# THE ADMISSION OF EXPERT EVIDENCE OF OPINION AS TO THE POTENTIAL UNRELIABILITY OF EVIDENCE OF VISUAL IDENTIFICATION

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*[The criminal courts are aware of the inherent unreliability of evidence of visual identification. Such evidence is generally admissible with the trial judge invariably issuing a warning to the jury concerning the problems with, and acting upon, such evidence.*

*The author argues that this warning is insufficient. The author further argues that expert (psychological) evidence concerning the potential unreliability of such evidence should be admitted. In so doing the author examines the prerequisites to the admissibility of such evidence, its form, and the case law concerning this area.]*

## *INTRODUCTION*

This article is broadly concerned with the treatment of evidence of visual identification in criminal trials.[1]

However, more particularly, the purpose of this article is to examine whether expert (psychological) testimony concerning the inherent unreliability of such identification evidence should be admitted into evidence, the pre-requisites and circumstances of such admission, and the content of such evidence. A number of alternatives to such evidence will also be analysed briefly.

Firstly, however, it will be necessary to examine briefly the way in which the Courts treat evidence of visual identification in order to highlight the deficiencies in such treatment.

There is a general awareness that such evidence is often unreliable — particularly where the testifying witness concerned did not know the accused before the incident out of which the trial arises. As a result, on the basis of such evidence, there have been many wrongful convictions.[2]

However, as a matter of law, evidence of an out of Court identification by a witness, in situations including identification parades, showings, and police photographs, is generally admissible, with very few protections accorded to the accused at his or her trial.

These protections can be listed as follows:

(i) a discretion in the trial judge to exclude evidence unfairly or improperly (or unlawfully) obtained;

(ii) a discretion in the trial judge to exclude evidence whose prejudicial value exceeds its probative value;

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[1] Other forms of identification evidence include handwriting, fingerprints and voice. In relation to voice identification, a number of recent decisions have established principles similar to those in cases of visual identification: *R. v. Paxton* [1983] 1 V. R. 178; *R. v. McKay* [1985] V.R. 623; *R. v. Smith* (1986) 7 N.S.W.L.R. 444; *R. v. Brownlowe* (1986) 7 N.S.W.L.R. 461; *cf. R. v. Thomas Hentschel* (unreported, Victorian Court of Criminal Appeal, 11 August, 1987).

[2] Some of these are discussed in Australian Law Reform Commission (A.L.R.C.), *Evidence: Volume 1: Report No. 26 (Interim)*, A.G.P.S., 10985 229–31.

(iii) a discretion in the trial judge to warn the jury of the dangers of identification evidence; and

(iv) a power in the trial judge to direct the jury to acquit where the prosecution evidence, if accepted, would raise a *prima facie* case, but, in his view, it would be unsafe to convict the accused on the basis of it.

The first of these protections depends upon considerations of public policy and does not relate to the unreliability of such evidence.

Each of the others, however, does depend upon the weakness and inherent unreliability of such evidence. However, attention need only be directed to the third factor, namely, the nature and content of the warning of the trial judge (the chief safeguard acting to prevent undue weight being accorded to evidence of eyewitness identification) in order to emphasise the insufficient regard paid by the Courts to the hazards of admission of such evidence. Furthermore, it should be noted that in exercising both the second discretion and the power listed above the trial judge must have firstly effectively directed himself in accordance with the warning contained in the third discretion.

## *THE WARNING OF THE TRIAL JUDGE*

The weight of Australian authority is to the effect that the warning should be given where the circumstances so require; it is, effectively, compulsory.

The approach of the Courts is as stated by Gibbs J., as he then was, in *Kelleher v. R.*[3]:

> It is in practice generally desirable that where the case for the prosecution includes evidence of visual identification by a person previously unfamiliar with the accused, an appropriate warning should be given to the jury, since jurors may not appreciate as fully as a judge may do, or even at all, the serious risk that always exists that evidence of that kind may be mistaken . . . If a warning is necessary, the duty to give it will not be satisfactorily discharged by the perfunctory or half-hearted repetition of a formula, and a warning in general terms will not alone be sufficient; the jury should be given careful guidance as to the circumstances of the particular case, and their attention should be drawn to any weakness in the identification evidence.

More recently this approach was unanimously affirmed by the High Court in *Bromley and Karpany v. R.*[4], where the Court also expressly approved the directions of the five member English Court of Criminal Appeal in *R. v. Turnbull*[5].

The effect of the decision in *Turnbull's Case* is that, in England, a detailed warning must be given to the jury in order to overcome the problems relating to evidence of visual identification in criminal cases. The Court set out a number of guidelines which can be summarised as follows:

(i) the jury should be warned of the special need for caution before convicting in reliance on the correctness of an identification whenever the case against the accused depends wholly or substantially on such evidence;

(ii) the jury should be advised as to the reason for such a warning;

(iii) the jury should be warned that mistaken witnesses can be most convincing;

[3] (1974) 131 C.L.R. 534, 551.

[4] (1986) 67 A.L.R. 12; (1986) 60 A.L.J.R. 651.

[5] [1977] Q.B. 224; (1976) 63 Cr.App.R. 132; [1976] 3 All E.R. 549; *cf. R. v. Long* (1973) 57 Cr.App.R. 871.

(iv) the jury should be directed to examine closely the circumstances in which the witness came to observe the person whom the witness states was the accused;
(v) the jury should be reminded that mistakes in recognition of people familiar to the witness are made; and
(vi) the trial judge should identify to the jury any evidence which he adjudges is capable of supporting the evidence of identification.

The propositions in *Turnbull's Case* have been approved in a number of decisions of the Victorian Court of Criminal Appeal.[6]

However, even prior to these cases, the authorities were clear in holding that, although each case depended upon its own circumstances, it was necessary when charging a jury where the Crown case depended wholly or substantially on identification evidence, for the trial judge to warn them of the great care which must be taken in scrutinizing such evidence and the likelihood of such witnesses being mistaken.[7]

Such principles were held to appy whether or not the witness previously knew the accused.[8] Where the accused was not previously known to the witness, more instruction and particularity was required of the trial judge in his warning.[9]

Most of the authorities were reviewed in *R. v. Burchielli*.[10] In a joint judgment, Young C.J. and McInerney J., with whom McGarvie J. agreed,[11] stressed that a trial judge must adequately alert the jury to the dangers lurking in evidence of visual identification, and explain the defects in such evidence.[12]

Subsequent to that decision, the Victorian Court of Criminal Appeal has on a number of occasions affirmed these principles and considered more precisely the nature and contents of the judicial warning.[13] These decisions merely provide a gloss to the propositions set out in *Burchielli's Case*.

In *R. v. Clune,*[14] Crockett J.,[15] with whom Starke A.C.J.[16] and McGarvie J.[17] agreed, stated that the content of the caution to the jury must depend upon the circumstances of the case in question, and that it is not necessary that a set formula be followed. Furthermore, the strength of the warning will depend upon the extent to which the Crown relies upon the evidence of identification. It was, therefore, incumbent upon a trial judge to give a warning that was both strong and complete where, were the jury not to accept such identification evidence, they could not convict.

In addition, the attention of the jury was to be drawn to all matters which might affect the capacity of the witness to make an accurate judgment as to a

6 *Infra*
7 *E.g. R. v. Preston* [1961] V.R. 761; *R. v. Doyle* [1967] V.R. 698; *R. v. Wright (No. 2)* [1968] V.R. 174; *R. v. Boardman* [1969] V.R. 151.
8 *R. v. Wright (No. 2)* [1968] V.R. 174.
9 *R. v. Wright (No. 2)* [1968] V.R. 174, 178.
10 [1981] V.R. 611.
11 [1981] V.R. 611, 621.
12 [1981] V.R. 611, 616-20.
13 *R. v. Clune* [1982] V.R. 1; *R. v. Dickson* [1983] 1 V.R. 227; *R. v. Haidley and Alford* [1984] V.R. 229.
14 [1982] V.R. 1.
15 [1982] V.R. 1, 6-8.
16 [1982] V.R. 1, 2.
17 [1982] V.R. 1, 14.

person's identity, including the state of lighting, a situation or condition of stress or fear, and the ability of the witness to perceive.[18]

Turning to the other Australian jurisdictions, it is readily apparent that the Courts do not adopt an identical approach in so warning juries as to the dangers inhering in evidence of visual identification.

Although the Queensland Courts have on a number of occasions approved both the English and High Court authorities relied upon by the Victorian Courts,[19] the Courts of New South Wales and South Australia have refused to adopt the *Turnbull* guidelines.

Having discussed the English and Victorian cases, Hodgson J. stated that the authorities in New South Wales:

> do not support the necessity of particular directions of this type, but rather stress that the jury must [merely] be warned appropriately and thoroughly and have some discussion of the way in which the warning and the need for caution must be taken into account in the light of the particular circumstances of the case in hand.[20]

As a result, the Court went on to reject the submissions made on behalf of the appellant which were, effectively, that the trial judge's warning was insufficient since it was not in accordance with the Victorian authorities.

This approach, it is submitted, is imprecise.[21]

Although the South Australian Court of Criminal Appeal has consistently held that a trial judge is to warn the jury of the need to exercise great care in relation to the identification of a person previously unknown to the identifying witness,[22] the Court has not been as strict as the Victorian Courts in defining the contents of such a warning.

Meanwhile, in England, the Courts have not consistently applied the *Turnbull* guidelines; for example, the Court in ***R.** v. Curry and Keeble*[23] emphasised that the directions set out in *Turnbull's* case are not required in every case involving a 'minor' identification problem, but are only intended to deal with 'fleeting glance sightings'.

It is submitted, however, that these attempts by the Courts to ensure that (a) the jury understands the possible weaknesses of identification evidence, and (b) the need to take particular care in its use, provide insufficient protection in some cases.

Before determining how, and where, such a warning is insufficient, it will be necessary to examine the mental processes involved in a person making an identification. (Since this article is primarily concerned with other matters, this psychological information will be presented as a few fundamental principles.)

18 [1982] V.R. 1, 6-9.

19 *E.g. R. v. Kern* [1986] 2 Qd R. 209; *R. v. Turnbull and Davidson* [1988] 1 Qd R 266.

20 *R. v. De Cressac* (1985) 1 N.S.W.L.R. 381, 394.

21 *R. v. Aziz* [1982] 2 N.S.W.L.R. 322; *R. v. Allen* (1984) 16 A. Crim. R. 441.

22 *E.g. R. v. Goode* [1970] S.A.S.R. 69; *R. v. Easom* (1981) 28 S.A.S.R. 134; *R. v. Evans* (1985) 38 S.A.S.R. 344; *R. v. Manh* (1983) 33 S.A.S.R. 563.

23 [1983] Crim. L.R. 737. Also see: *R. v. Oakwell* (1978) 66 Cr.App.R. 174, especially *per* Lord Widgery C. J.; *R. v. Weeder* (1980) 71 Cr.App.R. 228 (five member Court of Criminal Appeal); *cf. R. v. Tyson* [1985] Crim. L.R. 48.

*THE PROCESS OF IDENTIFICATION*

When a witness in a criminal trial asserts recognition of a certain person, he is effectively stating that:

(i) he made an observation which became impressed upon his mind; and
(ii) the impression has not altered; and
(iii) there is sufficient resemblance between the original impression and the accused to warrant a conclusion, not of resemblance, but of identity.[24]

These stages can be conveniently entitled and listed as follows:

(i) The Acquisition Stage.
(ii) The Retention Stage.
(iii) The Retrieval Stage.

Each of the stages is subject to factors which may weaken the value of the final identification. These will be considered in turn.[25]

(i) *The Acquisition Stage*

Factors affecting the ability of a witness to perceive accurately can be broadly classified as follows: those relating to the nature of the event itself, and those involving subjective characteristics of the witness.

*Event factors*

Some of these factors are obvious and include the number of opportunities the witness has to make an observation, whether the images were obscured, and the complexity of the event (namely the amount of activity forming the event under observation). There are, however, many other matters which lead to less than perfect perception. For example, it has been shown that witnesses may subconsciously concentrate only upon those stimuli relevant to their chance of safety or escape from the incident, rather than on the accused. Moreover, inaccuracies in perception will often occur if the observer does not realize the significance of a particular detail.

Anxiety and stress generated by the event also have a marked effect on the quality of perception. The impact of these sensations, however, is equivocal. Generally anxiety impairs perceptual efficacy by increasing the likelihood of block outs and distortions, the latter engendered/created by erroneous perceptions from incomplete impressions.[26] However, as some research indicates, anxiety may result in heightened perceptual accuracy and a broader spectrum of awareness.[27]

Furthermore, and somewhat surprisingly, many visual assessments are significantly less accurate in the centre of the visual field, compared with those in

[24] *Craig v. R.* (1933) 49 C.L.R. 429, 446 *per* Evatt and McTiernan JJ.

[25] See, generally, Re, L., 'Eyewitness Identification: Why So Many Mistakes?' (1984) 58 *Australian Law Journal* 509; the treatment in this section of the article is based upon Re's treatment of the issue.

[26] Lezak, M. D., 'Some Psychological Limitations on Witness Reliability' (1973) 20 *Wayne Law Review* 117, 126.

[27] *Ibid.* 126; also see Woocher, F. D., 'Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification' (1977) 29 *Stanford Law Review* 969, 979-80.

the periphery. Consequently most perception occurs within a very narrow field, with the result that the indistinct remainder is largely ignored.[28]

*Witness factors*

These are inherent characteristics of witnesses themselves and include the witness's age, sex, and background; they are often of significance as the subject of one's perception is usually in the same terms in which one perceives oneself.[29] In addition, some research demonstrates that there is a greater likelihood of distorted perception if the subject of observation is of 'emotional significance' rather than 'familiar'.[30] Also at each stage of the identification process, people over sixty years of age perform noticeably worse than those aged between fifteen and forty-five.[31] At the acquisition stage, in particular, there is a marked difference between men and women. Men tend to concentrate on physical characteristics such as clothing or size, while women are more likely to emphasize inferred psychological characteristics.[32]

Another factor of relevance is the ability of the witness to cope with stress;[33] one effect of stress tolerance is that the witness will try to 'escape' or withdraw from the (often unpleasant) situation and hence will absorb as little detail as possible.

Furthermore, witnesses perceive according to their expectations; that is, they see what they expect to see. As a result, the unfamiliar or unexpected is recast in familiar terms, or simply does not register.[34]

(ii) *The Retention Stage*

Each factor outlined in the above section can also cause a person to forget their observations.[35] Acute stress is particularly influential. Clifford and Scott have found a direct correlation between the level of stress within an incident and the amount of information forgotten.[36] Further relevant subjective characteristics include a witness's interest and motivation.

Even assuming that an impression is accurately acquired, many factors can operate to affect or even replace it.[37]

An impression is altered most commonly when a person is exposed to post event information before they make the identification. This either supplements or amends the previously acquired memory.[39]

28 Lezak, *op. cit.* 122.
29 *Ibid.* 123-4.
30 Levine, F. J., and Tapp, J. L., 'The Psychology of Criminal Identification: The Gap From Wade to Kirby' (1973) 121 *University of Pennsylvania Law Review* 1079, 1104.
31 *Ibid.* 1102-3.
32 *Ibid.* 1101-2.
33 *Supra*; See further Levine, and Tapp, *op. cit.* 1107.
34 Lezak, *op. cit.* 122-3; also see Woocher, *op. cit.* 980-1.
35 Lezak, *op. cit.* 131.
36 Clifford, B. R., and Scott, J., 'Individual and Situational Factors in Eyewitness Testimony' (1978) 63 *Journal of Applied Psychology* 352, 356.
37 Woocher, *op. cit.* 982-3.
38 Examples of such are media reports and the publication of either photographs or sketches of police suspects.
39 See Re, *op. cit.* 511-2.

If this information is in some particular inconsistent with the witness's impression, then a compromise will be effected.[40] In the short-term, these details which do not conflict may become either over emphasised or blurred.[41]

Memory is also affected by the phenomenon of unconscious displacement; here a person in one situation is mistakenly remembered from a different situation. Their familiarity to the witness is interpreted as being due to presence at the scene of the crime.[42]

(iii) *The Retrieval Stage*

Identification is based upon the process of drawing inferences from similarities (a 'matching process'), where there is much scope for error.

The stored image of a person is based partly upon features deemed salient by the witness, and when those features overlap with those of the accused, a positive identification is made. In such a process, however, there may be other unrecalled features which do not match those of the accused. As a result, a wrong identification may be made.[43] The entire process is made even more spurious if a witness is a 'sharpener', that is, he tends to focus on a few facets of a transaction, and accords them too much weight in making the identification.[44]

Furthermore, there is a significant possibility of error with an identification made in a different context. This was the subject of a study by Thomson who concluded that since 'context elements' such as background, actions, and dress are an integral part of the impression stored, should some of those elements be present at the identification, then there is a grave risk that an erroneous identification will result.[45]

Additional factors contributing to faulty identifications are difficulties in distinguishing the features of members of other races or of the opposite sex.[46]

*IS THE TRIAL JUDGE'S WARNING SUFFICIENT?*

A number of criticisms have been levelled at the warning on the basis that jurors do not receive such instructions until the conclusion of the trial — the time at which they are least likely to affect the jury's decision. Furthermore, such instructions are not heard in isolation, being read during a long and complicated charge, and are couched in difficult language beyond the understanding of most jurors.[47]

[40] *Ibid.* 512.

[41] Lezak, *op. cit.* 128.

[42] See Re, *op. cit.* 512-4; also, Brown, E., Deffenbacher, K., and Sturgill, W., 'Memory for Faces and the Circumstances of Encounter' (1977) 62 *Journal of Applied Psychology* 311, 317.

[43] See further in Jackson, J. D., 'The Insufficiency of Identification Evidence Based on Personal Impression' [1986] *Criminal Law Review* 203, 209.

[44] That is, such facets are enhanced far beyond their (original) importance; see Lezak, *op. cit.* 125.

[45] Thomson, D. M., 'Person Identification: Influencing the Outcome' (1981) 14 *Australian and New Zealand Journal of Criminology* 49; Thomson, D. M., 'The Realities of Eye-Witness Identification' (1982) 14 *Australian Journal of Forensic Sciences* 150.

[46] See Re, *op. cit.* 514; also, Addison, B. M., 'Expert Testimony and Eyewitness Perception' (1978) 82 *Dickinson Law Review* 465, 470-2.

[47] Woocher, *op. cit.* 1005.

It is submitted that these criticisms are not valid for, at least in this context, there is no evidence that jurors are neither conscientious nor true to their sworn duty. Moreover, judges in charging a jury do speak simply, encouraging the asking of questions should they be in any difficulty.

Nevertheless, it is submitted that, notwithstanding a warning as detailed as that given in Victorian courts, it is inadequate and insufficient in that it fails to draw the attention of the jury to a not insignificant number of factors which affect the accuracy or quality of evidence of a visual identification. The basis of this submission is that judges are not experts on the mental processes behind identification and so are not capable of providing the jury with all the information necessary to evaluate fully such evidence.

Examples of such deficiencies can be isolated by simply comparing the content of the warning with those factors which affect the accuracy of an identification set out above.

The warning generally fails to refer to:

— those stimuli which are subject to perception;
— the effect of the characteristics, including sex, of the witness upon both perception and identification;
— the effect of exposure of the witness to post-event information; and
— displacement.

The effect of these deficiencies is magnified when considered in the light of the weight accorded by juries to evidence of visual identification.[48] Jurors are inclined to too readily accept such evidence without the critical evaluation they normally display.

Cross-examination, however, will not fill the gap created by these deficiencies. Evidence of visual identification is especially impervious to the tests of coherence and demeanour because there is rarely any material against which to cross-examine — unless there are discrepancies between the original description and the actual appearance of the accused. Moreover, such cross-examination will generally be largely ineffective for it will merely excite the witness's overriding needs to establish his veracity and to reaffirm his belief in the validity of the contents of his memory.

Although some of the physical factors of perception can be easily brought out by cross-examination, many of the intangible psychological factors[49] cannot be reasonably ascertained in this way. Those which are capable of being ascertained under cross-examination as to credibility will often not be so exposed due to reinforcement by the witness. Alternatively, the value of such exposure will be much reduced without a full explanation of their effect.

## *A SUPPLEMENT, OR AN ALTERNATIVE, TO THE TRIAL JUDGE'S WARNING: THE ADMISSION OF EXPERT EVIDENCE*

The contention of the author is that the jury should be given enough information in order to evaluate fully and properly the evidence of visual identification.

[48] Re, *op. cit.* 515-6 where a number of experiments conducted by Loftus are explained.
[49] *Infra.*

As a result, it is submitted that the jury should be presented with expert psychological testimony about the potential unreliability of eyewitness testimony — at least where the case for the prosecution either wholly or substantially depends upon such evidence and the accused was not previously known to the witness.

Such an expert would explain the effects of all the factors which might affect the perception, retention, and resultant identification by the witness. This would facilitate intelligent reasoning by the jury.

It is submitted that the most appropriate form of this expert evidence would be as set out by Woocher:

> The expert witness can relate the findings of numerous studies and experiments that psychologists have conducted to test the general reliability of eyewitness identification and can analyze the various cognitive and social factors that may have affected the accuracy of the particular identification in the case at hand.[50]

The evidence of the expert would be used in conjunction with an extensive cross-examination of the relevant prosecution witnesses in order to elicit those factors present in the case which would affect the reliability of the identification. The expert would be basing his explanation upon this evidence, and in so doing, enumerating the specific factors tending to reduce the reliability of the evidence.[51]

It must be emphasised that the expert in so responding to the particular facts of the case before him, would be limiting his testimony to the general factors that influence eyewitness identification. The expert would *not* go so far as to venture an opinion whether the particular witness concerned is accurate.

It is trite law that the rules of evidence permit experts to give evidence under oath in a criminal trial in the form of opinion and facts helpful to the determination of issues in dispute.

There are, however, a number of restrictions upon the admission of such evidence; the following criteria must be satisfied before the evidence can be admitted:

(i) the witness must be an expert;
(ii) the subject of the expertise must be a judicially recognised body of knowledge and study that is beyond the reach of the ordinary juror;
(iii) there must be a need for the expert evidence to be given;
(iv) the witness is not permitted to state his opinion as to the existence of the ultimate fact-in-issue for such usurps the function of the jury; and
(v) the evidence upon which the opinion is based must itself be admissible and have been admitted into evidence.[52]

It is proposed to examine each of these conditions precedent in order to demonstrate that the admission of the expert evidence of the nature explained above is clearly proper.

50 Woocher, *op. cit.* 1006-7; also Holt, C. M., 'Expert Testimony on Eyewitness Identification: Invading the Province of the Jury?' (1984) 26 *Arizona Law Review* 399, 400.

51 Specific examples of the content of such evidence are set out in nn. 182-5 of Woocher, *op. Cit.* 1009-10. In n. 22 of Holt, *op. cit.* 402, the content of the expert evidence of Dr Loftus, sought to be adduced in the trial of Chapple, discussed *infra*, is set out.

52 Freckelton, I. R., *The Trial of the Expert* (1987); Gillies, P., 'Opinion Evidence' (1986) 60 *Australian Law Journal* 597; Doyle, JJ., 'Admissibility of Opinion Evidence' (1987) 61 *Australian Law Journal* 688.

(i) *The witness must be an expert*

Before a witness can give expert evidence, he must firstly qualify himself as an expert witness. The determination of this issue is a matter for the trial judge.

Generally, a witness is so qualified by reason of his formal training; either academic or technical, or practical experience.[53]

The question of qualification would not, however, be an issue in a case involving a psychologist presenting evidence within his field of expertise,[54] and so need not be further considered.

(ii) *The subject of the expertise must be recognised*

The second criterion restricting the admission of evidence of opinion from an expert is that the subject of the expertise be a judicially recognised body of knowledge and study that is beyond the reach of the ordinary juror.

On this point Gillies concludes:

> expertise . . . may be characterised broadly as consisting of a body of knowledge and/or skills . . . which concerns a subject which is of such a nature that it can be grasped and commented upon in an informed way by a person with training and/or experience extending beyond that possessed by the average person.[55]

It is submitted, however, that such is not the correct formulation of the test applied by the Courts.

In *R. v. Gilmore*,[56] the accused, at his trial, wanted to call a witness to give his opinion as to the identity of a voice on a tape-recording. The witness was a voice analysis expert, and he based his opinion upon a spectograph comparison of two sets of tape-recordings.

The trial judge rejected the evidence proposed to be given, substantially on the ground that it had not been established that voice analysis by means of a spectograph was a judicially recognised field of scientific knowledge capable of being the subject of expert testimony in Court.

In the Court of Criminal Appeal, Street C.J., with whom Lee and Ash JJ. agreed,[57] approved and adopted a test applied in similar circumstances in the United States,[58] and so held that such a means of voice analysis was an appropriate subject of expertise.

As a result, the decision is authority for the proposition that, should there be a demonstrable, objective procedure for reaching the opinion, such that qualified persons can either duplicate the result or criticise the means by which it was reached, drawing their own conclusions from the underlying facts, then such forms an admissible field of expertise.[59]

53 There is a conflict between the English and Australian authorities on the point whether mere practical experience is sufficient; see Freckelton, *op. cit.* Ch. 2, especially 20-33; also see, Gillies, *op. cit.* 603-4.

54 That is, within his competence; also *R. v. Bonython* (1984) 38 S.A.S.R. 45. *Cf. R. v. Haidley and Alford* [1984] V.R. 229, where the expert psychologist had no expertise upon the matter: the subject of intention to do a particular act or whether it was done voluntarily.

55 Gillies, *op. cit.* 602.

56 [1977] 2 N.S.W.L.R. 935.

57 [1977] 2 N.S.W.L.R. 942 and 943 respectively.

58 *Ibid.* 939.

59 As long as the body of knowledge is beyond the reach of the (ordinary) juror: *infra* n. 65.

Such an approach is consistent with the dictum of Menzies J.:

> Opinion evidence to account for a happening . . . is admissible only when the happening can be explained by reference to an organised branch of knowledge . . .[60]

Although there are no authorities precisely on point, it is submitted that expert evidence of the nature already indicated would satisfy these tests.[61]

One relevant decision is *Skyways Pty Ltd v. Commonwealth of Australia*[62] where it was held that expertise could be had in respect of the visibility available to a pilot in specified situations.[63] It is submitted that an analogy can be drawn between such a case and the perception of a witness, rendering admissible expert evidence as to the potential unreliability of his evidence.

(iii) *The expert evidence must be needed*

The Courts have clearly asserted that there are a number of fields of human endeavour in which they need not avail themselves of expert assistance because:

> the fact-finding tribunal, be it the judge or jury, is assumed by the law to have ordinary powers of intellect and a certain reservoir of general knowledge.[64]

This criterion of admissibility was similarly explained by the English Court of Appeal in *R. v. Turner*:[65]

> An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary.[66]

Since the courts will not receive expert evidence upon areas of common knowledge,[67] the Court is not subjected to unnecessary time-wasting and evidence that is potentially confusing and misleading. As a result, the Courts have consistently held that psychiatrists cannot give evidence as to the likely effect of pornography.[68] In reaching its decision in *D.P.P. v. Jordan*,[69] the House of Lords expressly approved a decision of the High Court of Australia: *Transport Publishing Co. Pty Ltd v. Literature Board of Review*[70] where Dixon C.J., Kitto and Taylor JJ. stated:

> ordinary human nature, that of people at large, is not a subject of proof by evidence, whether supposedly expert or not.[71]

But this issue has not been consistently approached by the Courts; for example, the English Court of Criminal Appeal recently held that expert evidence of

60 *Clark v. Ryan* (1960) 103 C.L.R. 486, 501.
61 For a similar formulation of the test see *R. v. Bonython* (1984) 38 S.A.S.R. 45; *cf. R. v. Tilley* [1985] V.R. 505.
62 (1984) 57 A.L.R. 657.
63 *Ibid.* 684-5; that is, what is visible to a pilot in a certain plane when the plane is flying at certain angles in certain weather conditions.
64 Freckelton, *op. cit.* 38.
65 [1975] Q.B. 834.
66 *Ibid.* 841.
67 Also *R. v. Carn* (1982) 5 Aust.Crim.R. 466, 469.
68 *D.P.P. v. Jordan* [1977] A.C. 699; also *Attorney-General's Reference (No. 3 of 1977)* [1978] 3 All E.R. 1166; *R. v. Anderson* [1972] 1 Q.B. 304.
69 [1977] A.C. 699.
70 (1956) 99 C.L.R. 111.
71 (1956) 99 C.L.R. 111, 119.

the effects of cocaine in inducing intoxication is admissible, since such is not within the experience of the ordinary person.[72]

The Courts have, however, held that there is an exception to the general prohibition: where the class of persons which forms the subject of the expertise is restricted. And so in the 'pornography cases', where the likely readers form a special class, such that a jury cannot be expected to understand the likely impact of the material upon its members, expert evidence is admissible in order to assist the jury.[73]

The majority of the High Court in *Transport Publishing Co. Pty Ltd v. Literature Board of Review*,[74] formulated the rationale to the exception in the following manner:

> particular descriptions of persons may conceivably form the subject of study and of special knowledge. This may be because they are abnormal in mentality or abnormal in behaviour as a result of circumstances peculiar to their history or situation.[75]

It is submitted that the general principles expressed in these authorities do not preclude the admission of expert evidence of the nature outlined above. This is because the content of such evidence does not fall within the category of ordinary human nature: it is outside the knowledge and understanding, and generally beyond the experience, of ordinary persons. Furthermore, witnesses giving evidence of visual identification form a requisite special class of persons, which in turn forms a subject of special knowledge, rendering expert evidence as to their mental processes admissible.

This argument is strengthened when the Courts relax their approach.[76]

In the alternative, the Courts have not infrequently adopted a different approach to this condition precedent: the question asked has been whether the jury will receive appreciable help from the expert.

Such was the approach of the Full Court of the Supreme Court of Victoria in *R. v. Wright*[77] where Young C.J. formulated this criterion of admissibility in the following manner:

> [whether] without the assistance of [the] opinion evidence, the jury would have been unlikely to form a proper judgment on the evidence . . .[78]

A similar approach was adopted by Gibbs J., as he then was, in *Burger King Corporation v. Registrar of Trade Marks*.[79] He stated that expert evidence is only to be rejected if the tribunal of fact is sufficiently able to draw its own conclusions without the evidence.

It is submitted that this alternative test was most clearly expressed in a recent

72 *R. v. Grossman and Skirving* (1985) 81 Cr.App.R. 9; [1985] 2 All E.R. 705. The expert evidence concerned also included the means by which cocaine is taken.

73 And so such expert evidence was held to be admissible where 5-7 year old children constituted the class: *D.P.P. v. A. B. C.Chewing Gum Ltd* [1968] 1Q.B. 159; this decision was applied by the Full Court of the Supreme Court of Victoria: *Buckley v. Wathem* [1973] V.R. 511.

74 (1956) 99 C.L.R. 111.

75 *Ibid.* 119.

76 *Supra* n. 72.

77 [1980] V.R. 593.

78 *Ibid.* 608.

79 (1973) 128 C.L.R. 417, 421-2.

decision of the Queensland Court of Criminal Appeal: *R. v. Kelvin Ronald Condren*.[80]

The issue for the Court to determine was whether evidence of speech-style from experts was admissible as 'fresh evidence' upon appeal. In so deciding, Macrossan J. considered that, generally, such evidence would be inadmissible at the trial for jurors could be considered to be aware that a person's language could be influenced by his educational standard, cultural background and life experience.

However, continuing, he held that if expert evidence could point out more precisely than general experience how such factors could influence choice of language then there '*might*' be scope for the introduction of expert testimony when it was relevant for a jury to know how an individual's choice of language might be identified.

Macrossan J. stated:

> The general rule is that opinion evidence is inadmissible but expert evidence, if otherwise relevant, is generally admissible if the tribunal of fact needs the benefit of expert assistance to form a correct judgment on a question at issue.[81]

It is submitted that upon this basis, expert evidence concerning the factors which lead to the unreliability of evidence of visual identification is clearly admissible, for there is no alternative means[82] by which the jury can properly approach the task of assessing the evidence in order to determine identification.

There are a number of authorities analagous to the admission of such expert evidence, and, with one exception,[83] they do not favour its exclusion.

In stating that matters within ordinary human experience cannot form the subject of admissible expert opinion evidence, the Court in *R. v. Turner*[84] continued:

> Jurors do not need psychiatrists to tell them how ordinary folk who are not suffering from any mental illness are likely to react to the stresses and strains of life.[85]

Since the content of the expert evidence proposed goes further than the evidence under discussion by that Court, such a decision provides no authority to the effect that such evidence is inadmissible.

Two authorities to the same effect are *R. v. Chard*[86] and *R. v. O'Callaghan*.[87] In the latter, Gowans J., in ruling that the expert witness, whom it was proposed to call to give evidence of the accused's personality (which was that of an ordinary man: 'not exhibiting any peculiarities of intelligence or personality') could not testify, held that the behaviour of ordinary persons cannot be made the subject of expert opinion.[88]

It is submitted that these decisions can be distinguished on at least two bases.

80 Unreported, *Australian* 8 May, 1987; *Law Report*, 15 June, 1987.
81 *Ibid.*
82 Whether by cross-examination, judicial warning, or the like.
83 *R. v. Fong* [1981] Qd R. 90.
84 [1975] Q.B. 834.
85 *Ibid.* 841H.
86 (1971) 56 Cr.App.R. 268.
87 [1976] V.R.441.
88 *Ibid.* 444.

Firstly, the psychological evidence for which I am arguing is not evidence of ordinary human behaviour; rather, it relates to aspects of the operation of the mind. Secondly, the content of the evidence in the above cited cases is generally understood by ordinary persons.

Consistent with the above approach, the Victorian Court of Criminal Appeal has held that evidence of an expert witness as to the effects of an intoxicant upon the mind of an accused, coupled with an opinion as to his capability to form an intention, and perform acts voluntarily, was inadmissible.

The Court in *R. v. Darrington and McGauley*[89] held:

> where the jury are faced with aberrations of human behaviour caused by the intake of alcohol, that is an area they are perfectly able to form a judgment about without being assisted by experts.[90]

This decision was applied by the Court in *R. v. Haidley and Alford*.[91]

It is submitted that these cases are again distinguishable upon the basis that the intoxicating effect of alcohol is within the experience and understanding of everybody.

Where, however, the subject of the expert evidence is a person who is not ordinary, in other words 'abnormal', the Courts, as already indicated, are keen to admit expert evidence in order to aid the jury.

In *Schultz v. R.*,[92] the appellant appealed against his conviction for wilful murder on the ground that the trial judge had erred in ruling inadmissible evidence from experts that he was a mental defective. No further evidence was to be adduced from them; they were not going to be asked for their opinion as to (a) whether the appellant's reduced intellectual capacity had any bearing upon the appellant's capacity to form an intent, or (b) whether the appellant had struck the deceased with the intention of causing death.

Burt C.J., with whom Wickham and Jones JJ. agreed,[93] held that the evidence was relevant and, if accepted (by the jury), sufficient to take the appellant outside the range of ordinary persons. In so doing he distinguished *R. v. Chard*[94] and *R. v. Turner*.[95] He further held:

> the accused may call expert evidence to establish any abnormal characteristic which he may have or which he may have had, at the relevant time which is not observable by and which without instruction is unlikely to be understood by the jury which affects or which at the relevant time may have affected the operation of his mind . . .[96]

It is submitted that this decision is authority for the proposition that where factors affect the operation of the mind, and those factors cannot be determined without the assistance of an expert, then his opinion is admissible. When so read, the decision favours the admissibility of the expert evidence for which I am arguing.[97]

89 [1980] V.R. 353.
90 *R. v. Haidley and Alford* [1984] V.R. 229, 233 *per* Young C. J.
91 *Ibid.* 229.
92 [1982] W.A.R. 171; *sub nom: R. v. Schultz* (1981) 5 A.Crim.R. 234.
93 [1982] W.A.R. 171, 176; (1981) 5 A.Crim.R. 234, 239.
94 (1971) 56 Cr.App.R. 268.
95 [1975] Q.B. 834.
96 [1982] W.A.R. 171, 176; (1981) 5 A.Crim.R. 234, 239.
97 Also *R. v. Barry* [1984] 1 Qd R. 74; *cf. R. v. Masih* [1986] Crim.L.R. 395 where the English Court of Appeal considered *Schultz's* case to go too far.

Furthermore, when so read, it is consistent with the decision of the Ontario Court of Appeal in *R. v. Clark*.[98] Upon trial on a charge of murder, the defence sought to call a psychiatrist to testify that the accused was suffering from hysterical amnesia. The trial judge ruled such evidence inadmissible.

Upon appeal, it was held that there was a need for such expert evidence for the circumstances which would bring about such a condition, and how it might affect one's ability to recall, were not well known to ordinary jurors.[99]

It is submitted that it is not appropriate to confine these cases to the basis that the persons concerned are abnormal; it is submitted that no material distinction can be drawn because the rationale of these decisions is that the content of expert evidence sought to be adduced is neither known nor understood by ordinary persons.

There is, however, one authority to the contrary: *R. v. Fong*.[1] Upon trial on charges of fraud, the accused sought to call opinion evidence from a psychologist bearing upon a witness's estimation of the amount of time occupied by an event. The trial judge ruled such evidence inadmissible, stating:

> What a person remembers and how they are likely to remember and the manner in which the human memory works by reconstruction or suggestion or otherwise are every day matters well within the field of knowledge of juries.[2]

The Queensland Court of Criminal Appeal, without analysing the law, held the ruling to be 'quite correct'.[3]

It is submitted that these Courts are quite wrong: the manner in which the mind operates is outside the expertise of the jury.[4]

In conclusion, it is submitted that in whichever form this pre-requisite to the admission of expert evidence of opinion is expressed, such evidence is admissible. Furthermore, with the exception of *R. v. Fong*,[5] a number of authorities favour the admission of such evidence.

### (iv) *The witness must not usurp the function of the jury*

Ultimate issues are entirely within the province of the tribunal of fact. And so the Courts, with very few exceptions, have not permitted experts[6] to pass upon the very question which falls to be decided by the jury.[7]

The requirement was expressed most succinctly by Dixon C.J. in *Clarke v. Ryan:*[8]

> expert witnesses . . . cannot be permitted to point out to the jury matters which the jury could determine for themselves.[9]

98 (1983) 1 D.L.R. (4th) 46.
99 *Ibid.* 67.
1 [1981] Qd R. 90.
2 *Ibid.* 95.
3 *Ibid.*
4 See psychological material, *supra.*
5 [1981] Qd R. 90.
6 Or any witness for that matter.
7 See, generally, Gillies, *op. cit.* 607-8; Doyle, *op. cit.* 693-4; for a recent decision, see *R. v. Fowler* (1985) 17 A.Crim.R. 16.
8 (1960) 103 C.L.R. 486.
9 *Ibid.* 491, in approving Cussen J. in *R. v. Parker* [1912] V.L.R. 152; recently affirmed by Carter J. in *Taylor v. Harvey* [1986] 2 Qd R. 137, 144-5.

As a result, the Courts have consistently held that experts cannot give evidence as to the credibility or veracity of a witness.[10] This proposition extends to expert evidence upon the reliability of a confession,[11] unless the witness whose credibility is in question, is abnormal.[12]

However these restrictions are not relevant to the instant argument for such evidence was expressly excluded. Nevertheless, should a Court consider such psychological evidence to usurp the function of the jury, the Courts have, on occasion, indicated that rule will give way to necessity.[13]

(v) *The basis of the opinion must be admissible and have been admitted into evidence*

An expert in giving evidence of opinion is expressing an opinion as to the existence of a fact. That opinion is based upon other facts. These facts must be proven in order to render the opinion admissible.[14]

The Court in *R. v. Turner*[15] formulated the rule in the following form:

> the facts upon which [experts] based their opinions must be proved by admissible evidence.[16]

The Court then explained the rationale of the rule:

> Before a court can assess the value of an opinion it must know the facts upon which it is based. If the expert has been misinformed about the facts or has taken irrelevant facts into consideration or has omitted to consider relevant ones, the opinion is likely to be valueless.[17]

And so one of the grounds upon which the evidence of the psychologist was excluded in *R. v. Haidley and Alford*[18] was that the facts upon which the expert based his opinion had not been proved by admissible evidence.[19]

Since these facts must be separately proved, then the expert must give an opinion on them put to him in the form of hypothetical questions which properly identify the material facts.

(Of course, for the expert evidence to be of any real value, the hypothesis upon which such evidence is based must closely accord with the facts found by the tribunal of fact.[20])

In presenting his opinion as to the factors affecting the reliability of the evidence of visual identification, the psychologist will, in furnishing the jury with this scientific criteria, be drawing upon the work of others in his field of expertise.[21] In so doing, the psychologist will, in part, be basing his opinion upon hearsay material.

10 *R. v. Turner* [1975] Q.B. 834, 842; *R. v. Ashcroft* [1965] Qd.R. 81, 85 *per* Gibbs J.; *R. v. Tonkin and Montgomery* [1975] Qd.R. 1, 39 *per* Dunn J.

11 *R. v. McEndoo* (1980) 5 A.Crim.R. 52, 54-5 *per* Connolly J., with whom Andrews J. concurred.

12 *R. v. Barry* [1984] 1 Qd.R. 74, esp. *per* Thomas J.

13 *R. v. Wright* [1980] V.R. 593, 598, *per* Young C.J.

14 See, generally, Gillies, *op. cit.* 605.

15 [1975] Q.B. 834.

16 *Ibid.* 840C.

17 *Ibid.* 840F.

18 [1984] V.R. 229.

19 [1984] V.R. 229, *per* Young C.J., 234, *per* Kaye J., 250, *per* Brooking J., 255.

20 *Ramsay v. Watson* (1961) 108 C.L.R. 642; *Paric v. John Holland (Constructions) Pty Ltd* (1985) 62 A.L.R. 85.

21 R. v. Abadom [1983] 1 W.L.R. 126; [1983] 1 All E.R. 364.

The law, however, must and does accept this kind of knowledge: an expert can rely upon the literature of his discipline for opinions based upon the proven facts.[22]

If an expert refers to the results of research published by a reputable authority in a reputable journal, the Court will ordinarily regard those results as supporting any inferences fairly to be drawn from them.[23]

Although the Court has a discretion in admitting expert evidence in this form,[24] it is submitted that the expert psychological evidence proposed complies with this condition precedent.

*Policy matters*

Notwithstanding the satisfaction of each of the criteria above, the Courts, for reasons of policy, still, on occasions, exclude expert evidence.

One fear held by judges is that by admitting evidence from experts who possess impressive credentials, the jury may accord too much weight to it. And so rather than risk biasing or misleading the jury, the Courts rule such evidence inadmissible.

This assertion relies upon the false premise that juries are not true to their sworn duties. In any case, should there be a real risk of such, jurors can be cautioned that such evidence is only one piece of evidence to be taken into account, and to look for sound scientific data supporting the proffered opinions.[25]

Furthermore, the trial judge can insist upon counsel:

> strip[ping] forensic evidence of its mystery so far as is possible [so that] trial by expert [will] never . . . take the place of trial by jury.[26]

Another fear held is that to admit certain expert evidence, the Courts will grind to a standstill due to the floodgates being opened when evidence is led in rebuttal by the other side.[27]

This argument fails to recognise that the trial judge, pursuant to his inherent power to control the proceedings in his Court, can prevent witnesses being called merely in order to re-present evidence already adduced.

Finally, the Courts have been reluctant to admit expert evidence where the basis of such scientific evidence is conflicting.[28]

However, should the second condition precedent above be satisfied, then this policy factor will generally be inapplicable.

*An Alternative Basis for the Admission of Such Expert Evidence*

It is submitted that there is an alternative basis upon which the expert evidence

22 *H. v. Schering Chemicals Limited* [1983] 1 W.L.R. 143, 148; [1983] 1 All E.R. 849, 854; Gillies, *op. cit.* 606; Freckelton, *op. cit.* 94.

23 *H. v. Schering Chemicals Limited* [1983] 1 W.L.R. 143, 148; [1983] 1 All E.R. 849, 854 — unless a different approach is shown to be proper.

24 *Borowski v. Quayle* [1966] V.R. 382, 386 *per* Gowans J. (also setting out the factors to be taken into account in exercising such a discretion).

25 See further, Woocher, *op. cit.* 1026.

26 *Lewis v. R.* (unreported, Court of Criminal Appeal of the Northern Territory, 17 July, 1987, *per* Muirheard A. J.).

27 Holt, C.M., *op. cit.* 414-7; Woocher, *op. cit.* 1027.

28 Holt, *op. cit.* 414-6.

of a form similar to that outlined above can be admitted: in rebuttal in order to impeach the credibility of the eyewitness, relying upon the exception to the rule that counsel are bound by answers to questions as to credit.

This exception was first explained in *Toohey v. Metropolitan Police Commissioner*.[29] In that case the appellant and two others had been convicted of assaulting M. The main evidence for the prosecution was given by M.

Immediately after the alleged assault M had been examined by a police surgeon. The police surgeon gave evidence as to M's hysterical condition. The trial judge, however, prevented defence counsel from asking questions as to the surgeon's opinion of the part alcohol played in M's hysteria and whether M was more prone to hysteria than a normal person.

This formed the basis of the ground of appeal both in the English Court of Criminal Appeal and in the House of Lords. The Court of Appeal both dismissed the appeal and rejected an application to tender fresh evidence as to M's mental condition.[30]

The House of Lords allowed the appeal, Lord Pearce stating:

> [W]hen a witness through physical (in which I include mental) disease or abnormality is not capable of giving a true or reliable account to the jury, it must surely be allowable for medical science to reveal this vital hidden fact to them . . . [it] must [be] allowable to call medical evidence of mental illness which makes a witness incapable of giving reliable evidence, whether through the existence of delusions or otherwise.[31]

As a result the decision is authority for the proposition that expert evidence is admissible to show that a witness suffers from some disease or defect or abnormality of mind that affects the reliability of his evidence. Such evidence includes a general opinion of the witness's unreliability, the foundation of the opinion, and the extent to which the credibility of the witness is affected.[32]

This decision was recently applied by the Court of Criminal Appeal of Western Australia in *R. v. Edwards*.[33]

In that case the appellant had been convicted of procuring P to murder his wife. The Crown case depended upon P's evidence.

Subsequently, however, P was convicted of making false statements to the police. In those proceedings evidence was given by two psychiatrists that P was suffering from a personality trait described as a severe immature histrionic personality disorder and was given to compulsive lying.[34]

The appellant appealed on the ground that there existed fresh evidence as to the state of mind and general credit of P to the effect that he was a pathological liar.

The Court held that such evidence constituted fresh evidence,[35] and relying upon *Toohey's* case, allowed the appeal, quashed the conviction, and ordered a new trial. The Court held that medical evidence may be called to impugn the

29 [1965] 1 All E.R. 506; (1965) 49 Cr.App.R. 148; [1965] 2 W.L.R. 439.
30 [1965] A.C. 595, 603; [1965] 1 All E.R. 506, 509D.
31 [1965] A.C. 595, 608 *per* Lord Pearce, with whom each of the other Law Lords agreed; [1965] 1 All E.R. 506, 512.
32 [1965] A.C. 595, 609; [1965] 1 All E.R. 506, 512.
33 (1986) 20 A.Crim.R. 463.
34 *Ibid.* 465, 470, 475.
35 *Ibid.* 466 *per* Wallace J., 470 *per* Kennedy J., and 476 *per* Rowland J.

reliability of a witness and indicate that, by reason of the mental defect, the capacity of the witness to tell the truth has been destroyed or impaired.[36]

More recently the Victorian Court of Criminal Appeal considered the effect of *Toohey's* case in *R. v. Trotter*.[37] In that case the applicant had been convicted of assault.

The Crown case was that the applicant, using a clenched fist, pushed C down so that he fell heavily. The defence was that C was intoxicated and fell over.

During the trial medical evidence was tendered to show that C was an alcoholic who had a history of falling over. In evidence, this was denied by C.

A doctor, called by the Crown, also gave evidence that C suffered from dementia, possibly due to alcohol, a symptom of which is vagueness of the mind and impaired memory.

Since C's credit was an important issue, as was whether his medical condition might affect his capacity to give reliable evidence, the applicant, who had conducted his own defence, wished to ask a medical witness:

— 'Would you believe C on his oath?'

The trial judge, in discussion, indicated that if such a question were put, then the applicant's bad character would be exposed to the jury pursuant to s. 399 of the Crimes Act, 1958 (Vic.).

The Full Court held that such a question was proper under the rule in *Toohey's* case.[38]

*Toohey's* case has been judicially considered on only two other occasions: *R. v. MacKenney*[39] and *R. v. MacKenney and Pinfold*.[40]

MacKenney had been charged with six counts of murder. The principal witness for the Crown was C; an accomplice who had pleaded guilty.

Counsel for MacKenney sought to call a psychologist to give evidence that C was psychopathic, lying is a characteristic associated with psychopathy, and that therefore C *might* be lying. It was submitted that the jury needed this expert evidence in order properly to assess C's veracity.

The trial judge, May J., considered *Toohey's* case and stated:

> [If] a witness is suffering from a mental disability . . . it may well be permissible to call psychiatric evidence to show that the witness is incapable of giving reliable evidence.[41]

However, in ruling the evidence of the psychologist inadmissible, he distinguished *Toohey's* case stating:

> If the witness is mentally capable of giving reliable evidence, [but who may well not be doing so], it is for the jury.[42]

(The trial judge also rejected the submission that the jury needed such evidence).[43]

It is submitted that the distinction drawn by May J. is arbitrary since the line between the situation of a witness being incapable of giving reliable evidence and

36 *Ibid.* 471 *per* Kennedy J.
37 Unreported, Court of Criminal Appeal (Vic.) 23 October, 1986.
38 Transcript at p. 9 *per* O'Bryan J. with whom Vincent J. agreed.
39 (1981) 72 Cr.App.R. 78.
40 (1981) 76 Cr.App.R. 271.
41 (1981) 72 Cr.App.R. 78, 80.
42 *Ibid.*
43 *Ibid.*

that of a witness, though capable, is likely to be giving unreliable evidence, cannot be accurately drawn. As a result, it is submitted that where there is a substantial risk that a witness is giving unreliable evidence, then the expert evidence should be put before the jury, with an appropriate judicial warning; the issue may then be determined by the jury.

Upon appeal, the ruling of May J. was held to be correct.[44] The Court held that where a witness is capable of giving accurate and reliable evidence, then it is a question for the jury to decide whether or not that witness is doing so, and the *only* assistance which will be accorded to them is the required warnings from counsel and the Court.[45]

Since eyewitnesses are often incapable of giving accurate evidence,[46] it is submitted that reliance can be placed upon the above line of cases in order to adduce expert evidence that the identification in question is unreliable. Although such witnesses are generally not abnormal, their evidence may be rendered inaccurate in the same way as the evidence of a mental defective, due to his mental condition, is rendered inaccurate.

In other words, if that line of cases is not confined to people of abnormal mental characteristics, but is construed as referring to all witnesses whose mental make-up is such as to preclude accurate evidence, then expert evidence of the nature proposed is admissible.

In conclusion, therefore, it is submitted that expert evidence as to the unreliability of evidence of visual identification can be admitted on either, or perhaps in appropriate circumstances, each of two bases. The content, and effect, of such evidence will vary according to the basis of admission as already indicated.

It is now necessary to analyse the case law on this specific point.

## *THE CASE LAW ON THE ADMISSION OF EXPERT EVIDENCE CONCERNING EYEWITNESS IDENTIFICATION*[47]

### *The United States*[48]

In the United States there have been numerous attempts by defence counsel to present expert evidence on the unreliability of eyewitness identification. The form of such evidence has invariably been in accordance with the first basis outlined above: a description of the studies that have been conducted on human perception and memory, and the factors that affect the reliability of eyewitness identification, in accordance with the circumstances of the instant case.

44 *R. v. MacKenney and Pinfold* (1981) 76 Cr.App.R. 271, 274.
45 (1981) 76 Cr.App.R. 271, 276.
46 *Supra.*
47 Woocher, *op. cit.*; Holt, *op. cit.*; Addison, *op. cit.*; Wade, L. A., 'Do the Eyes Have It? Psychological Testimony Regarding Eyewitness Accuracy' (1986) 38 *Baylor Law Review* 169; Feeney, T. J., 'Expert Psychological Testimony on Credibility Issues' (1987) 115 *Military Law Review* 121.
48 Sarno, J. D., 'Annotation: Admissibility, at Criminal Prosecution, of Expert Testimony on Reliability of Eyewitness Testimony' 46 American Law Reports 4th, 1047 (1986).

Although trial judges have, on occasions, permitted such evidence to be given,[49] until recently, no appellate court had allowed an appeal where the trial judge had ruled such evidence inadmissible. There are more than thirty reported decisions to that effect.[50]

The leading case is *U.S. v. Amaral*.[51] The appellant had been convicted of the robbery of a bank. At his trial, defence counsel sought to introduce expert evidence on the effects of stress on perception and on the unreliability of eyewitness identification in general. The trial judge ruled the evidence inadmissible on several grounds:

(i) it would be inappropriate to take from the jury the determination of the amount of weight to be given to, or the effect of, the evidence of identification;
(ii) it was the responsibility of defence counsel during cross-examination to reveal such deficiencies in the eyewitness evidence; and
(iii) expert evidence was not needed.[52]

The Court of Appeal, the Ninth Circuit Court of Appeals, affirmed the ruling stating that the trial judge had not abused his discretion,[53] and dismissed the appeal.

However, after noting that the case presented a novel issue,[54] the Court held that there were circumstances where it would be proper to admit such evidence. The Court adopted a test comprising four criteria, and if each was satisfied, then the trial judge might exercise his discretion in favour of the admission of the expert evidence. The criteria were listed:

(a) the expert must be a 'qualified expert';
(b) the evidence must concern a proper subject-matter;
(c) the testimony must be in accordance with a generally accepted theory; and
(d) the probative value of the expert evidence must exceed its prejudicial effect.[55]

Criteria (a), (b), and (c) correspond to Requirements (i), (iii) and (iv), and (ii) above respectively.

The Court failed to set out the factors to be taken into account by the trial judge in exercising his discretion.

In *U.S. v. Thevis*[56] defence counsel attempted to counter the eyewitness testimony with the evidence of an expert psychologist.[57] The trial judge excluded the evidence on the basis that the subjects of perception, memory, and identification were within the province of the jury. Upon appeal, it was held that the trial judge had not erred in the exercise of his discretion. The Court concluded that to allow

[49] Woocher, *op. cit.* 1006, n. 173.
[50] These appellate decisions are listed in Wade, *op. cit.* 175, n. 59, and Holt, *op. cit.* 400, n. 12.
[51] 488 F. 2d 1148 (1973).
[52] *Ibid.* 1153.
[53] *Ibid.*
[54] There were no reported decisions on the point.
[55] 488 F. 2d 1148 (1973), 1153. These criteria are discussed, at length, in Woocher, *op. cit.* 1014-28.
[56] 665 F. 2d 616 (5th Cir 1982).
[57] Dr Robert Buckhout.

the expert to give such testimony was to permit him to comment on the weight and credibility of the eyewitnesses' testimony.

In *State v. Galloway*[58] the defence sought to call an expert[59] to give evidence that eyewitness evidence is less reliable after the passage of time.[60] The trial judge excluded the evidence on the basis that it was not a proper subject for expert opinion as it was not beyond the knowledge and experience of the ordinary juror. Upon appeal, the Iowa Supreme Court held that the trial judge had correctly exercised his discretion.

However, more recently, there have been a number of decisions favouring the admission of such evidence. The leading case is *State v. Chapple*.[61]

Chapple was convicted of murder. The case for the prosecution was based solely upon the evidence of two eyewitnesses. There was no physical evidence.

At the trial, defence counsel attempted to call Dr Elizabeth Loftus to give expert evidence on the unreliability of eyewitness identifications and the factors present in the instant case which *could* affect the accuracy of the identification. The factors included unconscious transfer, the effect of stress, and the problems of delayed identification.[62]

The trial judge ruled such evidence inadmissible on the basis that such evidence was not within the proper sphere of expert testimony: it was not necessary and, moreover, would usurp the function of the jury.[63] Furthermore, it was ruled that counsel should uncover deficiencies in the evidence of visual identification in cross-examination and closing argument.[64]

Chapple appealed to the Arizona Supreme Court on the ground that the trial judge had erred in the exercise of his discretion in excluding such evidence.

The Court conceded two of the four *Amaral* criteria: the witness was qualified and the evidence conformed to a generally accepted explanatory theory.

Firstly, the Court noted that generally such evidence would be properly excluded.[64] However, the Court allowed the appeal on the ground that the trial judge had erred in excluding this evidence. The Court found several variables present which allegedly affected the accuracy of the eyewitness identification. As a result, the Court would have permitted the content of the expert evidence to include testimony on:

(i) the 'forgetting curve';
(ii) the effect of stress on perception;
(iii) unconscious transfer;
(iv) post-event information; and
(v) confidence and its relationship with accuracy.[65]

58 275 N.W. 2d 736 (Iowa, 1979).
59 Dr Elizabeth Loftus.
60 More than three years in this instance.
61 135 Ariz 281, 660 p. 2d 1208 (Arizona, 1983). This case is analysed in detail in Holt, *op. cit.* 400 and Wade, *op. cit.* 170
62 See Holt, *op. cit.* 402, n. 22.
63 660 P. 2d 1208, 1218.
64 660 P. 2d 1208, 1220.
65 660 P. 2d 1208, 1224.

Furthermore, the Court held that such factors were not within common knowledge, and to admit such evidence would not usurp the function of the jury.[66]

Unfortunately, however, yet again, the Court failed to set out guidelines to determine what factors, if present, would warrant the admission of expert evidence.

In *U.S. v. Smith*,[68] the Sixth Circuit Court of Appeals allowed an appeal on similar grounds holding that such expert evidence should be admitted in order to assist the trier of fact.[69]

Other recent cases to the same effect are *U.S. v. Downing*[70] and *People v. McDonald*,[71] each of which have been analysed in detail by Wade.[72]

*Other jurisdictions*

On this question, with one exception, there are *no* reported decisions in England, Ireland, Canada, New Zealand, or Australia.[73]

Recently, Vincent J. ruled upon the question in the course of a trial: *R. v. Smith*.[74]

The accused was on trial for murder. Counsel, on his behalf, indicated that since the central isue in the trial was the identification of the accused by several Crown witnesses, it was desired to adduce evidence from an expert psychologist, Dr Thomson.[75]

The content of this proposed expert evidence was to include the mental processes involved in an identification, and to indicate problems which render such processes imperfect. There was to be *no* attempt to adduce an opinion from the witness as to the reliability of the evidence given by the eyewitnesses.[76]

Vincent J. ruled the evidence inadmissible on a number of bases:

(i) the subject-matter of the expertise was not appropriate for the admission of specialist evidence;[77]

(ii) the content of the evidence would be within the knowledge possessed by an ordinary juror;[78] and

(iii) *R. v. Turner*,[79] *R. v. Fong*,[80] and the American decisions precluded the admission of such evidence.[81]

It is submitted, however, with the utmost respect, that His Honour has incorrectly analysed the case law on these points; a proper analysis, in my submission, clearly demonstrates that such expert evidence does satisfy the

66 660 P. 2d 1208, 1220-1.
67 *Ibid.*
68 736 F. 2d 1103 (1984).
69 736 F. 2d 1103, 1107.
70 753 F. 2d 1224 (3d Cir, 1985).
71 37 Cal 3d 351, 690 P. 2d 709, 208 Cal Rptr 236 (1984).
72 Wade, *op. cit.* 176-180. Also Sarno, *op. cit.* 1066-9.
73 As at November 30, 1987.
74 [1987] V.R. 907, February 24, 1987.
75 Dr Thomson has conducted research into aspects of perception and identification: *supra*.
76 [1987] V.R. 907, 908.
77 [1987] V.R. 907, 912.
78 [1987] V.R. 907, 909 and 910.
79 [1975] Q.B. 834.
80 [1981] Qd R. 90.
81 [1987] V.R. 907, 909-10.

requisite test in order to be judicially recognised, and is necessary in order to enable the tribunal of fact properly to assess the evidence.[82]

Furthermore, His Honour, in noting that the American authorities, appeared to fail to recognise that *most* are authority for the proposition that the trial judge retains a discretion to admit this variety of expert evidence. His Honour also, incorrectly, indicated that there is only one decision which upheld an appeal on the ground that the trial judge had erred in excluding the evidence.[83]

Vincent J. also relied upon a numberof policy considerations. He stated that to admit such evidence would introduce a number of complexities into the trial which would have the effect of rendering the jury less capable of employing their common sense.[84] Furthermore, he considered that the accused is already accorded sufficient protection in the form of the onus of proof, standard of proof, and judicial warning.[85] Finally, he held, that to admit such evidence would be inconsistent with the premise underlying the conduct of all criminal trials: human beings are perfectly capable of observing an event and recalling its content.[86]

It is submitted that, if the expert evidence is adduced in the appropriate manner,[87] then there is no reasonable likelihood of the jury not adequately performing their task. It is further submitted that the accused is not at present accorded sufficient protection in cases where the Crown case depends either wholly or substantially upon evidence of eyewitness identification.[88]

Perhaps the ruling should be read as authority for the proposition, that since *all* evidence depends upon perception, retention, and recall, then to permit the introduction of expert evidence in 'identification cases', as a matter of logic, such evidence would have to be admitted in *all* cases. Since the line must be drawn somewhere, such evidence should *never* be admitted. It is submitted that such an approach is incorrect, for identification evidence is peculiarly susceptible to error as distinct from mere eyewitness perception of an event.[89]

The trial resulted in conviction. Upon appeal, one of the grounds argued was that Vincent J. had erred in ruling the evidence of Dr Thompson inadmissible. In delivering the judgment of the Court of Criminal Appeal, Hampel J. stated:

> I respectfully agree with his Honour's conclusion that such evidence was not admissible for the reasons he expressed. The very matters about which Dr Thompson proposed to give his expert view are matters which are within the range of human experience. The jury system operates on the fundamental assumption that assessment of evidence is a matter for the jury, even though some aspects of such a function may also be the subjct of expert knowledge.
>
> An important safeguard and the most effective method of bringing to the attention of jurors the inherent dangers and problems in identification evidence is a thorough explanation and direction by the trial judge as to the nature of such evidence generally, and as to the factors which may affect the consideration of such evidence in the circumstances of the particular case. His Honour gave the jury such a charge.[90]

82 *Supra.*
83 [1987] V.R. 907, 908-9.
84 [1987] V.R. 907, 911-2.
85 [1987] V.R. 907, 911.
86 [1987] V.R. 907, 910-1.
87 *Supra.*
88 *Supra.*
89 *Supra.*
90 *R. v. Mark Anthony Smith* (unreported, Victorian Court of Criminal Appeal, 11 December, 1987), transcript at pp 12-13. The Court was constituted by Young C.J., Crockett and Hampel JJ.

As a result the ground was not sustained; neither were the other grounds and his application for leave to appeal against conviction was dismissed.

*Conclusion*

Upon an analysis of the conditions precedent to the admission of expert evidence in general,[91] it is submitted that those decisions of appellate courts which have upheld the rulings of trial judges in excluding expert opinion on the unreliability of identification evidence are incorrect. Such evidence is clearly admissible as a number of the more recent authorities clearly demonstrate.[92]

## *FURTHER SUPPLEMENTS, OR ALTERNATIVES, TO THE TRIAL JUDGE'S WARNING*

It is submitted that there are a number of alternative means by which juries can be informed of the unreliability of evidence of visual identification.

As was indicated by the Court in *U.S. v. Amaral*,[93] defence counsel in his final address to the jury can alert the jury to the dangers of heavily relying upon such evidence.

However, such adds nothing to the warning of the trial judge.[94] Furthermore, it is only a submission which in no way binds the jury.

Although there seem to be few limitations upon the content of the final address,[95] counsel can not lead evidence from the Bar table.[96] Even when counsel does so lead evidence, it does not bear the authority of an expert who gives sworn evidence which is subject to cross-examination.

Alternatively, in appropriate cases, experts can nevertheless be called in order to give evidence of particular aspects of the identification process. A meteorologist, for example, might be called in order to give evidence, of both fact and opinion, that at a certain point of time the weather was such as to render visibility impossible under certain conditions.[97]

Such evidence, however, will only relate to the process of perception, and will not refer to the mental processes of retention or recall.

A further alternative is to conduct a demonstration in the presence of the jury.

It is submitted, however, that this is generally impracticable since it is not possible to control, or even create, the infinite number of variables present in the incident which forms the subject of the proceedings.[98]

91 *Supra.*
92 *Supra.*
93 488 F. 2D 1148, *supra.*
94 By which the jury are bound.
95 *R. v. Wainwright* (1875) 13 Cox C.C. 171.
96 Of course many valiant attempts are made. For example, Mr Philip Dunn, of counsel, in representing Alan David Williams in *D.P.P. v. Alan David Williams and Brian Carl Hansen* (November 1984, County Court of Victoria, at Melbourne, before Judge Dixon) 'led' much psychological evidence in his final address to the jury by way of anecdote.
97 Such was the approach of Mr Colin Bayliss, of counsel, in representing Ross Kenneth Franklin in *D.P.P. v. Ross Kenneth Franklin and Philip Walter Schliebs* (January 1985, County Court of Victoria, at Melbourne, before Judge Fagan). Dr Timothy Travers, a Meteorologist from the University of Melbourne, was called in order to give evidence of weather and visibility.
98 See the discussion in the judgments in *R. v. Alexander* [1979] V.R. 615.

Furthermore, it is doubtful whether the trial judge has the power to order the witness concerned to take part in such a physical demonstration.[99]

It is submitted that the most realistic alternative is to require the trial judge to warn the jury that it would be dangerous to convict on the uncorroborated evidence of the eyewitness.

This area of law was recently the subject of the consideration of the High Court in *Bromley and Karpany v. R.*[1] The applicants in that case challenged the adequacy of the trial judge's direction concerning the evidence given by a witness for the Crown, C. C had stated that he was present when the applicants assaulted the deceased, and had later seen them escape. C was a schizophrenic.

Gibbs C.J., with whom Mason, Wilson and Dawson JJ. agreed,[2] stated that wherever the evidence of a witness may be unreliable, notwithstanding that he does not fall within one of the established categories in relation to which a full corroboration warning is necessary, the jury must be made aware of the dangers of convicting on such evidence alone.[3]

The judgment of Brennan J. was to the same effect. In formulating the requirement a little differently, he stated that whenever there is a real and substantial danger of acting upon the evidence of one witness, and the jury may not be fully aware of this danger, then a warning should be given.[4]

Although it must be conceded that such a direction is effectively contained in the identification warning, it is submitted that to so require a corroboration warning would emphasise, to the jury, the unreliability of the evidence of visual identification.

It must be concluded, however, that the above-described alternatives in no way match the admission of the expert evidence of either form proposed, for the attention of the jury is, again, not drawn to the factors which affect the reliability of evidence of identification. Since only psychologists understand such factors, then it is submitted that only psychologists can explain their effect.

## *SUMMARY AND CONCLUSION*

In criminal trials, particularly where the case for the Prosecution depends either wholly or substantially upon evidence of visual identification, and where such witnesses did not know the accused before the incident out of which the trial arises, a substantial warning as to the dangers of acting upon such evidence must be given by the trial judge to the jury.

In the light of the complex mental processes involved in the perception and retention of an event, and its subsequent recall (in an identification), it is submitted that such a warning is inadequate: it fails to draw sufficient attention to the dangers inherent in such evidence.

[99] *R. v. Burles and Murphy* [1964] Tas. S.R. 256, *per* Gibson A.C.J.

[1] (1986) 67 A.L.R. 12; 60 A.L.J.R. 651.

[2] (1986) 67 A.L.R. 12, 16, 19; 60 A.L.J.R. 651, 654, 656.

[3] (1986) 67 A.L.R. 12, 15; 60 A.L.J.R. 651, 653. In so doing the Court followed the recent decision of the House of Lords: *R. v. Spencer* [1987] A.C. 128; [1986] 3 W.L.R. 348; [1986] 2 All E.R. 928.

[4] (1986) 67 A.L.R. 12, 18; 60 A.L.J.R. 651, 655.

It is submitted, therefore, that to rectify properly this deficiency, expert evidence concerning the unreliability of such evidence should be admitted.

This evidence can be admitted according to the normal principles regulating the admission of expert evidence of opinion. Each of the conditions precedent to the admission of such evidence are satisfied. The form of the evidence would be an analysis of the cognitive and social factors which may have affected the accuracy of the particular identification in the instant case. No opinion would be offered as to the reliability of the witness concerned.

In the alternative, such evidence could be admitted on a second basis: under the exception to the rule that counsel, in cross-examining a witness as to collateral matters, is bound by the answers given. Under the exception, counsel can call expert evidence to the effect that the witness is not capable of giving reliable evidence. In this instance, the form of the evidence would differ, for an opinion would be given as to the reliability of the instant identification.

It is submitted that the admission of such evidence is consistent with the majority of the case law.