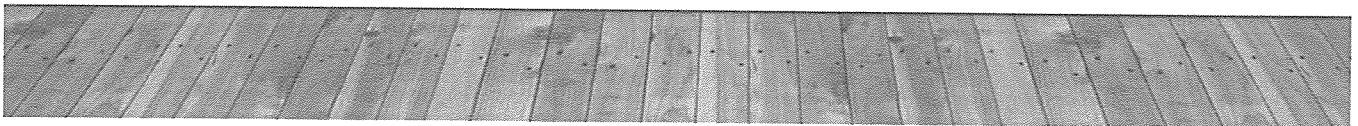


# SOCIAL MEDIA IDENTIFICATION AND *IMM V THE QUEEN*

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PREPARED FOR THE REASONABLE CAUSE CONFERENCE  
SATURDAY 30 MARCH 2019  
RORY PETTIT, TRIAL ADVOCATE, ABORIGINAL LEGAL SERVICE



# TWO PARTS

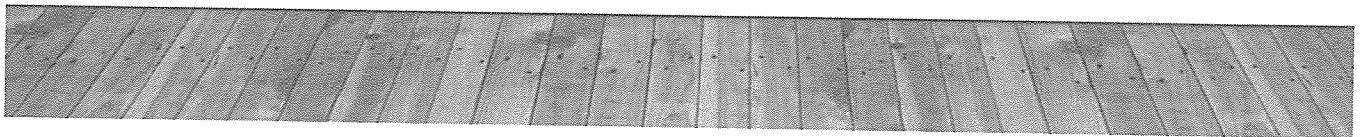
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## **I. General problems of identification evidence**

More acute with identifications from social media

## **II. *IMM*, probative value, and (un) reliability**

Social media identification a useful analysis tool



# TOPICS

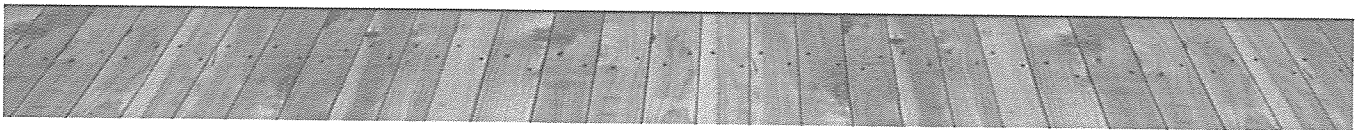
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## **I. General problems of identification evidence**

- A) Facebook identification: factual hypothetical
- B) Dangers of identification evidence
- C) Facebook cases

## **II. *IMM*, probative value, and (un) reliability**

- D) s 137 and probative value after *IMM*
- E) Three categories of reliability

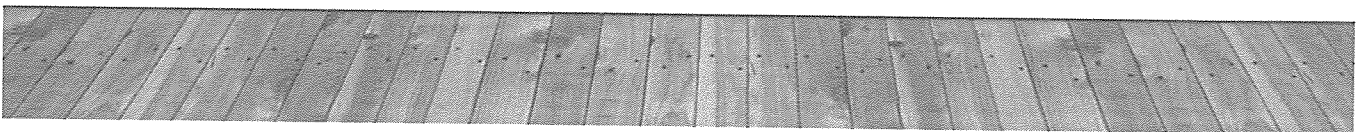


## PART 1: ID EVIDENCE

### A) FACEBOOK HYPOTHETICAL

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A woman, Jane, is sitting in the kitchen of her home. Without warning, a man bursts in the front door, holding a knife. He is unknown to her. He grabs Jane's handbag, which is sitting on the kitchen table, and flees. The interaction is over in seconds, but Jane was able to see the man's face and make some general observations about him. Jane didn't have her glasses on at the time, and she is very slightly short-sighted. Jane's friend Sue was in the other room, with a window out onto the street. Afterwards, Jane describes the man to Sue. Sue says "I saw that same man run past the window, and though I couldn't really see his face it looked like a man called Andrew Jones – I sort of know his mother, they live in the next suburb." Sue opens Facebook on her phone, and finds a photo of Andrew Jones. She shows the photo to Jane and says "it was him, wasn't it?" Sue looks at it and says "yes that's him, I'm sure of it." They tell police and provide the above version of events, and Andrew Jones is later charged with Robbery.

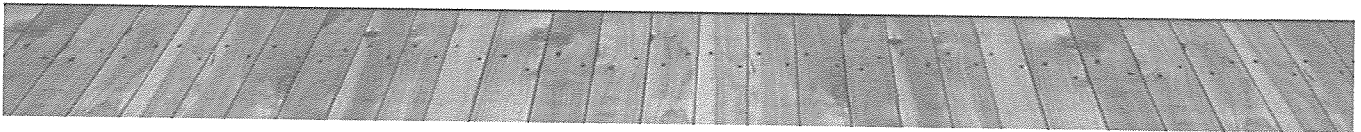


## B) GENERAL DANGERS OF IDENTIFICATION EVIDENCE

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- Dangers: danger of misidentification
- Numerous wrongful convictions
- Warnings in Evidence Acts – s116 and s165
- Mason J in *Alexander v R* (1981) 145 CLR 395:

“Identification is notoriously uncertain. It depends upon so many variables. They include the difficulty one has in recognizing on a subsequent occasion a person observed, perhaps fleetingly, on a former occasion; the extent of the opportunity for observation in a variety of circumstances; the vagaries of human perception and recollection; and the tendency of the mind to respond to suggestions, notably **the tendency to substitute a photographic image once seen for a hazy recollection of the person initially observed.**”



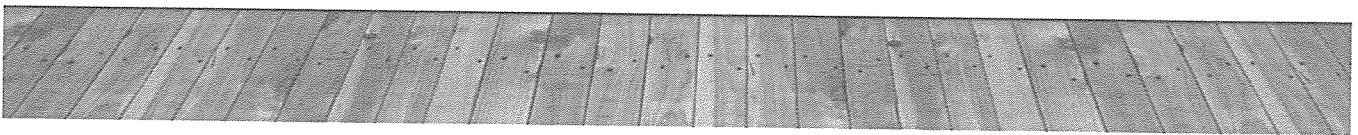
# DISPLACEMENT

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- Risk of Mason J's psychological phenomenon of displacement
- Also described by Murphy J in *Alexander v R* (1981) 145 CLR 395:

"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."

"The general dangers in identification of a stranger are compounded when the first identification after the crime is from a photograph. The well-known 'displacement' effect tends to reduce the reliability of a later identification."



# DISPLACEMENT AND SOCIAL MEDIA

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- Historically: witnesses shown physical photo of accused, then later undertake a photo board ID from which they pick the accused
- Little difference between historical examples and hypothetical
- Suggestibility + no 'foils' as in photo board
- Concern: will happen much more often than historical examples
- Evidence tainted before Police involvement



# RECOGNITION AND DISPLACEMENT

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- Displacement possible when identifier recognises offender?
- Will depend on degree of recognition
- *Carr v R* (2000) 117 A Crim R 272: Tasmanian CCA

‘recognition’ cases will often involve just as much danger of mistaken identification as cases involving persons first seen at the times of their alleged crimes [...] [danger will depend on **the degree of familiarity of the witness with the accused.**’

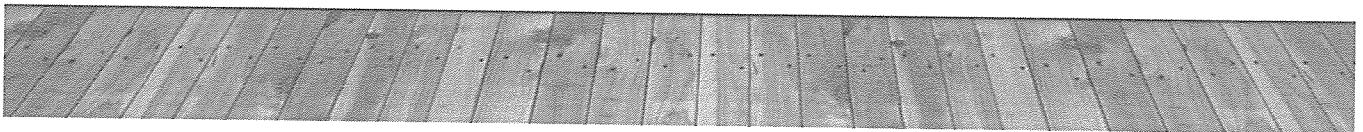
- Hypothetical: Sue makes identification, not Mary – displacement still possible – ‘knows of’ – has suggested to *herself*



# SINGLE SUSPECT IDENTIFICATION

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- Single suspect ID – from one photo or one person
- Enhances risk of displacement, especially when accompanied by factors that suggest guilt
- Examples (all real cases):
  - a. Single suspect at Police Station
  - b. Sitting in back of Police car
  - c. Presentation of single photo by Police
  - d. ID from Facebook linked to serious crimes
  - e. Dock identifications without prior identification by a witness

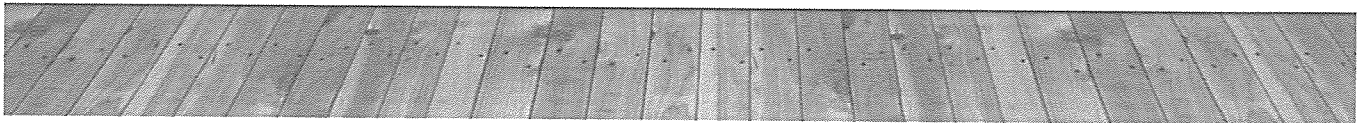


## DIFFICULTIES TESTING ID IN COURT

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- Danger of ID evidence: mistaken witnesses convinced they are right
- *R v Marshall* [2000] NSWCCA 210:

“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.”
- Cross-examination is a limited tool: witness honestly mistaken
- In part why identification evidence considered inherently unreliable (s116, 165 UEA)



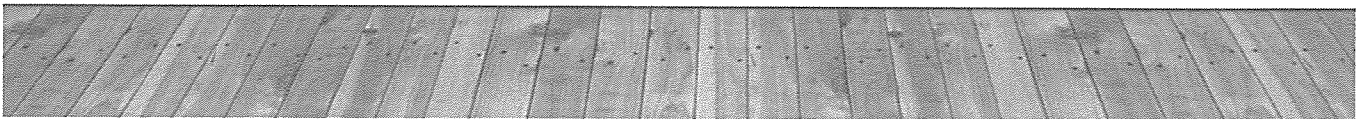
# FACEBOOK CASES

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*Strauss v Police* [2013] SASC 3 – Peek J

- ID from Facebook by complainant of assault after suggestion by two others present accused was present
- Comprehensive decision: ID excluded for insufficiency of evidence

“So called “*Facebook* identifications” have **none of the safeguards which accompany a properly executed formal identification procedure conducted by the police**. Purported *Facebook* identifications from group photographs are particularly dangerous in that they present a seductive and deceptive air of being a plausible identification but in fact rarely involve a group of people each having similar features to the accused; they suffer from “foil bias” as discussed above. [...] **The displacement effect will then later proceed to erase from the memory the subtle differences between the real offender and the person identified.**”

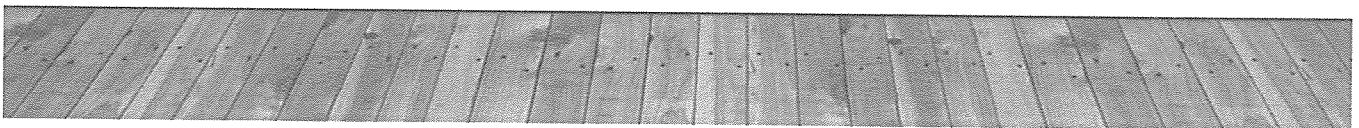


## FACEBOOK CASES CONT'D

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*R v Crawford* [2015] SASFC 112

- ID from Facebook after home invasion (offender had sunglasses on), police told victim name of suspect who looked accused up
- Appeal against admission of evidence at trial
- Majority: (despite finding probative value low): dismissed appeal, directions sufficient to cure
- Peek J: strong dissent, would have excluded under general unfairness, *Christie* or public policy



## FACEBOOK CASES CONT'D

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*Bayley v The Queen* [2016] VSCA 160

- ID from Facebook of Adrian Bayley, photo seen in circumstances linking him to Jill Meagher murder – later photo board ID, convicted of rape 12 years prior to Facebook ID
- CoA unanimously allowed appeal (**post-*IMM***)
- Found that Facebook ID of very low probative value, and:  
'...was in some respects no better than a dock identification. Indeed, it could reasonably be viewed as worse.'

