

THE ADMISSIBILITY OF OUT-OF-COURT IDENTIFICATION EVIDENCE IN CRIMINAL CASES

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At common law prior consistent out-of-court statements of a witness are generally inadmissible when the witness gives in-court testimony on the same point.¹ There are several reasons for this exclusionary rule. Such statements are thought to be unreliable as being self-serving.² Their evidential value is said to be minimal, and there is said to be a danger that they were deliberately concocted to support future in-court testimony.³ They also raise collateral questions which may be time-consuming and costly to resolve.⁴

There are at least three⁵ well-established exceptions to the rule against prior consistent statements. Such statements are admissible:

- (i) to rebut an allegation of recent fabrication;⁶
- (ii) as recent complaints in sexual offences;⁷
- (iii) as *res gestae*.⁸

So far as exceptions (i) and (ii) are concerned prior consistent statements received under their ambit are received solely to bolster the credit of in-court testimony by the witness.⁹ They are not substantive evidence of the truth of their contents. Prior consistent statements received as part of the *res gestae* are, however, received as substantive evidence.¹⁰

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¹ *Corke v. Corke* [1958] 1 All E.R. 224; *R. v. Lillyman* [1896] 2 Q.B. 167; *R. v. Roberts* [1942] 1 All E.R. 187.

² *Ibid.*

³ *Jones v. South Eastern and Chatham Ry* [1918] 87 L.J.K.B. 775, 778.

⁴ MacCrimmon M. T., 'Consistent Statements of a Witness' [1979] 17 *Osgoode Hall Law Journal* 285, 286.

⁵ Gooderson R., 'Previous Consistent Statements' [1968] *Cambridge Law Journal* 64. Note that the author of that article would add exculpatory statements by an accused upon arrest, and past identification to the three more clearly established exceptions to the rule against prior consistent statements.

⁶ *The Nominal Defendant v. Clements* (1960) 104 C.L.R. 476; *Fox v. General Medical Council* [1960] 3 All E.R. 225.

⁷ *R. v. Lillyman* [1896] 2 Q.B. 167; *Kilby v. R.* (1973) 129 C.L.R. 460; *R. v. Freeman* [1980] V.R. 1.

⁸ *R. v. Roberts* [1942] 1 All E.R. 187; *R. v. Fowkes* *The Times*, 8 March 1856.

⁹ MacCrimmon M. T., 'Consistent Statements of a Witness' [1979] 17 *Osgoode Hall Law Journal* 285.

¹⁰ *Ibid.* 292.

It has been argued by some writers that there is a further exception to the rule against prior consistent statements, namely, the admissibility of prior out-of-court identification evidence.¹¹ It has also been said by one Law Lord that such evidence is received solely for the purpose of bolstering the credit of an in-court identification.¹² Other sources suggest, however, that such evidence is received substantively, whether as original evidence,¹³ or by virtue of an exception to the hearsay rule,¹⁴ and not for the limited purpose just mentioned.

The purpose of this article is primarily to analyse the basis upon which evidence of out-of-court identification is received. Such an analysis, it is suggested, will expose serious logical and practical difficulties in the reasoning of a number of the leading authorities which bear upon this question.

A conceptual framework for analysis

In the course of a criminal trial, once a witness, A, has made an in-court identification of the accused, that witness is permitted to testify that he had previously made a similar out-of-court identification.¹⁵ Indeed, another witness, B, may also be called to testify regarding the previous out-of-court identification.¹⁶

There are at least three alternative bases upon which the admissibility of such evidence may be justified.

- (i) The evidence of past identification may be characterized as 'original' evidence.¹⁷ If it is sufficiently relevant, and infringes no exclusionary rule, it warrants admissibility.¹⁸

¹¹ Gooderson R., 'Previous Consistent Statements' [1968] *Cambridge Law Journal* 64; MacCrimmon M. T., 'Consistent Statements of a Witness' [1979] 17 *Osgoode Hall Law Journal* 285; Gobbo J., Byrne D. and Heydon J., *Cross on Evidence* (2nd Aust. ed. 1979) paragraph 10.35.

¹² *R. v. Christie* [1914] A.C. 545, 551 per Viscount Haldane L.C.

¹³ *R. v. Christie* [1914] A.C. 545, 554 per Lords Atkinson and Parker; *R. v. Alexander and Keeley* (Victorian Court of Criminal Appeal, 1st November 1979, unreported).

¹⁴ MacCrimmon M. T., 'Consistent Statements of a Witness' [1979] 17 *Osgoode Hall Law Journal* 285.

¹⁵ *R. v. Fowkes* *The Times*, 8 March 1856; *R. v. Fannon and Walsh* (1922) 22 S.R. (N.S.W.) 427, 430 per Ferguson J.

¹⁶ *R. v. Christie* [1914] A.C. 545.

¹⁷ Gobbo J., Byrne D. and Heydon J., *Cross on Evidence* (2nd Aust. ed. 1979) paragraph 1.9:

When a witness is asked to narrate a third person's statement for some purpose other than that of inducing the court to accept it as true, his evidence is said to be 'original'. Original evidence may, therefore, be defined as evidence of the fact that a statement was made, tendered without reference to the truth of anything alleged in the statement.

Note that the terms 'primary evidence' and 'direct evidence' are often used almost interchangeably with the term 'original evidence'. Such usage is imprecise and to be avoided, as these terms have their own quite distinct meanings. See *Cross on Evidence op. cit.* paragraphs 1.16 and 1.27.

¹⁸ Stone J., 'Res Gesta Reagitata' (1939) 55 *Law Quarterly Review* 66.

- (ii) The evidence of past identification may be received as an exception to the hearsay rule. Some formulations of the hearsay rule would not extend to cover prior consistent statements of a witness.¹⁹ They would speak of there being a separate 'rule against narrative' which prevents a witness from testifying as to his own previous statements.²⁰ In recent years, particularly in the United States, the scope of the hearsay rule has been broadened to include all prior statements of witnesses,²¹ provided of course that they are tendered to prove the truth of their contents.

From an analytical²² point of view, there seems to be no sound reason why the hearsay rule should not encompass previous statements made by a witness. Of course, the fact that the witness is in court, and is usually able to be cross-examined about his veracity, and his powers of perception, memory and narration at the time the statement was made, could be urged in support of non-characterization of a witness' prior statement as hearsay.²³ Equally these factors could be urged in support of reception of such evidence as an exception to the hearsay rule.²⁴ The really difficult problem arises where the witness is able to recount his previous statement, but only in such a manner that effective cross-examination upon that statement is impossible.²⁵ Such evidence, it will be submitted, warrants exclusion as hearsay.

- (iii) The evidence of past identification may be received for the limited purpose of bolstering the credit of witness A, after he has made an

¹⁹ Phipson, *On Evidence* (3rd ed. 1902); Baker R., *The Hearsay Rule* (1950); Cross R., 'The Scope of the Rule Against Hearsay' (1956) 72 *Law Quarterly Review* 91, 101; Gooderson R., 'Previous Consistent Statements' [1968] *Cambridge Law Journal* 64, 69; Gobbo J., Byrne D. and Heydon J., *Cross on Evidence* (2nd Aust. ed. 1979) paragraph 17.15; Bein F., 'Prior Inconsistent Statements: The Hearsay Rule, 801(d)(1)(A) and 803(24)' [1979] 26 *U.C.L.A. Law Review* 967. The classic judicial formulation of the hearsay rule is to the same effect — see *Subramaniam v. Public Prosecutor* [1956] 1 W.L.R. 965, 970.

²⁰ MacCrimmon, *op. cit.* 290.

²¹ McCormick's *Handbook of the Law of Evidence* (2nd ed. 1972) 601; Phipson, *On Evidence* (12th ed. 1976); Cross R., *Evidence* (4th ed. 1974) 6; Schiff S., 'Hearsay and the Hearsay Rule: A Functional View' (1978) *Canadian Bar Review* 674, 675; *Wigmore on Evidence*, Chadbourn Revision, Vol. 5, 17, paragraph 1364.

²² For the differences between conceptual (or analytical) and functional analyses of the hearsay rule, see Lempert and Saltzburg, *A Modern Approach to Evidence* (1977) 338. A conceptual analysis is one which focuses upon the type of statement and the purpose for which it is tendered, while a functional analysis focuses upon purported defects (e.g. lack of cross-examination) in testimony classified as hearsay.

²³ MacCrimmon M. T., 'Consistent Statements of a Witness' [1979] 17 *Osgoode Hall Law Journal* 286, 293.

²⁴ Schiff S., 'Hearsay and the Hearsay Rule: A Functional View' (1978) 56 *Canadian Bar Review* 674; Bein F., 'Prior Inconsistent Statements: The Hearsay Rule, 801(d)(1)(A) and 803(24)' [1979] 26 *U.C.L.A. Law Review* 967.

²⁵ As for example where the out-of-court statement is in writing, and the witness has no actual recollection of the events outlined therein. Another example would be where a witness has made a prior inconsistent statement, and at the trial denies the truth of that statement.

in-court identification.²⁶ In other words, it may be argued that evidence of past identification is admitted as an exception to the rule against prior consistent statements, for rehabilitative or reinforcement purposes. The same position would apply where witness B testifies to witness A's prior out-of-court identification.²⁷ Of course, if this third category is in fact the proper basis upon which evidence of past identification is received, it is a pre-requisite for the reception of such evidence that there be an in-court identification.

It is not at all clear which of the above three categories, if any, accurately expresses the basis upon which evidence of past identification is received. In the United States there is even a body of authority in support of a fourth view, namely, that all evidence of out-of-court identification is inadmissible.²⁸ In recent years the trend of authority appears to have been in favour of the admissibility of such evidence,²⁹ but it should not be assumed that the matter is now clearly resolved in that country.

A number of questions require consideration. Must there be an in-court identification before evidence of past identification can be received? Must the witness who made the out-of-court identification be in court to testify (and to be cross-examined) in relation to it? Is evidence of past identification evidence of identification *per se*? Or is it admissible solely in order to reinforce or rehabilitate an in-court identification made by the witness? The search for solutions to these questions requires, initially at least, careful analysis of a sizeable but not always coherent body of existing case law. The rest of this article is taken up with such an analysis.

Evidence of past identification where there is also in-court identification

If witness A makes an in-court identification of the accused, he is also permitted to testify as to any prior out-of-court identification made by him.³⁰ In addition witness B may testify as to any such out-of-court identification made by witness A, whether witness A refers to such prior identification or not.³¹

The propositions set out above represent English and Australian law on this subject. However the authorities from which these propositions derive

²⁶ *R. v. Christie* [1914] A.C. 545, 551 *per* Viscount Haldane L.C.

²⁷ *Ibid.*

²⁸ See Gooderson R., 'Previous Consistent Statements' [1968] *Cambridge Law Journal* 64. Note *Thompson v. State* (1944) 58 N.E. 2d 112, 113; *People v. Jung Hing* (1914) 106 N.E. 105; *Di Carlo v. U.S.* (1925) 6 F. 2d 364.

²⁹ *People v. Gould* (1960) 354 P. 865, 867. This is a particularly strong decision. Evidence of a past identification made by a woman was held to be admissible (when related by a police officer) even where she could not make an in-court identification, and could not recall with any clarity having made any prior identification.

³⁰ *R. v. Fowkes* *The Times*, 8 March 1856; *R. v. Fannon and Walsh* (1922) 22 S.R. (N.S.W.) 427, 430 *per* Ferguson J.

³¹ *R. v. Christie* [1914] A.C. 545.

differ greatly as to the basis or bases upon which such evidence is deemed to be admissible.

The leading case on this subject is unquestionably the decision of the House of Lords in *R. v. Christie*.³² The accused was charged with having indecently assaulted a small boy. At the trial the boy identified the accused in the dock as the person who had assaulted him. The boy did not refer to the fact that he had previously identified the accused, shortly after the alleged offence had occurred.³³ That previous identification had been made in the presence of the accused, and had been witnessed by the boy's mother and a police officer. The mother was called to give evidence of her son's out-of-court identification.

Their Lordships held unanimously that the testimony of the mother as to her son's prior identification of the accused was admissible. The basis for this admissibility lay in the fact that the statement of the boy had been made in the presence of the accused. Notwithstanding the fact that the accused had immediately denied its truth, it was open to a jury to infer that he had adopted it in whole or in part as his own statement. Therefore it was admissible as a possible admission by conduct, that is, an exception to the hearsay rule.³⁴ But it was only admissible in so far as it became, in effect, the accused's own statement by virtue of his demeanour in the face of the accusation.

What if the boy's statement had not been made in the presence of the accused? Alternatively, what if the accusation had been made in circumstances which did not call for any response on the part of the accused, as in the course of an identification parade? Their Lordships each uttered certain *dicta* which bear upon these questions.

Viscount Haldane L.C. was of the opinion that the basis upon which evidence of past identification is normally received, excluding the situation where the statements were made in the presence of the accused, was in order to bolster the credit of a witness making an in-court identification. His Lordship stated:

Had the boy, after he had identified the accused in the dock, been asked if he had identified the accused in the field as the man who assaulted him, and answered affirmatively, *then* that fact might also have been proved by the policeman and the mother who saw the identification. Its relevancy is to show that the boy was able to identify at the time and to exclude the idea that the identification of the prisoner in the dock was an afterthought or a mistake.³⁵

³² *Ibid.*

³³ The out-of-court identification was not made sufficiently contemporaneously with the commission of the offence to constitute *res gestae*.

³⁴ Subject to the existence of an overriding judicial discretion to exclude such legally admissible evidence if its probative value were outweighed by its likely prejudicial consequences, and its admissibility would be 'unfair'. *Christie's* case was the first case to spell out the existence of this now well-established discretion. See generally Weinberg M., 'The Judicial Discretion to Exclude Relevant Evidence' (1975) 25 *McGill Law Journal* 1.

³⁵ *R. v. Christie* [1914] A.C. 545, 551. (My emphasis)

The general tenor of this passage is to suggest that it is a pre-condition to the admissibility of an out-of-court identification that there first be an in-court identification, and that evidence of past identification is admissible only for the limited purpose of bolstering credibility. Viscount Haldane L.C. may also be taken to be denying that such evidence is admissible either as original evidence *simpliciter*,³⁶ or as an exception to the hearsay rule.

Lord Moulton was of the view that the issue of whether the statements made by the boy were admissible in order to bolster his credibility raised 'difficult questions'.³⁷ His Lordship went on to assert that whereas a witness might be permitted to give evidence of his own previous out-of-court identification of the accused, a bystander who had observed that identification could not give evidence of it where the witness had not done so. His Lordship relied upon what vestiges remained of the old 'best evidence' rule in drawing this distinction. He commented:

To prove identification of the prisoner by a person, who is, I shall assume, an adult, it is necessary to call that person as a witness. Identification is an act of the mind, and the primary evidence of what was passing in the mind of a man is his own testimony, where it can be obtained. It would be very dangerous to allow evidence to be given of a man's words and actions, in order to shew by this extrinsic evidence that he identified the prisoner, if he was capable of being called as a witness and was not called to prove by direct evidence that he had thus identified him. Such a mode of proving identification would, in my opinion, be to use secondary evidence where primary evidence was obtainable.³⁸

Lord Moulton failed to make clear in the course of his speech, what would be the position where the witness did not make an in-court identification, but sought only to testify as to his prior out-of-court identification. It is likely that his Lordship would have regarded such evidence as primary, and therefore admissible.

Lords Reading and Dunedin were of the view that where a witness had made an in-court identification, he was also permitted to refer to a previous out-of-court identification. However, where the witness had confined himself to an in-court identification, no bystander would be permitted to testify to any prior out-of-court identification by the witness. Their Lordships stated:

The statement cannot, in [our] judgment, be admitted as evidence of the state of the boy's mind when in the act of identifying *Christie*, as that would amount to allowing another person to give in evidence the boy's state of mind, when he was not asked, and had not said anything about it in his statement to the Court. If the prosecution required the evidence as part of the act of identification it should have been given by the boy before the prosecution closed their case.³⁹

³⁶ Original evidence *simpliciter* is distinct from an admissible prior consistent statement, which is in a sense also original evidence, in that such a statement is not evidence of the truth of its contents. Original evidence *simpliciter* is evidence which satisfies the test of relevance, and does not come within the ambit of any exclusionary rule. An admissible prior consistent statement is admitted by virtue of an exception to an exclusionary rule.

³⁷ *R. v. Christie* [1914] A.C. 545, 558. His Lordship chose not to deal with this matter because it was not necessary to do so for the purpose of deciding the appeal.

³⁸ *Ibid.*

³⁹ *Ibid.* 563.

Their Lordships did not expressly turn their minds to the question whether a witness who had *not* made an in-court identification could refer to his prior out-of-court identification. It is suggested that it may be logically inferred from their judgment that their answer to this question would have been in the negative. The reasoning is complex, but would run as follows:

- (i) If evidence of past identification were original evidence *simpliciter*,⁴⁰ there would be no objection to a bystander giving that evidence even where the witness who made the prior identification had not alluded to it in testimony. As their Lordships expressly rejected this possibility, *ex hypothesi*, they rejected the idea that evidence of past identification is original evidence *simpliciter*.
- (ii) Evidence of past identification could not be admissible as an *exception* to the rule against prior consistent statements in a case where there is no in-court identification. This is axiomatic, since the out-of-court identification would not be capable of being consistent with any testimony at all, and therefore would not fall within the ambit of any such exclusionary rule in the first place.
- (iii) Evidence of past identification, where there is no in-court identification, would not be admissible as an exception to the hearsay rule. This follows logically from the fact that evidence of past identification is not evidence of the truth of its contents (that is admissible hearsay) even where (as in *Christie*) there has been an in-court identification. Otherwise a bystander would have been permitted to give evidence of the prior identification, contrary to the analysis of Lords Reading and Dunedin. It would scarcely be rational if evidence of a less cogent nature were to have greater probative force than evidence which bolsters an in-court identification. Two identifications are surely better than one, even if an in-court identification alone carries little weight.⁴¹
- (iv) None of the three possible bases for the admissibility of evidence of past identification which are canvassed in this article is applicable where there has been *no* in-court identification, at least upon the analysis of Lords Reading and Dunedin. Assuming these three possibilities are exhaustive,⁴² it follows that such evidence is inadmissible.
- (v) Therefore, Lords Reading and Dunedin may be taken impliedly to support the views of Viscount Haldane L.C., namely that it is a

⁴⁰ *Supra* n. 31.

⁴¹ Certainly an out-of-court identification is likely to be more reliable than a dock identification. This is particularly the case where the rigid safeguards normally associated with identification parades have been complied with.

⁴² The argument that these three possibilities may not be exhaustive is considered at length below.

precondition for the admissibility of evidence of past identification that there be an in-court identification.

Lords Atkinson and Parker were of the opinion, that, at least where there is an in-court identification, evidence may be given by the witness himself, or by a bystander, of a prior out-of-court identification. Such evidence was admissible because it constituted original evidence. They stated:

The boy had in his evidence at the trial distinctly identified the accused. If on another occasion he had in the presence of others identified him, then the evidence of these eye witnesses is quite as truly primary evidence of what acts took place in their presence as would be the boy's evidence of what he did, and what expressions accompanied his act. It would, I think, have been more regular and proper to have examined the boy himself as to what he did on the first occasion, but the omission to do so, while the bystanders were examined on the point, does not, I think, violate the rules that the best evidence must be given. His evidence of what he did was no better in that sense than was their evidence as to what they saw him do.⁴³

Again, Lords Atkinson and Parker did not expressly consider the question whether evidence of past identification would be admissible if no in-court identification were made. However their judgment points strongly in favour of an affirmative answer to this question. Indeed their judgment may even go so far as to support the admissibility of the bystander's evidence where the person who made the out-of-court identification is not called as a witness at all, subject only to the operation of the 'best evidence'⁴⁴ rule. Certainly there is no hint of any other exclusionary rule being applicable.

The effect of *Christie's* case is to leave unanswered a great many questions. There is no majority view in favour of any of the three possible bases for the reception of evidence of past identification set out at the beginning of this article. *Christie* has been cited both by courts⁴⁵ and commentators⁴⁶ in support of a number of propositions which manifestly it does not support. It is suggested that the *dicta* of three of their Lordships, either directly or indirectly, support the proposition that evidence of past identification is inadmissible unless there is an in-court identification as well.⁴⁷ The *dicta* of the other three members of the House of Lords run counter to this view.⁴⁸ It is perhaps unfortunate that the Earl of Halsbury,

⁴³ *R. v. Christie* [1914] A.C. 545, 554.

⁴⁴ Gobbo, Byrne and Heydon, *op. cit.* paragraph 1.28.

⁴⁵ *R. v. Osbourne and Virtue* [1973] Q.B. 678, 690.

⁴⁶ Libling D., 'Evidence of Past Identification' [1977] *Criminal Law Review* 268, 272, where the author constructs a majority of Lords Atkinson, Parker, Reading and Dunedin in support of the proposition that other witnesses may testify as to an identifying witness' out-of-court identification provided that witness makes an in-court identification. With respect, it is suggested that this analysis is erroneous, and that Professor Cross is correct when he indicates that he regards only Lords Atkinson and Parker as supporting this proposition. See Gobbo, Byrne and Heydon, *op. cit.* paragraph 2.23.

⁴⁷ Viscount Haldane L.C., and Lords Reading and Dunedin.

⁴⁸ Lords Moulton, Atkinson and Parker. Note however that Lord Moulton's analysis proceeds along different lines to that of Lords Atkinson and Parker. Lord Moulton concludes that a bystander may not give evidence of an out-of-court identification

who was present during the hearing of argument in *Christie*, took no part in the actual decision of the case.⁴⁹

Evidence of past identification which contradicts in-court identification

Assume that witness A testifies that the accused is not the person who committed the offence. In cross-examination by the Crown, after a declaration that the witness is hostile,⁵⁰ it is suggested to him that he previously identified the accused as the offender,⁵¹ a suggestion which the witness denies.⁵² Witness B is then called to testify that witness A previously identified the accused.

If evidence of a prior act of identification is admissible as original evidence, or as an exception to the rule against hearsay, the effect of witness B's testimony is that there is admissible evidence of identification before the court. If witness B's evidence is admissible only for impeachment purposes, then there is no evidence of identification before the court at this stage, and if none is forthcoming, a submission of no case to answer must succeed.⁵³

There is authority for the proposition that such evidence is admissible only for impeachment purposes. In *Regina v. McGuire*⁵⁴ the appellant was convicted of murder. The case turned on identification, and there were four witnesses as to identity. W, J, and L were called by the Crown, and D was called by the Defence. At the trial W identified the accused in the dock, and also testified that he had previously picked him out at a lineup. J, D, and L swore that the accused was not the killer, though all three had previously identified him as such. The trial judge permitted evidence to be given of the out-of-court identifications by all four witnesses.

The Court of Appeal for British Columbia held that with the exception of W, whose sworn evidence was consistent with his prior out-of-court identification, the out-of-court statements of identification by J, D, and L ought not to have been admitted into evidence.

Their Lordships, after expressing approval of certain passages from *Wigmore on Evidence*,⁵⁵ concluded:

... it appears that, where a person under oath identifies an accused at a trial, his

because this is secondary and not primary evidence. However his Lordship would permit a witness to give evidence of his own prior out-of-court identification even if the witness could not make an in-court identification.

⁴⁹ [1914] A.C. 545.

⁵⁰ See generally *R. v. Hayden and Slattery* [1959] V.R. 102; *McLellan v. Bowyer* (1961) 106 C.L.R. 95; *R. v. Thynne* [1977] V.R. 98.

⁵¹ *Ibid.* Note also the operation of sections 34-36 Evidence Act 1958.

⁵² Section 35 Evidence Act 1958.

⁵³ See generally Bein F., 'Prior Inconsistent Statements: The Hearsay Rule, 801(d)(1)(A) and 803(24)' [1979] 26 *U.C.L.A. Law Review* 967.

⁵⁴ [1975] 4 W.W.R. 124.

⁵⁵ *Wigmore on Evidence*, Chadbourn Revision, vol. 4, 270-277. Note also that there has been a long standing debate in the United States as to whether prior inconsistent

statement may be supported by evidence that the person had identified the accused on an earlier occasion.

It is, however, elementary that, if the person does not himself give evidence, evidence of his earlier identification cannot be given. By the same token, if at the trial the person does not identify the accused, evidence that he did identify him on an earlier occasion cannot be admitted except by way of cross-examination of the person himself as to credibility, and even then there is not evidence of the content of the earlier statement.⁵⁶

It is suggested that these remarks strongly support the view that evidence of past identification is admissible only where an in-court identification is first made, and only to bolster the credit of the witness who made this in-court identification. In a sense the admissibility of prior consistent statements presents the converse issue to that of prior inconsistent statements. If it were *true* that evidence of past identification is admissible as an exception to the hearsay rule, or as original evidence, then it would be admissible as evidence of identification *per se*, and not merely for impeachment purposes, at least in the context of inconsistency between in-court and out-of-court identification. Given that *McGuire*⁵⁷ decides that evidence of past identification is admissible for the limited purpose of impeachment where there is inconsistency between the in-court and out-of-court identification, logic would seem to demand that such evidence be admissible solely to bolster credibility where the identifications are consistent. It would also seem to follow that evidence of past identification is inadmissible where there is no in-court identification at all.

Evidence of past identification where there is no in-court identification

Assume that witness A testifies in court, but is unable, or unwilling, to identify the accused in the dock as the offender. What is the position if there is evidence available that witness A did identify the accused on a previous occasion?

There are four distinct fact situations which require analysis:

- (i) Witness A, though unable to make an in-court identification, is able to testify that he previously identified the accused as the offender.⁵⁸
- (ii) Witness A is unable to make an in-court identification. He is also unable to recollect having made an out-of-court identification.

statements may be used only for impeachment purposes, or whether they may constitute substantive evidence of their contents. This debate is well canvassed in the article by Freda Bein noted above. In Australia it is clear that prior inconsistent statements are not substantive evidence —see *R. v. Thynne* [1977] V.R. 98, 100.

⁵⁶ [1975] 4 W.W.R. 124, 130.

⁵⁷ [1975] 4 W.W.R. 124.

⁵⁸ This is not an implausible situation, given that the accused's appearance may have changed substantially between the time of the offence and the out-of-court identification, and the time of the trial. See *R. v. Osbourne and Virtue* [1973] Q.B. 678; *R. v. Alexander and Keeley* (unreported, Victorian Court of Criminal Appeal, 1st November 1979 29).

Witness B is called to testify that witness A did in fact make an out-of-court identification.⁵⁹

- (iii) Witness A, though unable to make an in-court identification, may testify that he previously identified the person who committed the offence, that such identification was accurate when made, but that he is unable to say that the accused is the person he previously identified. Witness B is then called to testify that witness A picked out the accused on that previous occasion.⁶⁰
- (iv) Witness A, though unable to make an in-court identification, and unable to recollect having made an accurate out-of-court identification, 'refreshes his memory' from a document prepared by him or under his supervision, contemporaneously with the prior identification. Though his memory is not revived at all, he is willing to swear that the contents of the document are true.⁶¹

Alternatives (i) and (iv) may be further refined by a consideration of the possibility that witness B is called in each of these cases to testify as to witness A's prior identification.

These four situations raise for direct consideration the question of the basis upon which evidence of past identification is admitted. If this basis is solely to bolster the credit of the testifying witness as to an in-court identification, that is, as an exception to the rule against prior consistent statements, then it would follow that in all four cases the evidence should be inadmissible. However, there is some authority for the proposition that such evidence is admissible in each of these situations.

Fact situation (i)

In *R. v. Osbourne and Virtue*⁶² the defendants were jointly tried on a charge of armed robbery. Virtue had been identified at an identification parade by a witness, H. At the trial H could not make an in-court identification. However she was able to say that she had previously picked out the accused as the offender, though she subsequently resiled from this aspect of her testimony, and conceded that she could not be certain that the man she had previously picked out was the accused. A police officer who had observed the identification parade was called to testify that H had indeed picked out the accused as the offender at the identification parade. Objection was taken to this evidence upon the basis that it amounted to the Crown calling a witness to contradict one of its earlier witnesses.⁶³ The evidence was admitted, and the accused convicted.

⁵⁹ *R. v. Osbourne and Virtue* [1973] Q.B. 678; followed in *R. v. Collings* [1976] 2 N.Z.L.R. 104.

⁶⁰ *R. v. Burke and Kelly* (1847) 2 Cox C.C. 295.

⁶¹ *R. v. Alexander and Keeley* (unreported, Victorian Court of Criminal Appeal, 1st November 1979).

⁶² [1973] Q.B. 678.

⁶³ As the Court of Appeal pointed out, at page 690 of the judgment, there was no

In the Court of Appeal the admissibility of the evidence and the conviction were upheld. Reference was made to the decision in *Christie*⁶⁴ as supporting the following proposition:

that evidence of identification other than identification in the witness box is admissible.⁶⁵

With respect, it is suggested that *Christie*⁶⁶ supports no such general proposition. It will be recalled that the only basis for the admissibility of the mother's testimony upon which their Lordships were in unanimous agreement in that case was that the boy's statement had been made in the presence of the accused. In the absence of that factor there must be doubt that the evidence would have been admissible. It should also be remembered that *Christie*⁶⁷ represents the converse fact situation to that in *Osbourne and Virtue*.⁶⁸ In *Christie*⁶⁹ the boy did make an in-court identification, whereas in *Osbourne and Virtue*⁷⁰ witness H did not. The Court of Appeal did not allude to this distinction.

The Court of Appeal also did not consider the question whether the testimony of the police officer ought to be rejected as constituting hearsay and not falling within a relevant exception to the hearsay rule. Nor did it consider whether the evidence ought to be inadmissible because it did not constitute an exception to the rule against prior consistent statements, the out-of-court identification not amounting to a prior consistent statement in any event as there was no in-court identification. It may be argued that by not considering these possibilities, the Court of Appeal was, *sub silentio*, rejecting them as a basis for the admissibility of evidence of past identification.⁷¹ Such a view would see the judgment of the Court of Appeal as supporting the proposition that evidence of past identification is received as original evidence, at least where the witness who made the prior identification deposes to it.⁷² The difficulty with such a view is that, strictly

contradiction between the evidence of the identifying witness and the police officer. The identifying witness merely asserted that she could not be certain that the man she had previously identified was the accused. In any event, even if the police officer had contradicted the evidence of the Crown's own witness, as distinct from impeaching her credit, it is submitted that this would have been permissible. See *Vocisano v. Vocisano* (1974) 130 C.L.R. 267, and note the discussion in Aronson M., Reaburn N. and Weinberg M. *Litigation* (2nd edition 1979) 597-8.

⁶⁴ [1914] A.C. 545.

⁶⁵ [1973] Q.B. 678, 690.

⁶⁶ [1914] A.C. 545.

⁶⁷ *Ibid.*

⁶⁸ [1973] Q.B. 678.

⁶⁹ [1914] A.C. 545.

⁷⁰ [1973] Q.B. 678.

⁷¹ See Libling D., 'Evidence of Past Identification' [1977] *Criminal Law Review* 268, 275.

⁷² *Ibid.* The author comments that on the basis of *Osbourne and Virtue* 'evidence from an identifying witness as to his out-of-court identification of the accused is admissible in the absence of an in-court identification'. If this is correct, it can only be on the basis that such evidence is original evidence *simpliciter*, subject to one qualification which is discussed in the context of fact situation (iv) set out below. It

speaking, if the out-of-court identification bears the character of original evidence *simpliciter*, there would seem to be no reason why the witness who uttered the words of identification should be required to testify to them, instead of the Crown simply calling a bystander who happened to overhear them being spoken. A possible resolution of this difficulty is considered below under Fact situation (iv).

Fact situation (ii)

Fact Situation (ii) is also reflected in the facts of *Osbourne and Virtue*.⁷³ Witness X was unable to make an in-court identification of Osbourne. Nor could she recall having made any out-of-court identification. A police officer testified that X had picked out Osbourne at an identification parade.

The Court of Appeal upheld the admissibility of this evidence. Their Lordships observed:

The whole object of identification parades is for the protection of the subject, and what happens at these parades is highly relevant to the establishment of the truth. It would be wrong, in the judgment of this court, to set up artificial rules of evidence which hinder the administration of justice. The evidence was admissible.⁷⁴

A learned commentator has queried the applicability of the expression 'artificial rules of evidence' in the context of such fundamental exclusionary rules as the hearsay rule, and the rule against prior consistent statements.⁷⁵ One might also query the idea that the Court of Appeal was being asked to 'set up' any such rules. If evidence infringes either of these rules it is inadmissible, unless it falls within a relevant exception subject always to any possible doctrine of waiver.⁷⁶

The decision of the Court of Appeal in *Osbourne and Virtue*⁷⁷ supports the proposition that evidence of past identification is admitted as original evidence. However, it is suggested that the decision is manifestly incorrect, at least as regards the evidence of witness X. This is because it is clear that the effect of the testimony of witness X in this case was to contribute nothing at all on the issue of the identification of Osbourne. It was as though she had not even been called as a witness. The police officer was permitted to testify regarding an out-of-court assertion made by a person who was, in fact, called as a witness, but might just as well not have been

cannot be on the basis that such evidence is admissible hearsay since the author goes on to say that a bystander may also testify as to the out-of-court identification but not for the purpose of proving the correctness of that identification. In general, the author concludes, the bystander's evidence ought to be excluded as being immaterial or of little weight, or prejudicial to the accused. For a discussion of this latter point see *R. v. Collings* [1976] 2 N.Z.L.R. 104, 115.

⁷³ [1973] Q.B. 678.

⁷⁴ [1973] Q.B. 678, 690.

⁷⁵ Libling, *op. cit.* 271.

⁷⁶ See Weinberg M., 'The Consequences of Failure to Object to Inadmissible Evidence in Criminal Cases' (1978) 11 *M.U.L.R.* 408.

⁷⁷ [1973] Q.B. 678.

for all the probative value of her evidence,⁷⁸ in order to prove the truth of that assertion. The maker of that assertion could not realistically be cross-examined as to her powers of perception, narration or memory, or as to her veracity at the time the assertion was made.⁷⁹ On both conceptual and functional grounds,⁸⁰ the evidence of the police officer regarding witness X was inadmissible hearsay, and ought to have been excluded. It is suggested that this would be the correct solution to the problem posited in Fact situation (ii).⁸¹

Fact situation (iii)

This presents a nice problem. Witness A is once again unable to make an in-court identification, but is able to say that he previously made an accurate identification of the offender. However witness A is unable to swear that the person whom he previously picked out is, or was, the accused. Witness B is called to fill the gap by identifying the person previously identified by witness A as the accused. Is the evidence of witness B admissible?⁸²

There appear to be three possible analyses on the basis of *Osbourne and Virtue*:⁸³

- (a) If *Osbourne and Virtue* is correctly decided *in toto*, the testimony of witness B is clearly admissible. It constitutes original evidence *simpliciter* and does not infringe the hearsay rule.
- (b) If *Osbourne and Virtue* is correctly decided as regards witness H, but incorrectly decided as regards witness X, the question arises whether Fact situation (iii) ought to be analysed in the same terms

⁷⁸ [1973] Q.B. 678, 686. Witness X testified that 'she did not remember that she had picked out anyone on the last parade'. See also *R. v. Collings* [1976] 2 N.Z.L.R. 104, 114.

⁷⁹ Morgan E., 'The Relation Between Hearsay and Preserved Memory' (1927) 40 *Harvard Law Review* 712; Bein F., 'Prior Inconsistent Statements: The Hearsay Rule 801(d)(1)(A) and 803(24)' [1979] 26 *U.C.L.A. Law Review* 967.

⁸⁰ Lempert and Saltzburg, *A Modern Approach to Evidence* (1977) 338. Note again that a conceptual analysis of hearsay is one which focuses upon the type of statement and the purpose for which it is offered. A functional analysis is one which focuses upon purported defects in the testimony classified as hearsay.

⁸¹ Note that the Victorian Court of Criminal Appeal in *R. v. Alexander and Keeley* (unreported, 1st November 1979) expressly left open the question whether evidence of an out-of-court identification could be given by witness B where witness A, the person who made the out-of-court identification, did not testify, or at least did not give evidence of having made that prior identification. The judgment is discussed in detail below.

⁸² See *R. v. Burke and Kelly* (1847) 2 Cox C.C. 295. In that case the evidence of the victim of a robbery was held to be admissible even though he could neither make an in-court identification nor testify that the person whom he had picked out in his out-of-court identification was the accused. He was able to testify that at the time he made his out-of-court identification it was accurate. See also *R. v. Moir* (1974) 15 C.C.C. (2d) 305.

⁸³ [1973] Q.B. 678.

as Fact situation (i),⁸⁴ or as Fact situation (ii).⁸⁵ This question is considered at length below.

- (c) If *Osbourne and Virtue* is incorrectly decided both as regards witness H and witness X, the testimony of witness B is clearly inadmissible. This would be the case if evidence of past identification is only admissible if there has been an in-court identification.

Analyses (a) and (c) require no further consideration at this point. Consider analysis (b). Is evidence of the type set out in Fact situation (iii) hearsay? The case-law on this subject is not at all clear, and there are a number of conflicting rulings. Some decisions have held such evidence to constitute inadmissible hearsay.⁸⁶ For example, in *R. v. McLean*⁸⁷ the accused was charged with robbery. A car was used during the commission of the offence. There was evidence linking the accused with a car which had the registration number HKB 138 D. The victim of the robbery testified that while he could not identify the driver of the car used in the robbery, he had made a mental note of its registration number and dictated it accurately to a bystander within a few moments of the robbery. Subsequently he forgot the registration number.⁸⁸ The bystander was called to testify that he wrote down what the witness had told him, and to produce a sheet of paper with the registration number HKB 138 D written upon it. The Court of Appeal held that this evidence was hearsay, and inadmissible.

Though this decision is supported by no less formidable a commentator than Sir Rupert Cross,⁸⁹ a strong argument may be made that the evidence in question was original evidence.⁹⁰ Libling⁹¹ puts the argument this way:

The chief objection to hearsay evidence is that the assertion cannot be tested by cross-examination. Here, this objection is not open. The identifying witness can be cross-examined as to his veracity and his opportunity to observe at the scene of the crime and at the time of the identification. He can also be cross-examined as to the lapse of time and memory between the observation of the crime and the making of the statement to X. X does not assert the truth of the identifying witness's statement; he merely reports what it was.⁹²

Whether evidence of this type is characterized as hearsay or original evidence will largely depend upon whether a conceptual or functional approach is taken to the formulation of the hearsay rule.⁹³ However, even

⁸⁴ *I.e.* as original evidence *simpliciter*.

⁸⁵ *I.e.* as inadmissible hearsay.

⁸⁶ *Jones v. Metcalfe* [1967] 3 All E.R. 205; *Cattermole v. Millar* [1977] Crim.L.R. 553. *Cf. R. v. Penno* [1977] 3 W.W.R. 361.

⁸⁷ (1968) 52 Cr.App.R. 80.

⁸⁸ Had he verified that the bystander had indeed taken down accurately the number which was dictated to him the document could have been used by the maker of the statement to 'refresh his memory'. See *R. v. Davey* [1970] 2 C.C.C. 351.

⁸⁹ Cross R., 'The Periphery of Hearsay' (1969) 7 *M.U.L.R.* 1.

⁹⁰ See *R. v. Gao* (1960) 104 C.L.R. 419; *Guy v. R.* [1978] W.A.R. 125; *R. v. Alexander and Keeley* (unreported, Victorian Court of Criminal Appeal, 1st November 1979).

⁹¹ Libling D., 'Evidence of Past Identification' [1977] *Criminal Law Review* 268.

⁹² *Ibid.* 277. See *R. v. Penno* [1977] 3 W.W.R. 361.

⁹³ See Lempert and Saltzburg, *op. cit.* 338.

if *McLean*⁹⁴ and other like cases are regarded as having been incorrectly decided, it should be borne in mind that identification of a person is much less certain a process than notation of a licence number. Thus while the evidence excluded in *McLean*⁹⁵ may seem to have had strong probative force (it would be an amazing coincidence if the witness had managed to get the registration number wrong, but still picked one which fitted a car which bore the same general characteristics as one which was linked to the accused), no such strong probative force is inherent in the evidence considered under Fact situation (iii).

Fact situation (iv)

This postulates a witness who 'refreshes his memory', not in the sense of 'present memory revived',⁹⁶ but rather 'past recollection recorded'.⁹⁷ So far as a witness whose memory is actually revived is concerned, he gives present testimony as to the matter in question, his prior identification of the accused. Therefore his evidence is analytically indistinguishable from Fact situation (i), and should be treated by the courts in the same manner. If such evidence is inadmissible, in the absence of an in-court identification, it ought not to be rendered admissible by virtue of the doctrine of refreshing memory. That doctrine is not a device to be used to evade exclusionary rules of evidence.

What then of the witness who refreshes his memory only in the notional sense of past recollection recorded? Such a witness 'refreshes his memory' from a document prepared by him, or directly under his supervision,⁹⁸ contemporaneously⁹⁹ with the act of identification. He is, in effect, prepared to swear that the contents of the document are true and correct though he has no memory at all of the out-of-court identification.¹ In such a case is there evidence of identification fit to go before the jury? Can witness B be

⁹⁴ (1968) 52 Cr.App.R. 80.

⁹⁵ *Ibid.*

⁹⁶ Gobbo, Byrne and Heydon, *op. cit.* paragraph 10.24. The terminology is that of Wigmore.

⁹⁷ *Lord Talbot de Malahide v. Cusack* (1864) 17 I.C.L.R. 213, 220 *per* Hayes J.: that [refreshing memory] is a very inaccurate expression; because in nine cases out of ten the witness's memory is not at all refreshed; he looks at it (the document) again and again; and he recollects nothing of the transaction; but, seeing that it is in his own handwriting, he gives credit to the truth and accuracy of his habits, and though his memory is a perfect blank, he nevertheless undertakes to swear to the accuracy of his notes.

Note that Wigmore argued that a document used in such a manner, as distinct from reviving a present memory, became evidence of the truth of the facts recorded in it, *i.e.* an exception to the hearsay rule. This view was endorsed by the New Zealand Court of Appeal in *R. v. Naidanovici* [1962] N.Z.L.R. 334. However English authority is to the contrary. See *Maugham v. Hubbard* (1828) 8 B. & C. 14; *Birchall v. Bullough* [1896] 1 Q.B. 325; *R. v. Virgo* [1978] Crim.L.R. 557. See generally Newark M. and Samuels A., 'Refreshing Memory' [1978] *Criminal Law Review* 408.

⁹⁸ *Burrough v. Martin* (1809) 2 Camp. 112.

⁹⁹ *Jones v. Stroud* (1825) 2 C. & P. 196.

¹ The witness is really testifying to no more than his habit of accuracy.

called to fill in any gaps that there might be in the document, such as which particular person witness A picked out at the identification parade?²

It is suggested that if the sole basis upon which evidence of past identification is admissible is to bolster the credit of an in-court identification, such evidence of past recollection recorded is inadmissible. Once again the refreshing memory doctrine cannot be used to subvert an exclusionary rule of evidence.

What if some other basis for the admissibility of past identification is accepted? Assume for example that statements of past identification are admissible as an exception to the hearsay rule, whether or not there has been an in-court identification. In that event it would seem that evidence of the contents of the document in a case of past recollection recorded would be admissible as evidence of identification.³ A more bizarre situation arises if statements of past identification are seen as being original evidence. The fact that what is contained in the document is a statement of past identification would tend towards a characterization as original evidence, but the use to which the document is put might tend towards a treatment of its contents as admissible hearsay.⁴

In a recent case argued before the Victorian Court of Criminal Appeal, Fact situation (iv) came up directly for consideration. In *R. v. Alexander and Keeley*⁵ the accused were charged with Burglary. Forensic evidence was available to link a particular car, a green Nissan, with the offence in question. In order to link the accused with this car, the Crown called the dealer who had sold it some months prior to the burglary. The dealer testified that he had sold the car to two persons, under assumed names, neither of whom he could identify in court as being the accused. This was not surprising since the trial was conducted some two years after the events in question. The dealer could recall having been shown a folder of police 'mug' shots⁶ shortly after the burglary was committed, and he also recalled having made an identification from those mug shots. However he could not

² The document may record merely that the witness was able to pick the offender out during the course of an identification parade *i.e.* there would be a missing link between this testimony and a full identification of the accused as that person.

³ Of course if Wigmore's analysis of the status of documents which form the basis of 'past recollection recorded' is correct, the contents of the document would be admissible hearsay by virtue of that status alone.

⁴ Once again on the assumption that Wigmore's analysis is correct.

⁵ Unreported, Victorian Court of Criminal Appeal, 1st November 1979.

⁶ It was also argued that evidence of out-of-court identification from photographs in the possession of the police ought to be excluded in the exercise of the judicial discretion because of the prejudicial consequences of revealing to the jury that the accused had criminal records. See generally *R. v. Doyle* [1967] V.R. 698; *R. v. Russell* [1977] 2 N.Z.L.R. 20. See also Libling D., 'The Use of Photographs for the Purpose of Identification' [1978] *Criminal Law Review* 343. This ground of appeal was unsuccessful, though the Court of Criminal Appeal did express reservations regarding possible abuse of the practice of using photographs rather than identification parades.

recall whom he had identified,⁷ he was not able to say that those persons were the two accused,⁸ and he did not say that those identifications were accurate.⁹

The dealer was shown a document containing a statement which he had made to the police on the day of the identification. He was asked to 'refresh his memory' from the document. In that document there was an assertion that he had picked out photo number six as one of the purchasers of the Nissan. There is no indication in the transcript that the dealer actually had his memory revived by looking at the document. He merely asserted that it bore his signature and had been made by him.¹⁰ He did not assert that its contents were accurate.¹¹

The Crown then called a police officer to testify that the dealer had picked out photo number six, and that that photo was a photo of one of the accused. Objection was taken that this evidence was hearsay, but the evidence was admitted, and the accused were convicted.

On appeal, a number of arguments were raised against the admissibility of this evidence. The main arguments were:

- (a) that evidence of past identification was admissible only where an in-court identification was first made, and then only for the purpose of bolstering that in-court identification.
- (b) that even if the car dealer could give evidence of his past identification without making an in-court identification, he could only do so where he recollected that past identification either directly or after his memory was genuinely revived. Because evidence of past identification could be regarded as 'primary evidence',¹² the technique of past recollection recorded could not be used as a basis for admissibility.
- (c) that even if arguments (a) and (b) were rejected and the dealer could give evidence of his past identification in this manner, the police officer could not be called if the effect of the dealer's testimony was to leave a 'gap' in the identification of the accused. In this context it should be remembered that the dealer at no stage asserted that what was contained in the document was accurate, and also that the dealer was unable to say that photo number six was a photograph of one of the two accused.

⁷ Transcript of the trial, before his Honour Judge O'Shea of the Victorian County Court, 7th May 1979 at p. 314.

⁸ *Ibid.*

⁹ *Ibid.* Contrast *R. v. Burke and Kelly supra*, where the witness was able to testify that his out-of-court identification had been accurate at the time it was made though he could not recall whom he had identified, or link that person with the accused.

¹⁰ *Ibid.* 315, 316.

¹¹ *Ibid.* 317, 318.

¹² Gobbo, Byrne and Heydon, *op. cit.* paragraph 1.27.

These arguments were rejected. The Court of Criminal Appeal, in a unanimous judgment¹³ held that the evidence of both the dealer and the police officer was admissible. The proposition that a witness might not give evidence of his prior out-of-court identification in the absence of an in-court identification was said to be a matter which went to weight and not admissibility.¹⁴ Such evidence by the witness of his out-of-court identification was described as 'direct' or 'primary' evidence of his having performed a mental act of recognition.¹⁵ The words of identification spoken by the witness in his out-of-court identification were described as being 'verbal parts of a fact in issue'.¹⁶ In other words the principle was the same as that laid down in *McGregor v. Stokes*,¹⁷ the celebrated 'telephone gambling' case. The words spoken were not tendered testimonially, but only because they 'accompany and explain' a relevant fact,¹⁸ that is, the act of identification. As such they were original evidence *simpliciter*.

The Court of Criminal Appeal went on to say that a third party who observed the out-of-court identification by witness A would also be permitted to give evidence of the identification. The Court stated:

evidence by bystanders of acts done and declarations made by the identifying witness at a prior out-of-court identification is admissible if or in so far as what was said or done by the identifying witness constituted a declaration of identification and in so far as it serves to give legal significance to conduct otherwise equivocal so as to establish the link between the mental act of recognition or identification performed by the identifying witness in his own mind and the external fact of the person who or the photograph which excited that mental act of recognition.¹⁹

The Court also remarked:

Any person who was present when the original identifying witness selected or indicated that photograph can give evidence of that selection, and evidence of what the original identifying witness said or did in selecting that photograph is admissible in order only to indicate what photograph was selected.²⁰

If, as the Court of Criminal Appeal asserts, it is proper to characterize evidence of an out-of-court identification as original evidence, it would seem as a matter of logic that there should be no requirement that the out-of-court identifier be called as a witness, or, if called, that he testify as to the identification. In *McGregor v. Stokes*²¹ the persons who made the telephone calls were not called to testify, yet their statements over the telephone, to the effect that they wanted to place bets, were held to be admissible as original evidence.²²

¹³ *Per* McInerney, Murphy and Fullagar JJ.

¹⁴ *R. v. Alexander and Keeley* (unreported, 1st November 1979) 17.

¹⁵ *Ibid.*

¹⁶ *Ibid.* 19.

¹⁷ [1952] V.L.R. 347.

¹⁸ Gobbo, Byrne and Heydon, *op. cit.* paragraph 19.6.

¹⁹ *R. v. Alexander and Keeley* (unreported 1st November 1979) 19.

²⁰ *Ibid.* 18.

²¹ [1952] V.L.R. 347.

²² *Cf. State v. Di Vincenti* (1957) 93 So. (2d) 676; *Marshall v. Watt* [1953] Tas. S.R. 1 *per* Gibson J.

However, the Court of Criminal Appeal did not consider it necessary to decide this point.

Two passages in the judgment are instructive:

Provided the witness says he identified a particular photograph it is relevant and admissible for some other person present to state what photograph was identified and to produce that photograph . . .²³

It is not necessary in the present case to say anything concerning the admissibility of evidence of identification where the 'identifying witness' is unable to give evidence of such [prior] identification in court. Such a case does not arise here, and we would therefore prefer to reserve until the occasion arises any discussion of the correctness of that part of the decision in *Osbourne's* case, which held admissible evidence given by a third person to the effect that Mrs Brooks [witness X] (who could not remember identifying anyone) had in fact identified the accused.²⁴

Was the Court of Criminal Appeal in effect creating a new type of original evidence, which differs from original evidence *simpliciter*? If not, why should the capacity of witness B to recount the out-of-court identification depend upon whether witness A first gives evidence of it? If the answer is in terms of witness A being thereby available for cross-examination as to the circumstances of the prior identification, this is a matter which normally is relevant only to a functional appraisal of whether an out-of-court statement ought to be received testimonially (that is as admissible hearsay). It has nothing whatever to do with the question whether an out-of-court statement is conceptually and analytically hearsay, or original evidence.

If the out-of-court identification is admissible as a statement accompanying and explaining a relevant act, it is surely no less so admissible if the person who performed that act and uttered the statement (a) is not called as a witness or (b) has no recollection of that act. Though the Court of Criminal Appeal was reluctant to explore the full implications of its judgment, it is submitted that logic would seem to demand that if its analysis is adopted, the decision in *Osbourne and Virtue*²⁵ is correct *in toto*.

It is respectfully suggested that such a conclusion would be manifestly unsound as a matter of policy as well as contrary to established legal principle.²⁶ It amounts to a distortion of the hearsay rule, and an expansion of the scope of admissibility in precisely the area where evidence is most suspect and the need for cross-examination is greatest, that is, identification evidence.²⁷

²³ *R. v. Alexander and Keeley* (unreported 1st November 1979) 20. (My emphasis.)

²⁴ *Ibid.* 20-21. Note also the comment at page 17 of the judgment: 'The facts of this application do not require us to consider a case where the identifying witness does not give evidence of his identification'.

²⁵ [1973] Q.B. 678.

²⁶ See below. Note the decisions in *Sparks v. R.* [1964] A.C. 964, 981, and *Teper v. R.* [1952] A.C. 480, both of which it is submitted are correctly decided, and both of which run counter to *Osbourne and Virtue*.

²⁷ There is an abundant and ever expanding body of literature dealing with the unreliability of eye-witness identification evidence. See for example *Report of the*

The only alternative analysis of the judgment in *Alexander and Keeley*²⁸ which does not compel such a result is one which recognizes a new type of original evidence, namely, one which requires the presence in the witness box of the person who uttered the words characterized as original. However such an analysis makes no sense at all where that person cannot be cross-examined effectively regarding his out-of-court identification, as for example where he has no memory of the events in question.²⁹

Out-of-court identification where the identifying witness is not called to testify at the trial

Where a bystander overhears a statement identifying the accused as the offender made by a person not subsequently called as a witness, the bystander may not, as a general rule, testify to that prior out-of-court identification. Such testimony, it is suggested, would constitute a classic case of inadmissible hearsay.³⁰

As has been noted earlier in this article, one possible basis upon which evidence of past identification is deemed to be admissible is that it bears the character of original evidence, and infringes no exclusionary rules. The difficulty with such an analysis is that as a matter of logic it would seem to entail that in cases where the person who made the out-of-court assertion does not testify at all, evidence of that out-of-court assertion would still be admissible.³¹

It must be conceded that there are indeed certain cases where evidence of out-of-court identification has been received, notwithstanding the absence from the trial of the identifying witness. However it is suggested that where such evidence has been received it has been by virtue of a well-established exception to the hearsay rule, and not because such evidence is properly to be characterized as original in nature. There are at least six distinct categories of case to be considered.

- (i) The statement of identification may be admissible by virtue of the doctrine of *res gestae*.³² Thus if the victim of an assault were to

Committee on Evidence of Identification in Criminal Cases (H.M.S.O., London 1976) (known colloquially as the Devlin Report). See also Hain P., *Mistaken Identity — The Wrong Face of the Law* (London 1976); MacCrimmon M. T., 'Consistent Statements of a Witness' [1979] 17 *Osgoode Hall Law Journal* 285, 314.

²⁸ Unreported, 1st November 1979.

²⁹ Bein F., 'Prior Inconsistent Statements: The Hearsay Rule, 801(d)(1)(A) and 803(24)' [1979] 26 *U.C.L.A. Law Review* 967. Cf. MacCrimmon, *op. cit.*

³⁰ *Sparks v. R.* [1964] A.C. 964, 981; *Teper v. R.* [1952] A.C. 480; and *R. v. Gibson* (1887) 18 Q.B.D. 537.

³¹ *R. v. Osbourne and Virtue* [1973] Q.B. 678, 690; and *R. v. Collings* [1976] 2 N.Z.L.R. 104, 114 both impliedly support such a conclusion. It is respectfully suggested that in so far as they do point in this direction they are wrongly decided.

³² Professor Julius Stone, in a memorable phrase, described the doctrine of *res gestae* as the 'lurking place of a motley crowd of conceptions in muted conflict and reciprocating chaos'. See '*Res Gesta Reagitata*' (1939) 55 *Law Quarterly Review* 66. The doctrine is inclusionary in nature. It renders admissible statements made contemporaneously with the occurrence of some relevant fact or event,

name his assailant during the course of the commission of the offence, evidence of what the victim was heard to say would be admissible even if he were subsequently unable to testify.³³ Notwithstanding some authority for the proposition that evidence received under the rubric of *res gestae* is always original evidence,³⁴ the better view, and the view which it is submitted is now accepted by the courts, is that it is or may be received as an exception to the hearsay rule.³⁵

- (ii) The statement of identification may have been made in the presence of the accused in circumstances whereby his demeanour could indicate that he accepted the allegation as being true.³⁶ Here the contents of the statement become, as it were, transposed into an admission by conduct on the part of the accused, that is, an exception to the hearsay rule.
- (iii) What if the out-of-court identification takes the form of assertive conduct³⁷ on the part of the identifier? Suppose for example, that without saying anything, he walks over to the accused in an identification parade and places his hand upon his shoulder. Although there is some authority for the proposition that a policeman may testify as to what he observed, since he is merely describing conduct, and not speech on the part of the identifier,³⁸ it is submitted that such a view is manifestly incorrect. Whatever uncertainty there may be as to the scope of the hearsay rule, there is no doubt that it extends to conduct intended by the person performing that conduct to be communicative of a particular assertion.³⁹ There is no difference of any consequence between the act of pointing to

³³ In *R. v. Nye and Loan* [1978] Crim.L.R. 94, the Court of Appeal (Criminal Division) held that a bystander could testify as to an out-of-court identification made by the victim of an assault, where the victim did not make an in-court identification, on the basis that the victim's statement was a spontaneous identification within the ambit of the doctrine of *res gestae*. Note that the 'spontaneity' criterion for *res gestae*, laid down by the Privy Council in *Ratten v. R.* [1972] A.C. 378, may not represent the law on this point in Australia. In *Vocisano v. Vocisano* (1974) 130 C.L.R. 267 the High Court seemingly endorsed the rigid 'contemporaneity' approach adopted in the notorious old case of *R. v. Bedingfield* (1879) 14 Cox C.C. 341, the case where it was held that a woman's exclamation 'See what Harry has done to me' moments after her throat had been cut, was not sufficiently contemporaneous to warrant admissibility.

³⁴ *R. v. Christie* [1914] A.C. 545, 553 *per* Lord Atkinson; *Adelaide Chemical & Fertilizer Co. Ltd v. Carlyle* (1940) 64 C.L.R. 515, 531 *per* Dixon J.

³⁵ *Teper v. R.* [1952] A.C. 480, 487 *per* Lord Normand; *Ratten v. R.* [1972] A.C. 378; *R. v. Hissey* (1973) 6 S.A.S.R. 280, 293.

³⁶ *R. v. Christie* [1914] A.C. 545; *R. v. Taylor* [1978] Crim.L.R. 92.

³⁷ *I.e.* conduct which is intended by the performer to be communicative of an assertion. Sign language is perhaps the simplest example.

³⁸ *Johnson v. State* (1949) 36 N.W. 2d 86, 89; *Williams v. State* (1922) 110 S.E. 286, 299.

³⁹ *Chandrasekera v. R.* [1937] A.C. 220. This view is also accepted by the New South Wales Law Reform Commission in its *Report on the Rule Against Hearsay* L.R.C. 29 (1978).

the accused person in a police lineup, and the statement that 'the man third from the left is the offender'. If the latter is hearsay, so also is the former. Both ought to be regarded as inadmissible.

- (iv) What if the out-of-court identification takes the form of a statement not intended by its maker to be assertive? Suppose the issue is whether at the time a fire was started the accused was in the vicinity. If an unknown bystander was heard to utter a greeting to someone bearing the same (unusual) name as the accused, could evidence of that greeting be given in order to establish the accused's presence at the scene of the crime?⁴⁰

While there are persuasive arguments that such evidence is not hearsay,⁴¹ it is suggested that the better view,⁴² and indeed the view on balance supported by the authorities,⁴³ is that it does constitute inadmissible hearsay. Space does not permit a detailed analysis of the merits of each of the respective points of view. Such an analysis has been previously undertaken by the author of this article,⁴⁴ as well as by others.⁴⁵

- (v) What if the out-of-court identification takes the form of conduct of a **non-assertive type**, that is, conduct not intended by the performer of that conduct to communicate the 'assertion' which may reasonably be inferred from it? For example, assume that the victim of a brutal rape collapses in terror when she comes face to face with the accused during the course of an identification parade. Can evidence of this occurrence be given by a police officer who observed it if the complainant is unavailable to testify?

Once again it is impossible in an article of this nature to consider and evaluate the arguments in favour of and against extending the hearsay rule to cover this type of implied assertion. These arguments have been covered at length elsewhere.⁴⁶ It is sufficient to

⁴⁰ *Teper v. R.* [1952] A.C. 480.

⁴¹ See New South Wales Law Reform Commission *Report on the Rule Against Hearsay* L.R.C. 29 (1978) 64-71. Most recent attempts at codification of the Law of Evidence confine the scope of the hearsay rule to assertive statements and conduct. See for example Draft Canadian Evidence Code (1975) s. 27(2)(b); United States Federal Rules of Evidence Rule 801(a).

⁴² Schiff S., 'Hearsay and the Hearsay Rule: A Functional View' (1978) 56 *Canadian Bar Review* 674; Weinberg M., 'Implied Assertions and the Scope of the Hearsay Rule' (1973) 9 *M.U.L.R.* 268; Cross R., 'The Scope of the Rule Against Hearsay' (1956) 72 *Law Quarterly Review* 91.

⁴³ *Wright v. Doe d. Tatham* (1837) 112 E.R. 488; *Teper v. R.* [1952] A.C. 480. Cf. *Ratten v. R.* [1972] A.C. 378; *R. v. Wysochan* (1930) 54 C.C.C. 172.

⁴⁴ Weinberg M., 'Implied Assertions and the Scope of the Hearsay Rule' (1973) 9 *M.U.L.R.* 268.

⁴⁵ Morgan E., 'Hearsay and Non-Hearsay' (1935) 48 *Harvard Law Review* 1138; Maguire, 'The Hearsay System: Around and Through the Thicket' (1961) 14 *Vand. Law Review* 741; Finman, 'Implied Assertions as Hearsay: Some Criticisms of the Uniform Rules of Evidence' (1962) 14 *Stanford Law Review* 682.

⁴⁶ *Ibid.*

say that it is at least arguable that such evidence ought to be excluded as hearsay.

- (vi) It has been argued that evidence of an out-of-court identification ought to be admissible where the identifier is an 'impartial' person, and it is the *defence* which seeks to rely upon the identification of someone other than the accused by that identifier.⁴⁷ Whatever the merits of such a proposition in terms of policy, it is in no way consistent with established principles of law.⁴⁸

Conclusion

This article began by asserting that there are at least three possible bases for the reception of evidence of past identification. There are authorities which support each of these alternative bases. These authorities are often poorly reasoned, internally inconsistent and illogical.

Although the weight of authority appears to favour the view that evidence of past identification is admissible as original evidence *simpliciter*, or at least as a qualified form of original evidence requiring the maker of the statement to be called as a witness, it has been argued in this article that this view is unsound. Rather, it is suggested that as a general rule such evidence should be admissible for the limited purpose of bolstering the credibility of an in-court identification, that is, as an exception to the rule against prior consistent statements.⁴⁹ Where there is no in-court identification such evidence should be inadmissible,⁵⁰ unless it comes within one of two exceptional categories, *res gestae*, or statements made in the presence of the accused. If the out-of-court identification does fall within one of these two exceptional categories, it should be admissible as an exception to the hearsay rule.

⁴⁷ Libling D., 'Evidence of Past Identification' [1977] *Criminal Law Review* 268, 279.

⁴⁸ *Sparks v. R.* [1964] A.C. 964.

⁴⁹ Cf. MacCrimmon M. T., 'Consistent Statements of a Witness' [1979] 17 *Osgoode Hall Law Journal* 285, 322, where the learned commentator says:

A prior identification by a witness consistent with an in-court identification should be substantive evidence. It is a fiction to say that a prior identification supports the credibility of the witness making an in-court identification . . . [t]he most probative identification is one made soon after the event.

⁵⁰ Cf. MacCrimmon M.T., *op. cit.* 326-327. The author asserts that out-of-court identification evidence is more reliable than a dock identification, and therefore warrants admissibility even where there is no in-court identification, and the witness does not adopt the prior identification. With respect, while it may be conceded that dock identifications tend to be highly suspect, it is submitted that the inability to effectively cross-examine the maker of an out-of-court identification who has no recollection of having made it, ought to preclude such evidence from being admitted.