know, as an experienced police officer, that when you show a witness a photo of a suspect, it would not be fair to show the witness a single photo?*
- *Instead you include the photo in a group of other photos?*
- *You do that to reduce the chance of mistaken identification?*
- *And to be fair to the accused?*

- *Similarly, when you put together a group of photos to show an identifying witness, you try to get a fair spread of photos?*
- *That is, a group of photos where the appearance of the other people in the photos roughly matches that of the accused?*
- *It wouldn't be fair to have the selection of photos where the suspect sticks out like a sore thumb?*
- *It wouldn't be fair to have a selection of photos where every photo was disqualified in terms of the witness' description except for that of the accused?*

Thanks again to John Stratton SC for his kind permission in allowing the above material to be re-produced in this paper. I have re-read the above passage EVERY TIME that I have prepared an ID cross-examination for many years. I recommend that you do the same.

15. JUDICIAL WARNINGS / TRIAL DIRECTIONS CONCERNING IDENTIFICATION EVIDENCE

General Legislative Requirements

The Evidence Act 1995 (NSW) sets out statutory requirements for judicial warnings concerning identification evidence. These are as follows:

The Evidence Act s.116 states:

> ***"116 Directions to jury***
>
> *(1) If identification evidence has been admitted, the judge is to inform the jury:*
> *(a) that there is a special need for caution before accepting identification evidence, and*
> *(b) of the reasons for that need for caution, both generally and in the circumstances of the case.*
> *(2) It is not necessary that a particular form of words be used in so informing the jury."*

Evidence Act s.165 states:

> ***165 Unreliable evidence***
>
> *(1) This section applies to evidence of a kind that may be unreliable, including the following kinds of evidence:*
> ...
> ***(b) identification evidence,***
> ...
> *(2) If there is a jury and a party so requests, the judge is to:*
> *(a) warn the jury that the evidence may be unreliable, and*
> *(b) inform the jury of matters that may cause it to be unreliable, and*
> *(c) warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.*

> *(3) The judge need not comply with subsection (2) if there are good reasons for not doing so.*
>
> *(4) It is not necessary that a particular form of words be used in giving the warning or information.*
>
> *(5) This section does not affect any other power of the judge to give a warning to, or to inform, the jury.*

Evidence Act s.115(7) also deals with directions concerning picture identification evidence – see under the heading "Specific Issues - Picture Identification Evidence" below.

Case law concerning Evidence Act s.116

The following case law is critical to an understanding of the workings of the section and the formulation of the required judicial warning. Whilst the discussion is not exhaustive, it highlights the major cases with which you should be familiar.

R v Kerrie Anne Clarke **(1997) 97 A Crim R 414**

Hunt CJ at CL (Smart J, Howie AJ concurring):

At 422:

> *"The third ground of appeal (as expanded in argument) was that the trial judge failed to warn the jury as to the dangers of convicting on the evidence of identification upon which the Crown relied, and that he failed adequately to isolate and identify for the benefit of the jury significant matters which it was open to the jury to regard as undermining the reliability of Mrs Smith's identification evidence. The appellant relies upon what was said by the High Court* ***in Domican v The Queen*** *(1992) 173 CLR 555 at 561-562:*
>
> > *"Whatever the defence and however the case is conducted, where evidence as to identification represents any significant part of the proof of guilt of an offence, the judge must warn the jury as to the dangers of convicting on such evidence where its reliability is disputed. The terms of the warning need not follow any particular formula. But it must be cogent and effective. It must be appropriate to the circumstances of the case. ... the judge should [in a direction with the authority of the judge's office behind it] isolate and identify for the benefit of the jury any matter of significance which may reasonably be regarded as undermining the reliability of the identification evidence."*
>
> *The third ground of appeal falls into two parts - the requirement of a warning of the "dangers" of convicting upon identification evidence, and the direction that the jury are bound to take the possible weaknesses in that evidence into consideration in determining whether they will (or will not) rely on that evidence. I propose to deal with each part of the ground of appeal separately."*

At 424:

*"The added importance of the decision in **Domican v The Queen** (1992) 173 CLR 555 lay in (a) the requirement that a warning be given wherever identification evidence represented a "significant" part of the Crown case, and (b) the emphasis which it placed upon the requirement that the judge isolate and identify for the benefit of the jury any matter of significance which may reasonably be regarded as undermining the reliability of the identification evidence. Significantly, however, the requirement that a warning be given of the "dangers" of convicting upon identification evidence, as stated in Kelleher v The Queen and as later reinforced in **Domican**, was not accompanied by any requirement that it be explained to the jury just why it would be dangerous to do so - although it was common practice in this State to give some such explanation in relation to identification evidence."*

"It is against that background that the provisions of the Evidence Act must be considered…"

At 425:

*"It should be noted that both sections refer only to a "need for caution", although s 116 gives emphasis to the need being a "special" one. The "special" nature of the need for caution in relation to identification evidence relates to the seductive effect of that evidence, which the High Court in **Domican v The Queen** (1992) 173 CLR 555 said had frequently led to proven miscarriages of justice and which (in turn) had obliged the appellate courts to lay down "special" rules in relation to the directions to be given in criminal trials where identification is a significant issue.[39] Neither section requires the direction to refer to the "danger" or "dangers" of convicting, although each would permit such a direction to be given. It was submitted by the appellant that neither provision should be interpreted as diluting the content of the direction required by the High Court in **Domican v The Queen** (1992) 173 CLR 555. The Crown submitted that they should be so interpreted."*

At 427:

"I conclude from this material that the Australian Law Reform Commission did give full consideration to the common law at the time that a warning be given of the "danger" or "dangers" of convicting upon identification evidence. It is clear that the Commission necessarily intended that, instead of following the common law, a warning as to the special need for caution before accepting identification evidence is to be mandatory, and that greater emphasis is to be given to the reason why the warning is necessary - the serious risk (or the danger, if you like) that such evidence may be unreliable. So far as the Commission's proposals were enacted in the Evidence Act, that intention is made relevant to the interpretation of the Act itself."

"The approach of the Evidence Act, it seems to me (with respect), is far more effective in bringing home to the jury the degree of caution which has to be taken in relation to identification evidence than a direction merely that it is dangerous to convict upon that evidence. In my opinion, the requirements of the Act provide far greater protection against the risk (or the danger) of

miscarriages of justice than the common law. I am satisfied that the nature of the warning which is now required to be given in relation to identification evidence is dictated by s 116 and s 165 of the Evidence Act rather than by the decision of the High Court in Domican *v* The Queen*, although a judge is still permitted to add the* **Domican** *formulation if thought appropriate in the particular case."*

At 428:

"I acknowledge that no particular form of words is to be used but I do suggest that it would be prudent for trial judges to refer to innocent people having been convicted upon honestly mistaken evidence."

Smart J at 431-432:

"In accordance with this section [i.e. s.116] juries should now generally be directed in terms of the special need for caution before accepting the identification evidence. That means that the identification evidence should be carefully analysed in terms of its strengths and weaknesses and that in considering and evaluating it caution must be exercised before accepting it. The jury must be told of the reasons why caution must be exercised. Those reasons fall into the 2 categories mentioned. The judge may use the language which he regards as appropriate."

"The general reasons comprise that it has been the experience of the courts that in the past serious miscarriages of justice have occurred because people have been convicted of crimes that they did not commit because of mistaken evidence identifying them as the offenders. Further, experience has shown that such mistaken evidence of identification has been given by honest, responsible and sensible people who appeared to have watched what happened closely and who are convincing. It is always important to ascertain whether the identifying witness knew the accused before the event in question, how long he or she had seen the accused and the events under observation and how long after the events the witness identified the accused and in what circumstances. All these matters bear generally upon the risk of a mistake being made. It is then necessary to tell the jury of the particular reasons in the case before them why they need to exercise caution. That will involve isolating the particular potential defects of importance and highlighting or discussing them."

"The jury should be told that bearing in mind the experience of the courts of mistaken identification and the defects or potential defects discussed and giving them such weight as they merit and exercising the special need for caution which arises they should determine whether they are satisfied beyond reasonable doubt that the accused was in truth the person who committed the offence alleged."

Smart J at 432:

"Section 116 is a legislative expression and underlining of the view that it is not sufficient to give a warning and that the jury needs to understand the reasons

> *why the warning is being given for the warning to have its full effect. The section makes express what the High Court contemplated would underlie the warnings which it contemplated. Consistent with the legislative approach it is preferable, in general, to speak of the special need for caution rather than the danger of conviction or it being dangerous to convict."*

Danhoa v The Queen **(2003) 217 CLR 1; [2003] HCA 40**

This case is authority for the proposition that the warning required by s.116 is only applicable where the identification evidence is in dispute.

Gleeson CJ and Hayne J at [19]:

> *"If read literally, and apart from its statutory context, s 116 could be taken to mean that a judge is always required to inform the jury that there is a special need for caution before accepting identification evidence whenever identification evidence has been admitted, even if the reliability of the evidence is not in dispute. That would be absurd. If a witness claims to have seen an accused at a particular place on a particular occasion, and the truth of that assertion is not questioned or in any way put in issue, then ordinarily there is no special need for caution before accepting the evidence."*

McHugh and Gummow JJ at [53]:

> *"The obligation imposed by s 116 must be read in the context of the adversarial system of criminal justice. It is not to be supposed that, in enacting that section, the legislature intended that juries be given directions concerning identification evidence when identification was not an issue. It is not to be supposed that the legislature intended a trial judge to give a direction that was not relevant to the issues in the case. Not only would it be a waste of curial time and effort but the giving of an irrelevant direction would be likely to confuse the jury who understandably would be puzzled as to what significance the direction had."*

Mouroufas v The Queen **[2007] NSWCCA 58**

In this case, witnesses were challenged as to their truthfulness and credibility generally, but not as to their ability to identify the accused, nor as to being mistaken as to identity. It was held that there was no requirement to give the direction under s.116.

Hoeben J, (Sully and Bell JJ concurring)

> *"[32] The challenge to the evidence of Ms Loisos and Mr Multari was that they were not only unreliable but that they were not witnesses of truth. They were cross-examined extensively as to the lies which they had initially told to the police when interviewed and as to their participation in the cultivation activities. They were challenged about their motivation in making induced statements and in giving evidence against other accused such as the appellant. It is clear from their cross-examination that the challenge was not to their ability to identify the appellant but to their credit. It was never an issue at the trial that the appellant was present on the property and did many of the things*

described by Ms Loisos and Mr Multari, eg complaining of a bad back and spending time in the house."

"[34] In accordance with the analysis in Dhanhoa there was no issue as to the "identification" of the appellant and there was accordingly no need for a direction in accordance with s116."

***Kanaan v R* [2006] NSWCCA 109 at 183**

"…it is necessary pursuant to s 116 for the judge to go beyond how the case has been conducted and to refer to every matter of significance which may reasonably be regarded as undermining the reliability of identification evidence (unless the identification is in the end not in dispute: see Dhanhoa v The Queen (2003) 217 CLR 1 at [19]–[22], [53])"

Specific Issues - Picture Identification Evidence

It should be noted that *Evidence Act* s.115(7) applies whenever the prosecution adduces picture identification evidence. This is in addition to any other warnings required by ss.116 and 165 of the Evidence Act. The subsection reads as follows:

*"(7) If picture identification evidence adduced by the prosecutor is admitted into evidence, the judge **must, on the request of the defendant**:*
(a) if the picture of the defendant was made after the defendant was taken into that custody-inform the jury that the picture was made after the defendant was taken into that custody, or
(b) otherwise-warn the jury that they must not assume that the defendant has a criminal record or has previously been charged with an offence."

***R v Maklouf* [1999] NSWCCA 94**

In this case Wood CJ at CL stated at [27]:

"[27] No such warning was sought at the trial, and leave is required under R4 Criminal Appeal Rules to argue this ground. I would refuse leave. The submission is misguided. Neither the appellant nor any of the other persons depicted had been taken into custody, either at the time that the photographs were taken or at the time that identification was made. Nor was there anything in the photographs to suggest that the persons depicted were known to police or involved in any form of criminality. The section is not at large. It is directed to the problems associated with the use of "mug shots" ie pictures which themselves give the impression that the persons depicted were persons known to police. The Section takes its place alongside Section 137, which permits exclusion of evidence where its probative value is outweighed by the danger of unfair prejudice to the accused, and S165 which permits any relevant or appropriate warning to be given to the jury. The discretion there reserved provides ample protection for an accused, and explains why S 115(7) depends upon request being made by the accused."

Specific Issues – Voice Identification Evidence

Voice identification of an accused person is within the ambit of the definition of "identification evidence" contained within the *Evidence Act* dictionary. However, voice identification of a person other than the accused is not within the definition.

Voice identification of the accused will therefore be governed by s.116, with voice identification of a person other than the accused governed by s.165 on the basis that it is evidence of a kind that may be unreliable.

Specific Issues – Description Evidence

Description evidence that falls short of recognition evidence does not fall within the definition of "identification evidence" in the Dictionary to the Evidence Act (see *R v Taufua* NSWCCA 12 August 1996 unrep. and the discussion under the heading "Description Evidence" above). Therefore, such evidence cannot be subject to a direction to a jury pursuant to s.116 of the Evidence Act. It may however be the subject to directions pursuant to s.165. It should be remembered that s.165(1) deals with evidence of a kind that may be unreliable and the matters enumerated in subsection (1) are a non-exhaustive list.

Specific Issues – Identification of Objects

As identification of objects does not fall within the definition of "identification evidence" in the Dictionary to the Evidence Act, such evidence cannot be subject to a direction to a jury pursuant to s.116 of the Evidence Act. The decisions in *R v Clout* (1995) 41 NSWLR 312 and *Lowe* (1997) 98 A Crim R 300 (both of which pre-dates the *Evidence Act*) deals with the common law requirements of directions with respect to inanimate objects and offer guidance to the necessary formulation under s.165.

Evidence of the identification of inanimate objects may be the subject to directions pursuant to s.165. It should be remembered that s.165(1) deals with evidence of a kind that may be unreliable and the matters enumerated in subsection (1) are a non-exhaustive list.

Specific Issues – Identification of Persons Other Than the Accused

As identification of objects does not fall within the definition of "identification evidence" in the Dictionary to the *Evidence Act*, such evidence cannot be subject to a direction to a jury pursuant to s.116 of the Evidence Act. It may however be the subject to directions pursuant to s.165. It should be remembered that s.165(1) deals with evidence of a kind that may be unreliable and the matters enumerated in subsection (1) are a non-exhaustive list.

Specific Issues – Negative Identification / Failure to Positively Identify

***Kannan v R* [2006] NSWCCA 109**

In this case it was held (at [115] and [126]) that although negative identification evidence does not fall within the terms of s 116 of the Evidence Act, it is nevertheless

"evidence of a kind that may be unreliable", and thus falls within s 165. Suggested directions are found at [133] of the decision and are extracted in this paper – see above under the heading "Negative Identification Evidence / Failure to Positively Identify". The author of this paper humbly suggests that the principles in this case can be extended to cases where the witness fails to positively identify the accused from the array.

Specific Issues – Honest But Mistaken Identification Witnesses

Trial counsel should seek a trial direction to the effect that even honest witnesses may be mistaken. No particular form of words is required. Justification is found in the following authorities

MacKenzie v The Queen **(1996) 190 CLR 348, [1996] HCA 35**

In this case Gaudron, Gummow and Kirby JJ noted the problems inherent in honest but mistaken witnesses at 373:

> *"…many of the problems which have arisen in respect of identification evidence have occurred not because witnesses have deliberately given false evidence to police, and later to courts, but because it is an elementary feature of human psychology, in the words of the character witness in this case, to carry "a true mistake ... through with ... conviction". The mind, recognising perhaps the seriousness of the consequences of error, may seek unconsciously to reinforce conviction of the truth and accuracy of the recall, the subject of the testimony. This can lead to just such risks of dogmatism and certainty that have occasioned the requirements for court warnings in the case of identification evidence so as to prevent the risks of the miscarriages of justice which can otherwise, quite innocently, occur in that context. But the point made in the identification cases is one of general application. It applies in relation to recall of perceptions required months or (as in this case) years after events: especially where those events were brief and seemingly unremarkable at the time they occurred."*

R v Marshall (2000) 113 A Crim R 190, [2000] NSWCCA 210

Spigelman CJ at [15]:

> *"[15] The prejudice often associated with identification evidence is that, although mistaken, it is frequently given with great force and assurance by the person who made the identification. These are matters about which witnesses frequently refuse to admit the possibility that they might have erred and, accordingly, give evidence in a particularly definitive form."*

Specific Issues – Two or More Honest But Mistaken Witnesses

Trial counsel should seek directions in accordance with the passages taken from the following authorities:

R v Turnbull [1976] 3 All ER 54

The Court at 551-552:

> *"First, whenever the case against an accused person depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words."*

R v Burchielli **(1980) 2 A Crim R 352**

Court of Criminal Appeal, Victoria

Young CJ and McInerney J at 357:

> *"Now it often happens that two pieces of evidence, each in themselves unconvincing, will in combination produce a high degree of persuasion of a particular conclusion. The reason is often that the coincidence of the two pieces of evidence would be unlikely if the ultimate fact or conclusion had not occurred. But this is not true of identification evidence. Two unsatisfactory identifications do not support one another in the same way as two primary facts may lead to the conclusion of an ultimate fact. The situation which faced the learned judge when summing up to the jury was thus one calling for a particularly strong warning as to the dangers lurking in the evidence…"*

16. ACKNOWLEDGEMENTS

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All errors and omissions remain the sole responsibility of the author.

If you have any questions, or would like to get your hands on any case referred to in this paper that is "hard to get" please feel free to contact me. I am best caught on my mobile **0408 277 374**. (Please respect the "no fly zone" on my phone between 9.00am and 10.00am on a court day – I am sweating on my case too). Alternatively, you can drop me an email anytime at **dark.menace@forbeschambers.com.au.** I will almost certainly get back to you within 24 hours.

I have endeavoured to state the law of New South Wales as at 22 March 2018.

Mark Dennis
Forbes Chambers