

## *Who Did You See? An Evaluation of the Criminal Justice System's Response to the Danger of Eyewitness Misidentification*

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### I INTRODUCTION

On the night of 28 July 1984, a man broke into Jennifer Thompson's apartment in North Carolina, cut off her phone lines, and raped her at knifepoint.<sup>1</sup> During her ordeal, Jennifer resolutely studied her attacker's face, determined to identify him to bring him to justice. Later, Jennifer was able to trick her attacker and escape. Her attacker also fled, and raped a second woman half a mile away.

Police worked with Jennifer to construct a composite sketch, which led to a tip about a young man named Ronald Cotton who worked at a restaurant situated close to the scene of both rapes. He had a prior criminal record, including guilty pleas to breaking and entering and, as a teenager, to sexual assault. Jennifer identified Cotton from six photographs after studying each for five minutes. The second victim also saw the photo array, but could not make a choice. Cotton was arrested on 1 August 1984 and later placed into a physical line-up. Jennifer again picked Cotton. Afterwards, she was told that he was the same person she had chosen out of the photo line-up, and that he was, in fact, the suspect. This confirmation made Jennifer sure that her initial identification had been correct. Ronald Cotton was the man who had raped her.

At Cotton's trial, the jury heard about Cotton's past convictions, an incorrect alibi, rubber from Cotton's shoe that matched fibres from one of the crime scenes, and a flashlight in his home resembling the one used by the perpetrator; but there was no definitive physical evidence to link Cotton to the crime. However, Jennifer testified convincingly in court, identifying Cotton as her assailant. The jury returned after a mere 40 minutes of deliberation with a guilty verdict on all counts. Cotton was sentenced to life imprisonment in January 1985 at the age of 22.

This initial sentence was overturned because the trial judge had not allowed evidence that the second victim had picked another man out of the line-up to be heard. Cotton was subsequently retried in 1987, but this

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<sup>1</sup> Interview with Jennifer Thompson and Ronald Cotton (Lesley Stahl, Expert Testimony, 60 Minutes, CBS News, 8 March 2009) [Expert Testimony]; "Know the Cases: Ronald Cotton" Innocence Project <[www.innocenceproject.org](http://www.innocenceproject.org)>. The facts that follow are drawn from these sources.

time for both rapes, as the second victim had changed her mind and now believed that Cotton also perpetrated the crime against her. Before the second trial, a new inmate named Bobby Poole joined Cotton at North Carolina Central Prison. He too, had been convicted of rape and Cotton was struck by how much Poole resembled the early composite sketch made by Jennifer. In fact, people in the prison often mistook Cotton and Poole for one another, and Poole allegedly admitted to another inmate that he had committed the crimes for which Cotton had been convicted. Cotton argued that Poole had been the real assailant. At trial, Jennifer did not recognise Poole at all, but was angered at the suggestion that she would not know what her rapist looked like. She was confident that it was in fact Cotton. On the strength of her testimony, Cotton was convicted again.

While serving his sentence, Cotton learnt of the new science of DNA. He wrote to his attorney and viable DNA was found in the evidence from Jennifer's rape. The result proved what Cotton had asserted all along: he was innocent, and Bobby Poole was Jennifer's rapist. Cotton was finally released on 30 June 1995. He had served ten and a half years of his sentence.

Eyewitness identifications are essential during the investigatory stage in identifying a suspect, and at the trial stage in building a case against the suspect. However, as the story of Ronald Cotton illustrates, even the most honest and confident eyewitnesses can be mistaken. To date, post-conviction DNA evidence has exonerated more than 220 people in the United States. Of these, witness misidentification played a role in 75 per cent of the cases.<sup>2</sup> However, these exonerations from DNA are likely to account for only a small percentage of the total number of wrongful convictions due to eyewitness misidentification. Conclusive biological traces that can be used for DNA testing are usually only available in sexual assault cases, and rarely for other crimes that often rely on eyewitness identification such as murders or robberies.<sup>3</sup> While no New Zealand statistics are available on this exact point, eyewitness misidentifications are accepted to be the "greatest single cause of wrongful convictions".<sup>4</sup> Even though much of our understanding is derived from overseas empirical information, the same issues are applicable and should be considered in New Zealand.<sup>5</sup>

The high rate of eyewitness misidentifications poses serious concerns for the criminal justice system, as the consequences are grave. A misidentification obviously affects the innocent party who is prosecuted; for Cotton, Jennifer's misidentification cost him ten and a half years of his life. At the same time, the real perpetrator was allowed to walk free. In fact, as Ronald Cotton was the focus of the police investigation and

2 "News and information: Eyewitness Identification Reform" Innocence Project <[www.innocenceproject.org](http://www.innocenceproject.org)>.

3 Gary Wells and Deah Quinlivan "Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later" (2009) 33 *Law & Hum Behav* 1 at 2.

4 Elizabeth Loftus "Expert testimony on the eyewitness" in Gary Wells and Elizabeth Loftus (eds) *Eyewitness Testimony: Psychological Perspectives* (Cambridge University Press, Cambridge, 1984) 273 at 282.

5 Thomas Thorp *Miscarriages of Justice* (Legal Research Foundation, Auckland, 2005) at 84 note 302.

subsequently wrongfully convicted, Bobby Poole was able to commit another rape, creating yet another victim, before he was finally caught.<sup>6</sup> Another serious concern is that cases such as Cotton's cause the public to lose faith in the ability of the criminal justice system to determine truth and facilitate justice.

In order to address these concerns, the causes of eyewitness misidentification must first be analysed. For the purposes of this article, they can be split into two categories: psychological causes and procedural causes. Part II will briefly discuss the psychological causes, which relate to the inherent imperfection of human memory. These vary from witness to witness and event to event, and are largely outside the control of the criminal justice system. Conversely, Part III will consider procedural causes, related to police interviewing and identification procedures. These may be suggestive if they do not accord with processes suggested by relevant scientific research, but are under the control of the criminal justice system. Part III will outline the identification procedures required of New Zealand police for that evidence to be admissible at trial and consider how these requirements align with practices recommended by psychological studies.

Part IV will move on to discuss the role of the courts. The courts are essential once eyewitness identification evidence is collected and submitted at a criminal trial as they can facilitate errors by admitting possibly inaccurate eyewitness identifications. Jurors place substantial weight on eyewitness evidence,<sup>7</sup> but research shows that jurors are typically unaware of factors that impact on its accuracy, and instead rely on intuitive factors that can have little correlation with accuracy.<sup>8</sup> To prevent wrongful convictions, the court system needs to offer necessary safeguards to assist the jury in assessing the reliability of eyewitness identification evidence. This Part aims to provide a brief overview of the main safeguards that are currently available in New Zealand, namely: cross-examination, judicial instructions to the jury, and the possibility of expert testimony regarding the reliability of eyewitness identifications. It will discuss the issues and concerns regarding each safeguard, as their effectiveness in actually preventing misidentifications has been questioned by both legal and psychology professionals. It will also briefly consider some of the alternative safeguards that have been proposed.

Finally, Part V will conclude with a general review of the effectiveness of New Zealand's criminal justice system in the prevention of eyewitness misidentifications.

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6 Expert Testimony, above n 1.

7 Richard Wise, Kirsten Dauphinais and Martin Safer "A Tripartite Solution to Eyewitness Error" (2007) 97 J Crim L & Criminology 807 at 812.

8 Brian Cutler and Steven Penrod *Mistaken Identification: The Eyewitness, Psychology, and the Law* (Cambridge University Press, Cambridge, 1995) at 213.

## II THE PSYCHOLOGY OF MEMORY

Eyewitness identifications are essentially about the recollection of events. Human memory is limited in the events it can capture and retain, and is vulnerable to external influence. It is necessary to outline briefly the psychological process of memory as the reliability or unreliability of eyewitness identifications depends heavily on this process. The memory process can be split into three stages: acquisition, retention and retrieval.

### Acquisition

Acquisition involves the actual perception of the event and the encoding of it in the memory system. An eyewitness can be influenced by many factors at this stage, including age, eyesight and any personal expectations.<sup>9</sup> Factors of the event itself such as the lighting, the presence of any obstacles, or the duration and number of observations being made will also impact on this initial perception.<sup>10</sup> Studies have shown a number of psychological effects relevant to eyewitness testimony that can impair memory acquisition, many of these counter-intuitive to the layperson. One example involves “cross-racial identification”, where empirical evidence suggests that people are significantly less accurate at identifying someone of a different ethnicity to themselves,<sup>11</sup> a difficulty that studies show is underestimated by juries.<sup>12</sup> Another psychological phenomenon is the effect of stress or anxiety on perceptual ability. The common misconception is that eyewitnesses who emphatically claim, “I was so frightened I could never forget his face”, are more accurate than those who were not under such stress. However, studies show that when witnesses are anxious or frightened, their perceptual abilities actually decrease significantly.<sup>13</sup> This can be illustrated by the “weapons effect”: when a weapon is involved in the crime, the witness is likely to feel fear or stress and may focus on the weapon instead of the perpetrator.<sup>14</sup>

### Retention

Retention involves the storage of memory between the initial acquisition and later recall. As memory is an active and malleable process, it is also subject to interference at this stage. Memories can change simply through

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9 Sarah Anne Mourer “Reforming Eyewitness Identification Procedures under the Fourth Amendment” (2008) 3 Duke J Const L & Pub Pol’y 49 at 56; John Rowan “Eye-witness identification” [2004] NZLJ 500 at 502.

10 Mourer, above n 9, at 56–57.

11 Frederic Woocher “Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification” (1977) 29 Stan L Rev 969 at 982.

12 Thomas Dillickrath “Expert Testimony on Eyewitness Identification: Admissibility and Alternatives” (2001) 55 U Miami L Rev 1059 at 1064.

13 Woocher, above n 11, at 979.

14 Mourer, above n 9, at 57.

the passing of time, particularly if there is a long delay between witnessing an event and the witness later being asked to identify the perpetrator. It can also be affected by other similar experiences, or by rehearsal through talking or thinking about the event.<sup>15</sup> This becomes an important concern during the investigatory stage, as research demonstrates that memory can be adversely affected if the investigation exposes the eyewitness to post-event information that can interfere with their recollections of a particular crime and the perpetrator's appearance.<sup>16</sup>

### Retrieval

Retrieval, the final stage of the memory process, is where the eyewitness recalls information about the event, often describing or identifying the perpetrator to law enforcement officers. Memory at this stage is particularly vulnerable to suggestion and can be affected by external cues such as the use of photographs or questions.<sup>17</sup> The situational pressures under which the identification evidence is given may also affect memory.<sup>18</sup> For example, during police questioning witnesses often feel a pressure to give enough information to help police identify a suspect.<sup>19</sup>

Studies have also documented a phenomenon known as the "displacement effect", where the eyewitness unconsciously associates the familiarity of an individual with the perpetrator of the witnessed crime, which results in a misidentification if this unconscious transference is erroneous. Once such a mistaken identification is made, studies show that the witness's actual memory of the perpetrator may be completely replaced with the current identified individual, meaning that they are unlikely to be able to identify the real perpetrator in the future.<sup>20</sup> Due to these concerns, the use of police processes that encourage accurate recall based on scientific knowledge is essential to preventing eyewitness misidentifications.

## III POLICE PROCESSES

Identification procedures rely solely on eyewitness memory, unlike other police investigatory techniques that can make use of physical evidence.

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15 Law Commission *Evidence: Miscellaneous Paper 13 – Total Recall? The Reliability of Witness Testimony* (NZLC MP13, 1999), at [13] [*Total Recall*].

16 David Hall, Elizabeth Loftus and James Tausignant "Postevent information and changes in recollection for a natural event" in Gary Wells and Elizabeth Loftus (eds) *Eyewitness Testimony: Psychological Perspectives* (Cambridge University Press, New York, 1984) 124 at 124–125.

17 Mourer, above n 9, at 57–58.

18 Law Commission *Total Recall*, above n 15, at [14].

19 Neil Brewer, Nathan Weber and Carolyn Semmler "Eyewitness Identification" in Neil Brewer and Kipling Williams (eds) *Psychology and Law: An Empirical Perspective* (Guilford Press, New York, 2005) 177 at 198–199.

20 Rowan, above n 9, at 501–502.

Human memory is a constructive mechanism and vulnerable to suggestion. Therefore, the procedures adopted by police while interviewing witnesses or conducting identification procedures risk modifying a witness's memory if the various sensitivities of the memory process are not kept in mind.<sup>21</sup> This contribution to eyewitness misidentifications, unlike the memory process itself, is under the control of the criminal justice system. This Part will discuss interview techniques and various identification practices available to law enforcement officers, and how those practices can facilitate the most accurate recollection based on the available scientific research on memory.

### Interviewing Techniques

During their investigations, police officers will likely interview an eyewitness for a description of the perpetrator. However, the interviewing techniques adopted can often contaminate eyewitness memory. A large part of this is through giving a witness post-event information, as the human memory incorporates information about the same event, whether it was obtained at the actual event or at a later time.<sup>22</sup> The wording of a question to the witness may also affect the witness's actual memory of the event, as well as the immediate answer.<sup>23</sup> Although a description of the perpetrator that is made without any prompting or assistance has been shown to result in the most accurate and bias-free account, this is also the method that produces the least detail.<sup>24</sup> There is often a systemic bias for officers to gather pro-prosecution evidence due to the fact that police officers work for the prosecution.<sup>25</sup> Officers may honestly believe that a particular suspect is the perpetrator, and so will often conduct interviews in a manner intended to acquire corroborating evidence. Such unsatisfactory procedures stem from a general unawareness of the factors that influence memory processes and a tendency to overestimate the accuracy of eyewitnesses.<sup>26</sup> Education of police officers in this regard may be needed to improve the interviewing techniques employed.

### Identification Procedures

After the initial interview process, police officers commonly conduct some form of identification procedure. Like interviewing techniques, many identification procedures can alter eyewitness memory if used improperly.

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21 Ibid.

22 Wise, Dauphinais and Safer, above n 7, at 844–845.

23 Woocher, above n 11, at 986.

24 David Deutscher and Heather Leonoff *Identification Evidence* (Carswell Publication, Canada, 1991) at 17.

25 Wise, Dauphinais and Safer, above n 7, at 847.

26 Ibid, at 843–844.

In New Zealand, the main methods used are live identification parades, photographic identifications and informal procedures.<sup>27</sup>

### *1 Identification Parades*

The New Zealand Court of Appeal has stated that live identification parades are “[the] standard practice police officers should follow”,<sup>28</sup> in accordance with the general judicial view on the subject.<sup>29</sup> The *Police Manual of Best Practice* echoes this view: “formal identification parades are fair and carry more evidential weight than other methods”.<sup>30</sup> Despite the traditional preference for live identification parades, they are rarely used in New Zealand. No statistics have been kept, but an informal survey of police officers conducted across the country in 1998 estimated that identification is an issue in 25 per cent of criminal cases, and identification parades are only used in 20 per cent of those cases.<sup>31</sup> It may be difficult to find appropriate volunteers to be distractors (individuals other than the suspect) in the line-up, and organising a parade can be taxing on already strained police resources. Many victims are also reluctant to confront their perpetrator again,<sup>32</sup> a problem compounded by the fact that few police stations in New Zealand have one-way screens that can lessen victim apprehension.<sup>33</sup> Suspects may also be unwilling to take part in a parade, or be advised against doing so by their solicitor, as appearance in a line-up is optional in New Zealand under s 344B of the Crimes Act 1961. New Zealand’s position is a sharp contrast to that of the United Kingdom, where an identification parade must be held whenever identity is an issue in a case. This has led to the creation of ‘Identification Suites’ that use strategies such as engaging employment agencies to find people that are paid to appear as distractors in a live parade.<sup>34</sup> The cost of this approach in both money and police time is high,<sup>35</sup> and seems to be an unrealistic procedure for New Zealand to adopt if there are effective alternatives. Instead, identification by photo array is the preferred and most prevalent form of identification used by New Zealand police.<sup>36</sup>

27 Yvette Tinsley “Identification Procedures and Options for Reform” (2000) 31 VUWLR 117 at 117.

28 *R v Hristov* (1985) 8 CRNZ 158 (CA) at 163.

29 See also *R v Tamihere* [1991] 1 NZLR 195 (CA) at 197 per Cooke P: “The desirability of a properly conducted identification parade has been repeatedly stressed.”

30 Tinsley, above n 27, at 119 note 4.

31 Law Commission *Total Recall*, above n 15, at [84].

32 Tinsley, above n 27, at 122.

33 *Ibid.* Tinsley carried out a qualitative research of the police stations in Dunedin, Christchurch, Wellington and Auckland and found that only two police stations in these main New Zealand centres were equipped with a one-way screen.

34 *Ibid.*, at 121–122.

35 *Ibid.*, at 122.

36 *Ibid.*

## 2 Photo Arrays

This procedure was traditionally reserved for investigation when the suspect's identity was unknown or in circumstances where a live identification parade could not be organised, comparable to the current practice in the United Kingdom. However, creating a photo array is faster and requires fewer resources than creating a live parade, and, as mentioned previously, eyewitnesses often prefer to make their identification from photographs rather than risk the possibility of facing their perpetrator again.<sup>37</sup>

Some scientific research suggests that using live identification parades would produce the most accurate identifications due to the fact that this procedure provides the witness with information about the individual's body such as height and weight that a static photographic alternative would not.<sup>38</sup> However, a meta-analysis of experimental data on the subject showed that the variance in accuracy between different mediums such as live versus photographic line-ups was, on average, insignificant. Based on this finding, the study concluded that there is no reason to prefer or attribute more evidential weight to live parades over photographic arrays.<sup>39</sup> This same view was taken by the New Zealand Law Commission report on the reform of evidence law.<sup>40</sup>

## 3 Informal Procedures

Informal processes such as show-ups, where only one individual or photo is given to the eyewitness for identification<sup>41</sup> are sometimes used when the suspect refuses to participate in a formal procedure, or it is impossible to arrange one.<sup>42</sup> This may be the case if the suspect has a very distinctive feature for which it is hard to find distractors.<sup>43</sup> These methods are clearly not ideal, and research indicates that formal procedures with standard guidelines will likely provide a much more reliable identification.<sup>44</sup> This concern is reflected in the Evidence Act 2006.

### **The New Zealand Approach: Section 45 of the Evidence Act 2006**

Section 45 of the Evidence Act 2006 details the procedure to be followed in order for visual identification evidence to be admissible.<sup>45</sup>

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37 Ibid, at 122–124.

38 Law Commission *Total Recall*, above n 15, at [85] and [86].

39 Ibid, at [87].

40 Law Commission *Evidence: Report 55 – Volume 1: Reform of the Law* (NZLC R55 – Volume 1, 1999) at [201] [*Reform of the Law*].

41 Gary Wells "Eyewitness Identification: Systemic Reforms" [2006] *Wis L Rev* 615 at 628.

42 Tinsley, above n 27, at 118.

43 Ibid.

44 Law Commission *Reform of the Law*, above n 40, at [201].

45 Evidence Act 2006, s 45 (emphasis added). This section has been quoted in part.



#### 45 Admissibility of visual identification evidence

- (1) If a formal procedure is followed by officers of an enforcement agency in obtaining visual identification evidence of a person alleged to have committed an offence or there was a good reason for not following a formal procedure, that evidence is admissible in a criminal proceeding unless the defendant proves on the balance of probabilities that the evidence is unreliable.
- (2) If a formal procedure is not followed by officers of an enforcement agency in obtaining visual identification evidence of a person alleged to have committed an offence and there was no good reason for not following a formal procedure, that evidence is inadmissible in a criminal proceeding unless the prosecution proves beyond reasonable doubt that the circumstances in which the identification was made have produced a reliable identification.
- (3) For the purposes of this section, a *formal procedure* is a procedure for obtaining visual identification evidence —  

[List of characteristics that are required for a formal procedure.]
- (4) The circumstances referred to in the following paragraphs are *good reasons* for not following a formal procedure:

[List of characteristics that would constitute a good reason for not following formal procedure.]

This section aims to minimise mistaken identifications by encouraging the use of reliable police identification methods. Whether these procedures outlined in s 45 are supported by empirical research, amongst other issues in need of further consideration, must be examined.

#### *1 No Preference for Medium Used in Identification Procedures*

Section 45 reflects the view taken by the Law Commission and shows no preference for the use of a particular medium for identification procedures. Instead, s 45 only requires that a “formal procedure” — one shown by research to result in the most accurate identification<sup>46</sup> — be followed unless there is a good reason for not doing so. The Law Commission stated that the formal procedure required by s 45 for “obtaining identification evidence [is] applicable to all types of visual identification: live parades, photo montages, [and] sequential video images”.<sup>47</sup> Details of what constitutes a

<sup>46</sup> Law Commission *Reform of the Law*, above n 40, at [201].

<sup>47</sup> *Ibid.*, at [205].

formal procedure and what amounts to a good reason for not following a formal procedure are listed in s 45(3) and s 45(4), respectively.

## 2 *Emphasis on Reliability*

Several factors in s 45 reflect its general concern with reliability,<sup>48</sup> recognising the very real dangers of imperfect memory. The list of ‘good reasons’ for not following a formal procedure is exhaustive, a policy consideration suggested by the Law Commission, as a ‘good reason’ shifts the burden of proof onto the defendant.<sup>49</sup> Under s 45(2), if a formal procedure was not followed and there was no good reason for doing so, then the onus rests with the prosecution to prove beyond reasonable doubt that the identification evidence is nevertheless reliable.<sup>50</sup> Commentators in the United States have argued for such a change in the burden of proof, as currently the burden in the United States rests with the defence to show unreliability in order to keep out the identification evidence.<sup>51</sup> This change will likely encourage police officers to be aware of and refrain from using suggestive procedures,<sup>52</sup> and is a positive step in improving the accuracy of identification evidence at trial.

## 3 *Functional Size of Identification Procedures*

Identification parades are essentially multiple-choice questions. One of the concerns is that the functional size of the identification, live or photographic, should be high enough to combat chance identifications. This means that it is the number of plausible choices within the line-up that is important, not the total number of distractors.<sup>53</sup> The Evidence Act 2006 asks for no fewer than seven,<sup>54</sup> and to be truly effective, each of the distractors should be a conceivable choice for the eyewitness. Research generally suggests that it is much better to match distractors to the witness’s initial description of the perpetrator instead of matching to the suspect, as this ensures that all the distractors are plausible choices for the witness based on what he or she has described.<sup>55</sup> Contrary to this, the New Zealand police compile distractors that resemble the suspect’s appearance.<sup>56</sup> The effect of this may decrease the functional size of the line-up, meaning that the number of plausible choices for the eyewitness is smaller than the total makeup of the identification parade.

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48 *Ibid*, at [190].

49 *Ibid*, at [211].

50 Evidence Act 2006, s 45(2).

51 Wells and Quinlivan, above n 3, at 20.

52 *Ibid*.

53 Hall, Loftus and Tousignant, above n 16, at 127–128.

54 Evidence Act 2006, s 45(3)(b).

55 Law Commission *Total Recall*, above n 15, at [88]–[91]; Deutscher and Leonoff, above n 24, at 28–29.

56 Law Commission *Total Recall*, above n 15, at [82].

#### 4 Use of Warnings

The Evidence Act 2006 also requires that the eyewitness be warned that the suspect may not be in the identification procedure.<sup>57</sup> This is due to the demonstrated effect of witnesses feeling pressured to make an identification during a line-up rather than admitting that they are unsure. They do not want to disappoint the police officer or to fail at what they perceive to be their job — that is, to identify the suspect — and subsequently appear foolish.<sup>58</sup> The danger of this pressure is illustrated by studies that demonstrate the tendency of a witness to make a relative choice if the line-up does not contain the actual culprit. The eyewitness will instead choose the (innocent) person that most resembles the perpetrator, and may honestly believe that he or she is the actual culprit.<sup>59</sup> Once a mistaken identification is made, it is almost impossible to correct.<sup>60</sup> Although it seems logical that a witness would know that an identification parade most likely included the suspect, as they would not have been called to perform an identification otherwise, research shows that when a witness is given this direction, they are much less likely to feel pressured to make an identification.<sup>61</sup>

#### 5 Presence of Investigating Officer During Identification Procedure

There have also been suggestions by commentators that the investigating officer should not be present at an identification parade. This is because studies have pointed to the possibility that the officer may unintentionally offer non-verbal cues about the identity of the suspect, through behaviours such as nodding or smiling.<sup>62</sup> The Evidence Act 2006 does require that no indication be given to the eyewitness about who the suspect is,<sup>63</sup> but this only prevents conscious actions by the officer present. Nevertheless, the Law Commission concluded that to exclude the investigating officer from the procedure would be impractical as security concerns require the officer present to know who the actual suspect is.<sup>64</sup>

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57 Evidence Act 2006, s 45(3)(d).

58 Mourer, above n 9, at 58–59. Jennifer Thompson reported that during the identification procedures she felt like she was sitting a test. She was never informed that the real perpetrator may not be in the line-up.

59 Wells, above n 41, at 618–620. This effect was demonstrated by Jennifer in the Cotton case. She knew that the suspect was in the line-up, and since her real assailant was absent, she chose the person who looked most like him: Ronald Cotton.

60 Wise, Dauphinais and Safer, above n 7, at 852. The witness's original memory is replaced with the positive identification made. In the case of Cotton, Jennifer did not recognise Bobby Poole as her real assailant even when she saw him later because her memory of the perpetrator had been replaced by Cotton.

61 Law Commission *Reform of the Law*, above n 40, at [207].

62 *Ibid.*, at [206].

63 Evidence Act 2006, s 45(3)(c).

64 Law Commission *Reform of the Law*, above n 40, at [206].

## 6 Use of Mugshots in Photo Arrays

Photographic identification procedures in New Zealand now use the computerised “photographic identification system” whereby the Police National Headquarters keeps a library of all prisoner photos and responds to police requests for a photo array of people who resemble their suspect.<sup>65</sup> However, the use of mugshots in photographic identification arrays has been questioned. This is an area where a live line-up may have an advantage, as the use of mugshots can suggest to the witness that the suspect already has a criminal record.<sup>66</sup> It may also make it difficult for defence counsel to challenge the identification at trial since disputing the identification process will risk revealing the use of mugshots to the jury. This can unnecessarily prejudice the jury against the defendant, as evidence of prior convictions of the defendant is *prima facie* inadmissible.<sup>67</sup>

## 7 Additional Recommendations for Reform

New Zealand police officers use the simultaneous method to present identification procedures, where the eyewitness is shown all the photos or members of the live parade at the same time.<sup>68</sup> An alternative method is the sequential line-up, where the witness is shown alternatives one at a time and asked whether each individual or photograph is the perpetrator. Commentators have suggested that this method should be used instead, as research comparing the two procedures has shown that the sequential procedure results in fewer misidentifications.<sup>69</sup> Although the Law Commission considered the supporting empirical evidence, it concluded that it would be “premature” to recommend sequential procedures as “police who do not or cannot ensure investigator impartiality may create more problems in sequential than simultaneous procedures”.<sup>70</sup> To delay this recommendation because another aspect may be problematic could be too cautious an approach. This is an issue that should be revisited if empirical evidence continues to support the implementation of sequential procedures.

Another suggested reform is the videotaping of identification procedures, which ensures that an accurate and complete record is subsequently available at trial for the fact-finder to assess the fairness of the procedure.<sup>71</sup> Commentators have also recommended that the

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65 Law Commission *Total Recall*, above n 15, at [82]. The photographs contain both front and side profiles of head and shoulders.

66 Tinsley, above n 27, at 123.

67 See generally Evidence Act 2006, ss 37–38 and ss 41–43. Evidence of prior convictions usually needs to satisfy these veracity or propensity rules in order to be admissible.

68 Law Commission *Total Recall*, above n 15, at [97].

69 Wells, above n 41, at 625–626.

70 Law Commission *Total Recall*, above n 15, at [101].

71 Wise, Dauphinais and Safer, above n 7, at 863–864.

level of confidence felt by an eyewitness should be recorded at the time of the identification. This aims to obtain an accurate indication before the eyewitness learns the result of the identification, as confidence can inflate substantially if positive feedback is received. An accurate record is essential as eyewitness confidence tends to be a determining factor in the jury's view on the credibility of that evidence, even though research shows only a small correlation between confidence and accuracy.<sup>72</sup>

### 8 *The Judge as a Gatekeeper in Assessing Police Procedures*

While s 45 encourages reliable procedures to be adopted by the police in obtaining identifications, it also relies on the judge as a gatekeeper to keep out unreliable identification evidence made in the absence of a formal procedure or a good reason not to follow one.<sup>73</sup> However, for this to be effective, judges must be aware of the factors that the reliability of eyewitness testimony turns on, and this is not always the case. An illustration of this point is the Court of Appeal case of *R v Tamihere*,<sup>74</sup> where the defendant was accused of the murder of two tourists in a remote bush area, and two eyewitnesses had allegedly met a man in the presence of one of the tourists at a bush clearing prior to the murders. Police officers did not hold a live identification parade, and neither of the eyewitnesses could identify the accused from a photo montage. Instead, a positive identification was made when one of the eyewitnesses was shown a single photograph of the accused against a bush background, attached to a police folder containing other mugshots of the accused. Cooke P (as he then was) recognised that showing the eyewitness a single photograph in this manner was clearly suggestive of the fact that the person depicted was the suspect, and may well have created a displacement effect where “[a] mere general resemblance may then convince the witness of the correctness of his or her identification”.<sup>75</sup> However, despite identifying this problem with memory and the suspect nature of identification from a single photograph, Cooke P nevertheless ruled the evidence admissible due to the fact that since the eyewitnesses in this case were confident and detailed, their identification was likely to be reliable.<sup>76</sup> While this case was decided prior to the enactment of the Evidence Act 2006, it highlights the fact that judicial ability to recognise the true predictors of eyewitness accuracy is sometimes questionable; and, consequently, so is leaving the assessment of the reliability of identification evidence to the judge.

Police interviews and identification procedures should be carried out in the fairest and most reliable way possible as “irregular identification

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72 Wells, above n 41, at 620–622 and 631. In the Ronald Cotton case, Jennifer reported that the positive feedback she received after she picked Cotton out of the line-ups made her feel sure that Cotton was her assailant.

73 Evidence Act 2006, s 45.

74 *R v Tamihere*, above n 29, at 195.

75 *Ibid.*, at 197.

76 *Ibid.*, at 202; see also the critique of *R v Tamihere* in Rowan, above n 9, at 502–503.

techniques by the police can jeopardise the course of justice”.<sup>77</sup> Following a formal procedure and educating officers to be aware of possible suggestive techniques can reduce the potential for misidentifications from faulty police processes. However, even if police processes are perfect, an identification made using formal procedures may nevertheless be mistaken. This is due to the fact that eyewitness error can never be eliminated completely because of the inherent susceptibility of memory itself. The next — and last — line of defence against wrongful convictions from misidentifications is the court system at trial.

#### IV AT TRIAL: THE LEGAL FRAMEWORK

Eyewitness error is largely attributable to the inherent imperfections of human memory and its vulnerability to suggestion from secondary sources, including improper police interviewing techniques and identification procedures. It is almost inevitable that some identification evidence submitted at trial will be inaccurate. However, many juries and even judges are not aware of the causes of eyewitness error, and consequently place undue confidence in the reliability of identification evidence.<sup>78</sup> Therefore, it is important to consider what safeguards are available at trial to prevent eyewitness misidentifications once evidence is introduced, and whether they are sufficient. This section will discuss the three main possible safeguards in New Zealand: cross-examination, jury instructions and expert testimony on the psychology of memory.

##### Cross-examination

Cross-examination is a cornerstone of our adversarial legal system that has been described as “the greatest legal engine ever invented for the discovery of truth”.<sup>79</sup> It is the safeguard most frequently employed by defence counsel and is characteristic of virtually every single trial where identification evidence is offered.<sup>80</sup> Although commonly perceived to be an effective safeguard against misidentifications, numerous weaknesses have been recognised with this technique in relation to the specific difficulties of eyewitness identification evidence.<sup>81</sup>

One important objective of cross-examination is to elicit facts that the witness knows, but has not revealed. This is a problem in identification cases as many misidentifications arise from the inadequacies of human

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77 *R v Tamihere*, above n 29, at 203.

78 *Wise, Dauphinas and Safer*, above n 7, at 830.

79 *California v Green* 399 US 149 (1970) at 158 note 11.

80 *Cutler and Penrod*, above n 8, at 143.

81 *Wise, Dauphinas and Safer*, above n 7, at 828.

memory, of which the average eyewitness would not be aware. The witness may be mistaken but honestly and completely confident that he or she is correct. No amount of cross-examination, however skilful, will be able to elicit what the witness does not subjectively appreciate.<sup>82</sup>

Cross-examination is also typically used to test the credibility or demeanour of a witness. Eyewitnesses offering sincere but mistaken identification evidence cannot readily be assessed from credibility or demeanour. Furthermore, as eyewitnesses are often the victims of a crime, a defence counsel who attacks the credibility of an eyewitness will almost definitely increase the jury's sympathy for that witness.<sup>83</sup>

This means that cross-examination is somewhat limited to questioning factors around police procedure or viewing conditions of the witnessed event. Questions in this manner can still be useful if they are able to raise issues like delay between the event and the subsequent identification, the level of certainty the witness felt at the initial identification procedure, or characteristics of the event itself such as lighting or length of the encounter.<sup>84</sup> However, in order to do this, counsel need adequate opportunity to find out information about these different events, which is largely dependent on the quality of second-hand information from police officers or eyewitnesses.<sup>85</sup> Even if accurate information is readily available, counsel need to be informed of the various factors that can affect the accuracy of eyewitness identification to enable them to ask effective questions on cross-examination. Unfortunately, like numerous police officers, many defence lawyers are not knowledgeable about these factors. This means that counsel normally focus on finding holes or inconsistencies in the witness's testimony rather than the factors that actually influence memory.<sup>86</sup>

Furthermore, effective cross-examination requires the fact-finder to be able to know what to do with the information obtained from the questioning. However, many juries and even judges (as mentioned in the discussion of *R v Tamihere* above) do not have adequate knowledge of what influences eyewitness accuracy.<sup>87</sup> Even if defence counsel were, for example, able to elicit information about a high level of stress felt during the event, if the jury were unaware of the effects of such stress on perceptual accuracy, then such cross-examination would be pointless. The same is true for factors such as the cross-racial effect or the weapons effect. Combating these cannot be done through cross-examination alone as juries require additional information in order to understand the implications of these effects.<sup>88</sup>

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82 Woocher, above n 11, at 994–995.

83 Dillickrath, above n 12, at 1095.

84 Ibid, at 1095–1096.

85 Cutler and Penrod, above n 8, at 144–146.

86 Ibid, at 144.

87 Wise, Dauphinas and Safer, above n 7, at 830.

88 Dillickrath, above n 12, at 1096.

Cross-examination can raise issues of suggestibility in police procedure or with the conditions of the witnessed event. However, it is limited in its ability to bring to the jury's attention factors that influence eyewitness accuracy — specifically, psychological factors relating to memory of which laypersons are typically unaware. Counsel cannot offer scientific evidence to educate the jury about the psychology surrounding identifications,<sup>89</sup> so while skilled cross-examination can reveal certain weaknesses in a particular case, it is usually insufficient to provide the jury with enough information to understand the true significance of those weaknesses.<sup>90</sup> In the words of one commentator, “[f]or even the most skilled lawyer, cross-examination by itself is probably insufficient to attack the problems of eyewitness misidentification”.<sup>91</sup>

### Jury Instructions

Given the concerns about the ability of cross-examination alone to safeguard against honestly mistaken eyewitness testimony, the criminal justice system has relatively recently adopted the use of judicial warnings as an additional protection against misidentification.

The development of jury instructions relating to identification evidence in New Zealand follows that of the United Kingdom. In the wake of two wrongful convictions based wholly on identification evidence,<sup>92</sup> Lord Devlin chaired a small committee to review the law of identification evidence and make recommendations if necessary. The “Devlin Report”, published in 1976, evaluated the issues and concluded that:<sup>93</sup>

The possibility of a mistake in visual identification is sufficiently high to mean that as a rule of evidence visual identification standing by itself should not be allowed to raise the level of probability of guilt up to the standard of reasonable certainty that is required by the criminal law.

The Devlin Committee recognised that identification evidence is usually very persuasive to the jury,<sup>94</sup> but its often doubtful accuracy means that a conviction based solely on this evidence raises serious concerns. The

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<sup>89</sup> Only qualified experts can offer this sort of opinion evidence; this will be discussed further below.

<sup>90</sup> Lisa Dufraimont “Regulating Unreliable Evidence: Can Evidence Rules Guide Juries and Prevent Wrongful Convictions?” (2008) 33 Queen’s LJ 261 at 287.

<sup>91</sup> Dillickrath, above n 12, at 1096.

<sup>92</sup> See Deutscher and Leonoff, above n 24, at 1. Both these cases involved honestly mistaken eyewitnesses who identified the defendants as the perpetrators, and were convicted despite the fact that they both offered contrary alibi evidence. A discussion of these cases, involving defendants named Dougherty and Virag, can be found in *Devlin Report*, below n 93.

<sup>93</sup> Deutscher and Leonoff, above n 24, at 47 note 10. The report’s details are as follows: Patrick Devlin *Report to the Secretary of State for the Home Department of Departmental Committee on Evidence of Identification in Criminal Cases* (London: HMSO, 1976) at [4.54] [*Devlin Report*].

<sup>94</sup> *Ibid*, at 1. *Devlin Report*, above n 93, reported that in 178 out of the 347 cases reviewed, the prosecution’s case depended solely on identification evidence. Out of 347 cases, 74 per cent were convicted.



Committee recommended that a judicial warning to juries should be given about the danger of making a conviction based solely on eyewitness identification evidence.<sup>95</sup> This included warning the jury that although a mistaken eyewitness may appear extremely convincing, without supporting evidence for the accused's guilt or other "exceptional circumstances" the jury should return with a 'not guilty' verdict.<sup>96</sup>

No legislation was enacted in the United Kingdom according to the recommendations of the Devlin Report, but the English Court of Appeal set out the first detailed response in its landmark case of *R v Turnbull*.<sup>97</sup> The Court agreed that misidentifications were likely to result in a miscarriage of justice, and endeavoured to follow the recommendations of the Devlin Report in setting out an identification warning.<sup>98</sup> It held that a comprehensive warning should be given to the jury of the additional need for caution when a case depends largely on identification evidence, as witnesses may be sincere but mistaken. The warning should include a direction to consider the circumstances surrounding the witnessed event, such as the length of time for which the witness observed the perpetrator and whether it was a clear view, as well as whether there was a difference between the appearance of the defendant and the witness's initial description given to the police. In addition, the judge should direct the jury to any specific weaknesses in the particular case, such as the fact that identification of a stranger may be more difficult than that of someone the witness already knows.<sup>99</sup> However, the Court did not adopt the Devlin Committee's recommendation to mention "exceptional circumstances" as they were of the view that this would likely lead to categorisations of what constitutes an exceptional circumstance, when it is the quality of the identification evidence in each particular case that should be the focus.<sup>100</sup>

Following the English developments, the New Zealand Criminal Law Reform Committee also explored the problem of eyewitness misidentifications and produced a "Report on Identification" in 1978 with similar recommendations.<sup>101</sup> As a result of these recommendations, ss 334B–334D regarding various aspects of identification evidence were inserted into the Crimes Act 1961.<sup>102</sup> These sections generally reflected the directions of *R v Turnbull*, which has also been followed by the New Zealand courts.<sup>103</sup> Section 334D (now repealed) contained a statutory requirement that the jury be warned when the primary evidence in a case is

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95 Ibid, at 48.

96 Ibid. See *Devlin Report*, above n 93, at [4.83]. "Exceptional circumstance" was not defined, but included examples like situations where the witness knew the perpetrator: at [4.62].

97 *R v Turnbull* [1977] QB 224 (CA).

98 Ibid, at 231.

99 Ibid, at 228–229.

100 Ibid, at 231.

101 See "Adams on Criminal Law: Evidence — Evidence in Criminal Cases" Brookers Online [ED 7.03].

102 Inserted by the Crimes Amendment Act 1982, s 2.

103 See also *R v O'Carroll* (1991) 8 CRNZ 187 (CA) at 191 per Cooke P: "... *Turnbull* has been followed in general terms by the New Zealand Courts and is in effect incorporated by the New Zealand statute".

identification evidence. An equivalent requirement in summary proceedings for the judge to exercise caution when relying on identification evidence was enacted in the same year, namely s 67A of the Summary Proceedings Act 1957.<sup>104</sup> Legislative bodies in other common law jurisdictions had generally left these various recommendations regarding identification evidence to the judiciary, meaning that New Zealand's statutory reform was a "notable exception".<sup>105</sup>

While the availability of jury instructions was an attempt to address some of the deficiencies of having only cross-examination as a safeguard, the efficacy of those instructions has been a source of debate. One of the concerns that has been raised is that while judicial instructions can point to a few factors affecting eyewitness accuracy, they do not explain to the jury how these factors affect memory or how significant its effects can be. There are also many factors that impact on identifications which are unlikely to be dealt with under general jury instructions, such as the weapons focus or cross-racial effect, or specific features of suggestive procedure.<sup>106</sup>

Many of these concerns about jury instructions are taken from the United States, where research into eyewitness evidence is abundant. Jury instructions in the United States take the form of those set out in *United States v Telfaire*.<sup>107</sup> The relevant factors listed in that case were not identified by psychological research, but rather by legal precedents such as the traditional concern with eyewitness confidence.<sup>108</sup> Consequently, the case mentioned problematic police procedures, but failed to recognise many psychological factors empirically shown to affect eyewitness accuracy.<sup>109</sup> Commentators in the United States have argued for jury instructions that are tailored to the circumstances of a particular case, including instructions on the presence of psychological factors as well as suggestive procedures that may impact the accuracy of eyewitness identifications.<sup>110</sup> Again, the legislature in New Zealand seems to have kept the danger of identification evidence under consideration, and the new section in our Evidence Act 2006 is much closer to the position that these commentators recommend than the law in the United States itself.

The Evidence Act 2006 contains the requirement for a judicial warning in s 126, which replaces s 344D of the Crimes Act 1961:<sup>111</sup>

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104 Inserted by the Summary Proceedings Amendment Act 1982, s 2.

105 Deutscher and Leonoff, above n 24, at 49 note 18.

106 Cutler and Penrod, above n 8, at 256–257.

107 *United States v Telfaire* 469 F Supp 2d 522 (CA DC 1972) at 558–559.

108 Wells and Quinlivan, above n 3, at 20–21.

109 Cutler and Penrod, above n 8, at 256–257.

110 Wells and Quinlivan, above n 3, at 20–21.

111 Section 344D was repealed by s 215 of the Evidence Act 2006 from 1 August 2007.

## 126 Judicial warnings about identification evidence

- (1) In a criminal proceeding tried with a jury in which the case against the defendant depends wholly or substantially on the correctness of 1 or more visual or voice identifications of the defendant or any other person, the Judge must warn the jury of the special need for caution before finding the defendant guilty in reliance on the correctness of any such identification.
- (2) The warning need not be in any particular words but must—
  - (a) warn the jury that a mistaken identification can result in a serious miscarriage of justice; and
  - (b) alert the jury to the possibility that a mistaken witness may be convincing; and
  - (c) where there is more than 1 identification witness, refer to the possibility that all of them may be mistaken.

This new s 126 is a re-enactment of sorts of the former s 344D, and still contains a very general warning. The Law Commission decided to maintain the relatively short and simple direction already in place, but with the very important opportunity for the trial judge to tailor it to the facts of a particular case.<sup>112</sup> Like its predecessor, s 126 only requires the judge to give a warning if the case against the defendant depends substantially on the identification evidence offered.<sup>113</sup> A few changes were introduced by s 126, including its inclusion of voice identification evidence, and its applicability to any witness, not just the defendant. The change that is most relevant for the purpose of this article is s 126(2)(a). Where the old s 344D<sup>114</sup> only required “the reason for the warning”, s 126(2)(a) now requires that the judicial warning go a step further and specifically outline that a misidentification can result in a “serious miscarriage of justice”.

The Court of Appeal in the recent case of *R v Turaki*<sup>115</sup> recognised that the warning required under s 126 must be tailored appropriately to the particular case, and “should include, as appropriate, directions beyond those prescribed by s126(2)”.<sup>116</sup> The Court stated that the direction could be tailored in a number of ways, including:<sup>117</sup>

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112 Law Commission *Reform of the Law*, above n 40, at [216]–[217].

113 See also *R v Allatson* [2009] NZCA 205 at [48]–[49]. The Court was of the view that since Parliament determined the circumstances where a warning is applicable, “there [was] no reason to impose any additional requirements on trial judges in that regard”.

114 Crimes Act 1961.

115 *R v Turaki* [2009] NZCA 310.

116 *Ibid.*, at [90].

117 *Ibid.*

- (a) The ways in which events surrounding the witness's observation of the defendant may have influenced the quality of the identification evidence (e.g., time of observation, lighting, distance of witness from offender, weather conditions, the stress inherent in the situation, whether violence was used, or whether a weapon was involved);
- (b) The ways in which any factors particular to the individual witness may have influenced the quality of the identification evidence (e.g., poor eyesight or hearing, or bias);
- (c) The fact that, if the witness and defendant are of a different race/ethnicity, the identification may be less reliable; [and]
- (d) The greater the period of time between the sighting and the identification, the greater the likely deterioration of memory[.]

These factors are taken from a fuller list of matters that a judge may consider. That list was detailed in the Law Commission's commentary to the Evidence Code,<sup>118</sup> which identified psychological concerns about eyewitness identification. Such warnings allow the judge to explain specifically relevant memory effects to the jury, such as the cross-racial effect. The Court also stressed that whenever a case depends substantially on identification evidence, even if the evidence is of a very high quality, a full s 126 warning must be given.<sup>119</sup> To fail to give a full warning "[would] constitute an error of law".<sup>120</sup>

However, there are other concerns with jury instructions that the flexibility of s 126 cannot address. One is that judicial warnings come at too late a stage to be truly helpful to the jury. They are given at the conclusion of a trial, by which stage jurors may have already made their decisions as to the defendant's guilt from previous evidence, and these decisions can be difficult to change. In addition, judicial directions about eyewitness identification are given together with the much longer overall instruction about the jury's task and the relevant legal principles of the case. These concepts can be complex and presented in language largely unfamiliar to the average juror. Consequently, the few paragraphs about identification evidence within the overall instructions may not be sufficient to guarantee that the jury will afford the identification evidence the careful consideration that it needs.<sup>121</sup> Empirical studies have demonstrated that in mock jury trials where the only evidence against the defendant was that of identification evidence, participants who were given judicial warnings did not show any significant sensitivity to factors that affect eyewitness identifications. This is consistent with general research findings that show jurors can have difficulties understanding judicial directions that are

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118 Law Commission *Evidence: Report 55 – Volume 2: Code and Commentary* (NZLC R55 – Volume 2, 1999) at [C398].

119 *R v Turaki*, above 115, at [87]–[88].

120 *Ibid*, at [87].

121 *Woocher*, above n 11, at 1005.

contrary to their prior knowledge or beliefs, as many factors that affect eyewitness accuracy will be.<sup>122</sup>

Due to the limitations of cross-examination and jury instructions, some commentators have advocated the need for expert testimony on the psychology of memory as an additional safeguard.

### **Expert Testimony**

Unlike cross-examination or jury directions, allowing qualified experts to testify would provide more adequate explanation to the jury of the cognition behind factors that can influence eyewitness identifications.<sup>123</sup> Despite this fact, however, there are a number of concerns with the admissibility of such expert testimony. Much of this debate has also occurred in the United States where the courts have adopted inconsistent views.<sup>124</sup> A survey of these varied concerns and approaches in detail is beyond the scope of this article. Instead, this section will discuss the admissibility of such expert evidence in New Zealand, as well as some possible differing judicial responses to its admissibility with reference to examples from the United States.

In New Zealand, the admissibility of expert testimony is governed by s 25 of the Evidence Act 2006:

#### **25 Admissibility of Expert Opinion Evidence**

- (1) An opinion by an expert that is part of expert evidence offered in a proceeding is admissible if the fact-finder is likely to obtain substantial help from the opinion in understanding other evidence in the proceeding or in ascertaining any fact that is of consequence to the determination of the proceeding.
- (2) An opinion by an expert is not inadmissible simply because it is about—
  - (a) an ultimate issue to be determined in a proceeding; or
  - (b) a matter of common knowledge.
- (3) If an opinion by an expert is based on a fact that is outside the general body of knowledge that makes up the expertise of the expert, the opinion may be relied on by the fact-finder only if that fact is or will be proved or judicially noticed in the proceeding.

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122 Wise, Dauphinais and Safer, above n 7, at 830–832.

123 Edward Stein “The admissibility of expert testimony about cognitive science research on eyewitness identification” (2003) 2 L, P & R 295 at 297.

124 Dillickrath, above n 12, at 1060–1061.

An expert is “a person who has specialised knowledge or skill”,<sup>125</sup> and a qualified psychologist would clearly fall within this definition. Section 25(1) requires that the expert’s testimony be of “substantial help” in assisting the jury to understand other evidence in the proceeding, namely the identification evidence of the eyewitness. The expert should base his or her testimony on empirical evidence, so complying with s 25(3)’s legitimate body of knowledge requirement should not be problematic.

Traditional arguments against the admissibility of such expert evidence were that judging the accuracy of an identification testimony is within the common knowledge of the jury. However, psychological research has shown that many of the common beliefs around eyewitness factors are, in fact, incorrect.<sup>126</sup> Another concern was that expert psychological evidence treaded too closely to the ultimate issue, as it should be the jury’s role to determine the credibility of the eyewitness evidence.<sup>127</sup> Even if the expert limits his or her testimony to the implications of empirical research, the jury may attribute too much weight to the expert and infer that all identification evidence is suspect.<sup>128</sup> However, these two concerns are no longer an absolute bar to the admissibility of such evidence in New Zealand by virtue of s 25(2) of the Evidence Act 2006.

Expert psychological evidence of this kind has the potential to be admitted under s 25, but there have not been any New Zealand cases to date that have put this argument forward.<sup>129</sup> Many cases in the United States however, have involved arguments for the admissibility of such expert testimony. These examples serve as an appropriate illustration of some of the differing legal perspectives for and against its admissibility, particularly as the United States has similar evidence rules regarding expert testimony.<sup>130</sup>

The United States courts have adopted inconsistent views regarding its admissibility, but generally this type of expert evidence is excluded.<sup>131</sup> A small number of United States federal and state courts have expressly adopted an exclusionary rule regarding expert evidence on the reliability of eyewitness identification.<sup>132</sup> Reasons for this include arguments that the determination of such reliability is within the experience of the jury (although this has been contested by psychological research), and

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125 Evidence Act 2006, s 4.

126 Woocher, above n 11, at 1016–1017.

127 *Ibid*, at 1018–1020.

128 *Ibid*, at 1027.

129 Based on a careful search by this author of both reported and unreported New Zealand cases on the Brookers Online database <[www.brookersonline.co.nz](http://www.brookersonline.co.nz)>.

130 See the United States Federal Rules of Evidence, Rule 702: “If scientific, technical, or other specialised knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” It is comparable to s 25 of the Evidence Act 2006’s “substantial help” test.

131 Dillickrath, above n 12, at 1099.

132 *Ibid*, at 1068–1072. Oregon, Nebraska, Louisiana, Tennessee and Kansas are the state courts that have most explicitly prohibited expert testimony on the reliability of eyewitness testimony.

that allowing expert evidence would be usurping the role of the jury by effectively instructing them on how to evaluate such evidence.<sup>133</sup> As mentioned above, these arguments alone will not necessarily bar expert evidence from being admissible in New Zealand under s 25 of the Evidence Act 2006, but the closer that expert evidence approaches the realms of common knowledge or the ultimate issue, the less “substantial help” it may provide for the jury.

In direct contrast, an even smaller number of courts have taken the view that all expert testimony on eyewitness reliability should be admitted unless it does not add anything at all to the ordinary knowledge of the jury.<sup>134</sup> The reasoning is that to do otherwise in a case where a material issue is identification of the perpetrator would deprive the jury of “information that could have assisted them in resolving that crucial issue”.<sup>135</sup>

The majority of the courts in the United States apply some sort of discretionary rule in allowing this expert testimony by considering whether it will be helpful to the trier of fact, though even the approaches within these courts are varied.<sup>136</sup> Most of these courts limit the admitted expert testimony to certain topics or generalised scientific studies.<sup>137</sup> However, this is still a discretionary rule, and a great number of judges in practice systematically exclude expert testimony while outwardly recognising this discretion.<sup>138</sup>

While it is still uncertain which view New Zealand courts will adopt in regard to the admissibility of expert psychological testimony on eyewitness identifications, an obiter comment in *R v Turaki* may foreshadow the likely response:<sup>139</sup>

Research has suggested that directions by judges and traditional safeguards such as cross-examination of eyewitnesses have only a limited ability to help a jury discriminate between accurate and inaccurate eyewitness identifications. Instead, they have a tendency to foster a generalised disbelief of all eyewitnesses among jurors. This has led to calls for jurors to be assisted by expert testimony on human memory and guidance in the assessment of eyewitness testimony. However, even such expert evidence has not been unequivocally shown to result in an improvement in juror performance, which is generally at a level akin to that which would be achieved by chance.

This dictum reflects concerns about accepting expert testimony as the next logical safeguard against eyewitness misidentifications to combat the

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133 Ibid.

134 Dillickrath, above n 12, at 1084–1085. The only courts to have done this are in California and Massachusetts.

135 *People v McDonald* 690 P 2d 709 (Cal 1984) at 726.

136 Dillickrath, above n 12, at 1072.

137 Ibid, at 1074–1078.

138 Ibid, at 1072–1073.

139 *R v Turaki*, above n 115, at [47].

deficiencies in cross-examination and jury instructions. The effectiveness of such expert testimony in improving the jury's ability to evaluate identification evidence has been questioned and shown to be inconclusive.<sup>140</sup> If this result is accepted by the New Zealand courts, as done so in *R v Turaki*, it will challenge s 25's "substantial help" requirement. The courts may well exclude this expert testimony since it has not been empirically shown to improve jurors' evaluative abilities.

There are numerous other concerns with regard to allowing expert evidence on this subject. One of the most prevalent is that allowing expert testimony by the defence would lead the prosecution to offer their own expert, and the defence to rebut with yet another, and so forth. This may result in an indefinite 'battle' between the two sides' experts, depending on the range of possible eyewitness factors, relevant studies, or relative wealth of the parties. This would cause substantial delay in the court proceedings, and the persistent scientific rebuttal can be very confusing for the jury.<sup>141</sup> This concern can be slightly diminished if the expert testimony is limited to general scientific information without reference to particular eyewitnesses in the case.<sup>142</sup> However, using expert testimony is also very expensive, easily costing several thousand dollars at a time. It may not be feasible for the typical defendant, and perhaps less costly safeguards that are available to all defendants should be preferred.<sup>143</sup>

### Alternatives: A Brief Consideration

Various alternatives to prevent eyewitness misidentifications have been suggested in light of the weaknesses with each currently available legal safeguard. Commentators have suggested the use of court-appointed experts in order to avoid this 'battle of the experts' and retain greater judicial control over court proceedings. Indeed, this was considered in the Law Commission report on evidence reform, although ultimately rejected as a "judicial descent into the arena" that is incompatible with our adversarial system of criminal justice.<sup>144</sup>

One commentator offered the "daring approach" of using juror education materials, such as approved videotapes, to inform the jury of factors affecting eyewitness accuracy.<sup>145</sup> Regardless of the medium used, education for the primary participants in the criminal justice system on these factors has been advocated.<sup>146</sup> A survey of judges in the United

140 Howard Egeth and Michael McCloskey "Expert testimony about eyewitness behavior: Is it safe and effective?" in Gary Wells and Elizabeth Loftus (eds) *Eyewitness Testimony* (Cambridge University Press, Cambridge, 1984) 283 at 301.

141 Roger Park "Eyewitness identification: expert witnesses are not the only solution" (2003) 2 L. P & R 305 at 306-307; Woocher, above n 11, at 1027.

142 See Dillickrath, above n 12, at 1078-1079. This approach has been taken by the courts in the State of Illinois.

143 Park, above n 141, at 307.

144 Law Commission *Reform of the Law*, above n 40, at [88]-[90].

145 Park, above n 141, at 307.

146 Wise, Dauphinas and Safer, above n 7, at 865.



States indicated that, regardless of the amount of experience, those who had more knowledge about the factors that influence eyewitness accuracy were associated with a greater tendency to use judicial safeguards in cases that depended substantially on eyewitness evidence.<sup>147</sup> Education would also assist police officers in adopting reliable procedures<sup>148</sup> and lawyers in being able to focus on the right questions at trial.<sup>149</sup>

Recommendation of an outright exclusion of eyewitness identification evidence has also been suggested by some commentators in light of the fallibility of available safeguards against misidentification, as these safeguards do not eliminate the inherent unreliability of memory.<sup>150</sup> However, this assertion of a blanket ban on identification evidence should be treated with caution. From a practical perspective, eyewitness identification may be the only evidence in a case to link the suspect to the crime. An outright exclusion would also exclude all of the accurate identification evidence obtained from proper procedures and allow many of the truly guilty to walk free.<sup>151</sup> This cannot be a desirable outcome.

## V CONCLUSION

Eyewitness misidentification stems from the inherent imperfection of the human memory and can be compounded by suggestive police processes. Such misidentification is of special concern in the criminal justice arena as jurors place substantial weight on eyewitness testimony, often being unaware of factors that have been empirically shown to influence its reliability. New Zealand has recognised this need for reliable identification evidence, and while memory fallibility is not under the control of the criminal justice system, misidentifications resulting from suggestive police processes can be minimised by following formal identification procedures. Many of the formal procedures required by s 45 of the Evidence Act 2006 are reflective of psychological research, but additional recommendations, such as the use of sequential (instead of simultaneous) procedures, should be considered.

However, due to the inherent unreliability of memory, mistaken identifications will always exist regardless of the quality of police procedures. Additional safeguards are required at trial to assess the reliability of identification evidence. The traditional tool of cross-examination is insufficient in this regard, as it does not reveal erroneous identifications from witnesses who are honestly mistaken.

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147 *Ibid.*, at 805–806.

148 Tinsley, above n 27, at 125–126.

149 Wise, Dauphinais and Safer, above n 7, at 867.

150 See Noah Clements “Flipping a Coin: A Solution for the Inherent Unreliability of Eyewitness Identification Testimony” (2007) 40 *Ind L Rev* 271. This article provides a thorough argument for the outright exclusion of all eyewitness identification testimony.

151 Woocher, above n 11, at 1001.

Instead, jury instructions have been added in many jurisdictions, with New Zealand notably incorporating this mechanism into statute. Section 126 of the Evidence Act 2006 allows judges to tailor their instructions to the facts of a particular case and to refer to various psychological effects that influence accuracy. However, there are still concerns around the stage at which such an instruction is given, as well as juror ability to give it adequate consideration in the context of the full judicial instruction of a case.

Many commentators have argued for expert psychological testimony to assist juries with evaluating eyewitness identification evidence. This may be admitted under s 25 of the Evidence Act 2006, but there are many legitimate concerns regarding this expert testimony. One of the most compelling is the risk of opening the floodgates to a battle between defence and prosecution experts, which may only add to jury confusion as well as significantly prolong proceedings. This type of evidence is excluded in the majority of United States cases, and New Zealand may also favour its exclusion if the comments of the Court of Appeal in *R v Turaki* reflect judicial sentiment on the subject.

These available safeguards have the potential to reduce much of the error from police processes, as well as assist the evaluation of some psychological factors that influence eyewitness accuracy at trial. Underlying the ability of these safeguards in reducing eyewitness error, however, is a pressing need for education. Empirical evidence indicates that many factors that affect eyewitness accuracy are counter-intuitive, and many of the main participants in the criminal justice system — jurors, lawyers, police officers and even judges — are not always well-informed about such factors. With appropriate education, the use of suggestive procedures can be reduced by the police, and will allow judges to tailor their judicial direction correctly to psychological findings.

Eyewitness misidentifications pose a very real threat to the criminal justice system's search for truth. The criminal justice system in New Zealand has recognised and taken positive steps to reduce such misidentifications through focusing on making identification evidence as reliable as possible, and attempting to inform the fact-finder of factors that have empirically been shown to affect eyewitness accuracy. However, these safeguards can still be improved, and it is essential for the criminal justice system to work continually towards bridging the gaps between empirical research, education and legal reform. After all, there is much at stake.