IDENTIFICATION EVIDENCE[1]

Introduction

- Although the sections in the Act relating to identification evidence are comparatively simple, in their practical application they may be fraught with difficulty.

- In *Harney v Police*,[2] the Supreme Court said this:

> [15] Identification evidence is a species of opinion evidence. The witness is offering an opinion that the alleged offender was the person the witness saw in circumstances related to the offending. Such evidence has, however, inherent and well-known dangers which the requirements of s 45 are designed to mitigate so far as possible. As defence counsel often say to juries, there have been famous miscarriages of justice arising from mis-identification by an honest, and therefore apparently believable, eyewitness. Judges should therefore be astute to ensure that what s 45 requires is strictly followed and that identification evidence is not admitted except in accordance with the section.

- Visual identification evidence ("VIE") may be supplemented by expert evidence (see the recommendations of the National Academy of Science Committee at the end of the paper), but only if "substantially helpful" as required by s 25.[3]

- The concerns referred to in that passage were amplified by the Court of Appeal in *R v Edmonds*.[4] Points made there include:

  a. Identification evidence, particularly of strangers after a "fleeting glance", is notoriously unreliable, yet juries place inordinate weight on it and have difficulty assessing the reliability of such evidence.

  b. Research shows that the traditional means of helping juries to assess identification evidence (e.g. directions and cross-examination) are of limited

1 This paper has been updated for the 2018 seminar by Thomas Riley.
2 *Harney v Police* [2011] NZSC 107, [2012] 1 NZLR 725. See also *Hohipa v R* [2015] NZCA 73 at [58].
3 See for example *R v Police* [2016] NZHC [54]–[56].
4 *R v Edmonds* [2009] NZCA 303; [2010] 1 NZLR 762.

assistance in helping juries distinguish between accurate and inaccurate identifications. In particular, cross-examination "can reveal nothing about the integrity of the cognitive processes that produced the identification".[5]

c. Identification evidence is unreliable partly because of distortions arising during the investigation and collection of such evidence, and partly because of the inherent unreliability of perception and memory.

d. Even with the use of properly constituted identification parades, recent surveys establish that there is an approximate error rate of 20 per cent.

Relevant sections

- They are ss 4, 24, 25, 35, 45, 46, 126 and 8.

- Section 4 defines "enforcement agency", "visual identification evidence", and "voice identification evidence".

- Section 24 (which makes opinion evidence generally admissible) is relevant because identification evidence is a species of opinion evidence.

- Section 25, which governs the admissibility of expert opinion evidence, is relevant to certain types of voice identification evidence.

- Section 35 (the previous consistent statements rule) potentially creates a conflict with s 45. But identification evidence admissible under the specific regime in s 45 should not be excluded under the more general rule in s 35.[6]

- Section 45 governs the admissibility of VIE.

- Section 46 governs the admissibility of voice identification evidence.

---

5 Andrew Roberts "Expert evidence on the reliability of eyewitness identification" (2011) 16 E & P 93 at 98.
6 *Harney v Police* at [15].

- Section 126 prescribes the warning you must give a jury about identification evidence, including self-warning in the case of a Judge-alone trial.

- Even if identification evidence is capable of passing the requirements of s 45 or 46, it might still be excluded under s 8.[7]

Officers of an enforcement agency

- Means the Police or any organisation with statutory responsibility to enforce an enactment:

    a. So it includes Police, Customs, Fisheries and IRD.

    b. Appears not to include Prison Officers, but VIE initially obtained by prison officers and provided to the Police has been held admissible under s 45.[8]

    c. Perhaps unintentionally, and probably unimportantly, potentially includes a wide range of other bodies.

VIE

- Be alive to the breadth of this definition. It encompasses:

    a. Direct evidence of identification or recognition *at* the scene of the crime, for example "The man in photo 2 was the man I saw stab X" or "I recognised the woman who hit the victim with the axe as my flatmate Monica Brown. We've been flatmates for the last three years".[9] It includes identification evidence from a police officer who witnesses an event.[10]

---

7 *R v Kingi* [2017] NZCA 449 at [25]; *Mukoko v R* [2018] NZCA 87 at [58]-[60].
8 *R v Phillips & Collier* HC Wellington CRI 2009-020-4936, 27 August 2010, Mallon J. See also *Collier v R* [2011] NZCA 482 at [30].
9 *R v Edmonds* [2009] NZCA 303, [2010] 1 NZLR 762 at [38].
10 *Naidu v Police* [2013] NZHC 2453 at [16], applying *Harney*.

b. Direct evidence of identification *near* the scene of the crime; for example "The man who came running past me holding a backpack and got into a waiting car is the man in photo 6".

c. Although the definition in s 4 encompasses "circumstantial evidence", s 45 does not apply to description or resemblance evidence.[11] This is because: "There is a need for the caution about identification evidence which involves the subjective and uncertain process of a witness concluding that a previously unknown person seen involved in the commission of the offence was the same as another unknown person seen subsequently. That is an exercise of judgment that does not occur then the evidence is only descriptive of features."[12]

d. Similarly, s 45 will not apply to evidence that is "wholly circumstantial, involving inferential elimination of alternatives" based on facts other than the appearance of the suspect:[13] for example, seeing a silhouette, knowing there are only two men present in the house and, and deducing the figure's identity due its non-resemblance to the other man. In *Meaker v R*, the complainant excluded five of the men shown in the photo montage but could not identify any of the remaining three as one of the attackers.[14] The Court of Appeal held that was not identification evidence because it was not an assertion by the complainant that the defendant was one of the attackers.

e. The Court of Appeal has nonetheless clarified, following comments in the Law Commission's 2018 issues paper, that tentative identification evidence ("I think it is X but I am not sure") still falls within the ambit of s 45:[15]

> [34] The definition [in s 4] provides that the assertion is "to the effect" that the defendant was present. The learned authors of The Evidence Act 2006: Act and Analysis say this may have been intended to include cases where the person making the assertion admits to some uncertainty. This comment is noted and implicitly accepted by the Law Commission in its second review of

---

11 See *R v Turaki* [2009] NZCA 310 at [58]; *Henderson v R* [2017] NZCA 605 at [7]-[11].

12 *Martin v R* [2015] NZCA 606 at [20]. See also *Matara v R* [2015] NZCA 261 at [19] (concerning CCTV footage viewed by the jury at trial).

13 *Higgins v R* [2017] NZCA 486 at [12].

14 *Meaker v R* [2016] NZCA 236. The evidence was excluded nonetheless on s 8 grounds – the Crown would no doubt be able to prove that the other two men were not involved, which would leave the jury with the impression that it must have been Mr Meaker.

15 *Fane v R* [2018] NZCA 246.

> the Act when considering whether the definition of visual identification evidence should be amended.
>
> [35] We agree with this interpretation. A somewhat narrow reading of the phrase is required because it would otherwise capture a large portion of circumstantial evidence which is broadly to the effect that a defendant was at or in the vicinity of an offence.

Section 45

- This governs the admissibility of VIE.

- At the heart of s 45 is VIE obtained by a "formal procedure". Although s 45(3) sets out requirements that a formal procedure must meet, no particular form of identification procedure is mandated by the Act. So, the requirements apply to all types of identification procedures, including photo montages, live parades and video parades.

Section 45(1)

- The following is admissible unless the defendant proves it is probably unreliable:

  a. VIE obtained by a formal procedure.

  b. VIE obtained where there is good reason for not following a formal procedure.

- Where the identification is by formal procedure the admissible evidence encompasses both the circumstances of the offending and the circumstances of the formal procedure.[16]

- The s 45(1) inquiry is a broad one that can take into account not only the circumstances in which the identification was made but any other evidence supporting or raising concerns about the accuracy of the identification – for example, evidence that the offender drove off in a car registered in his father's name,[17] the fact that the

[16] *Harney v Police* at [20], which held that that is the ambit of the words "that evidence" in s 45(1).
[17] *Harney v Police* at [32]; *R v Edmonds* at [111].

suspect has a twin or is of a different ethnicity to the witness,[18] or witness confidence.[19] It can also include consideration of post event information – which may have "displacement effect".[20]

- However, an anonymity order in respect of the witness is not a factor going to reliability.[21]

- Your assessment under s 45(1) of admissibility is a threshold inquiry. It does not affect the jury's role and is not to be referred to at trial. The same applies to your assessment under s 45(2).[22]

Section 45(2)

- If for no good reason VIE was not obtained by a formal procedure it is inadmissible unless the prosecution proves beyond reasonable doubt that "the circumstances in which the identification was made have produced a reliable identification".

- So, there is a two-fold bias in s 45 toward VIE being obtained by a formal procedure. First, if – without good reason – it has not been, then the onus of establishing that the identification is reliable shifts to the prosecution and the standard lifts from the civil to the criminal one. The prosecution has to exclude any reasonable doubt about the reliability of the VIE. The standard of proof was met in *D (CA714/14) v R*,[23] but not in *Ah Soon v R*.[24]

- Second, the prosecution is restricted to reliance on the "circumstances in which the identification was made". So, it is a narrower enquiry than under s 45(1).[25] The permissible enquiry includes factors internal to the witness (such as eyesight, state of sobriety, prior knowledge of the alleged offender)[26] and external factors (such as the

---

18 *Mukoko v R* at [54], [56].
19 *Bassett v R* [2015] NZCA 319 at [29].
20 *Gibbins v R* [2015] NZCA 462 at [13] and *R v Police* [2016] NZHC 523 at [46].
21 *R v Kingi* at [19]
22 *R v Edmonds* at [105] and [108].
23 [2015] NZCA 76.
24 [2012] NZCA 48 at [34].
25 *Harney v Police* at [32].
26 See *R v Taiaroa* [2015] NZHC 2401 at [103].

state of the lighting, distance, duration of the observation and any obstructions to the view. It extends also to the means of collecting the identification evidence, including any possible distortions to the evidence that may have occurred during that process,[27] such as a significant delay before identification.[28] It does not extend to evidence unconnected to the identification process which tends to corroborate the identification.[29]

- The confidence of – or any hesitation about – an identification is one of the circumstances relevant under both s 45(1) and (2). Because confidence about an identification does not equate to accuracy, you should be cautious about placing weight on it. But it should not be disregarded, particularly where a confident identification ("I'm 100% sure it was X") was made at the time of the identification without any positive feedback (such as the supervising officer saying "yes, we think you've identified the right person).[30]

Section 45(3)

- Note that the seven requirements for a formal procedure are cumulative – the word "and" appears after each of (a) to (f). All seven requirements must be met.

- As a matter of good practice, the police should use a recent photograph of a suspect, if one is available, unless there has been a marked change of appearance since the incident.[31]

- Clause 17(1) of the Evidence Amendment Bill 2015 replaced "person to be identified" with "suspect" in s 45(3)(b), (c) and (d) and in (4)(a), (b) and (c). This is to reflect that s 45, unlike s 126 (and contrary to the Commission's original intent), only relates to the identification of a suspect/defendant, not any other person.[32]

---

27 *Harney v Police* at [32]; R *v Edmonds* at [112]; *R v Phillips & Collier* at [31].
28 *Chrichton v R* [2017] NZCA 301 at [29].
29 At [12].
30 *Harney v Police* at [33].
31 *Ambler v R* [2018] NZCA 245 at [21]. Note though that here, although a photo from five years prior to the incident was used, the Court considered that error did not invalidate the process.
32 *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at 144.

- In summary, the requirements of a formal procedure are:

  (a) As soon as practicable ("as soon as feasible to do so in the circumstances. This involves issues of practicality and may involve consideration of available means and resources").[33] It is as soon as practicable after the offence was reported, not when it was committed.[34]

  (b) Compared to no fewer than seven others of similar appearance (to the suspect's actual appearance, not similar to the witness' description of the offender).[35]

  (c) No indication given as to who is to be identified.

  (d) Person making the identification must be informed that the person to be identified [suspect] may or may not be among the persons in the procedure.[36]

  (e) Written record of the procedure actually followed.

  (f) Pictorial record.

  (g) Complies with any further requirements in the regulations (there are currently none in force or proposed relating to identification evidence).

Section 45(4)

- This list of good reasons for not following a formal procedure is not exhaustive.[37] However, the only extra "good reason" accepted by the Supreme Court to date is that a witness recognises an alleged offender – however, whether a formal procedure is not required in such a case will depend on the degree of familiarity.[38]

---

33 *Malone v R* [2010] NZCA 59.
34 Section 45(3)(a), *Harney v Police* [2011] NZSC 107, [2012] 1 NZLR 725.
35 *R v Paki* [2013] NZHC 332 at [42]; *R v Eruera* [2015] NZHC 2655 at [75]; *Faifua v R* [2011] NZCA 152 at [21]; *Sylva v R* [2017] NZCA 567 at [9].
36 *Tai v R* [2013] NZCA 521.
37 *Harney v Police* at [25].
38 *Harney v Police* at [27] ff; see also *Lelei v Police* [2015] NZHC 2110 at [25] and *May v Police* [2016] NZHC 806 at [16].

- In summary, the good reasons for not following procedure are:

  (a) Refusal of the suspect to take part in the procedure;

  (b) The singular appearance of the suspect; (for example, a distinctive and unique facial tattoo).[39]

  (c) A substantial change in the appearance of the suspect;

  (d) Police couldn't reasonably anticipate that identification would be an issue;

  (e) The alleged offender was identified to the police (or other enforcement agency) soon after the offence **occurred** and in the course of the officer's initial investigation;

  (f) If the alleged offender was identified to the police after a chance meeting with the person making the identification.

Section 46

- Voice identification evidence is inadmissible unless the prosecution can prove on the balance of probabilities that the circumstances in which it was made produced a reliable identification. No formal procedure is required.

- Unlike s 45(2), s 46 only requires reliability to be proved on the balance of probabilities. However, the onus always lies with the Crown. This is because the voice identification evidence is recognised as being generally less reliable than its visual counterpart.[40]

- There are three generally recognised categories:[41]

---

39 *R v Eruera (No 3)* [2015] NZHC 3004 at [38]. In *Moala v R* [2018] NZCA 488, the Court of Appeal suggested superimposing a shirt collar over photographs where the suspect had a neck tattoo so the suspect was not the only one in the montage with a distinctive tattoo.

40 *Hohipa v R* [2015] NZCA 73 at [66]-[67].

41 At [54].

- Lay recognition: identification by a witness familiar with the defendant's voice;

- Expert recognition: identification by a witness, often a police officer, with no prior connection with the defendant but who has acquired familiarity by repeated and close listening (sometimes referred to as "ad hoc expertise");[42]

- Expert analysis: identification by an appropriately qualified witness who has analysed voice samples using an analytical technique.

- The substantial helpfulness test contained in s 25 is applicable to the latter two categories.[43] Generally, if the witness is held to have sufficient expertise, they will be able to offer an opinion on identification under s 25 because a jury has no realistic hope of acquiring the same expertise during the course of the trial.[44] Just because a jury is able to listen to the voice recording themselves does not mean the expert's opinion is not substantially helpful.[45]

- However, it is not enough that the expert identification evidence is substantially helpful to a jury. It must also pass the relevant reliability threshold in s 46. The expertise of the person making the recording is a factor relevant here, as are:[46]

    - The witness' degree of familiarity with the voice
    - Any identifiable properties of the voice that distinguish it from others
    - The duration, manner, and clarity of the speech
    - Any delay before identification
    - The quality of the recording

---

42 See *R v Paora* [2016] 1672 at [11], [36]. See also *Hunt v R* [2018] NZCA 503; the expert (in that case, a detective who had listened to some 2,000 phone calls over a period of 6 weeks) need not have heard the suspect speak in their presence; familiarity with the voices from recordings is sufficient.

43 At [56], [60].

44 *R v Paora* at [11].

45 At [61].

46 At [73]; *Murray v R* [2016] NZCA 221 at [55].

- Any circumstances of the identification that may create a psychological predisposition to identify a person selected by the investigator

- Whether any police procedure has been adequately documented
- The witness' ability to distinguish between voices generally
- Any hesitation by the witness
- Anything else about the circumstances that bears upon reliability

Interaction between identification evidence provisions and hearsay provisions

The Court of Appeal in *Reynolds* considered the interplay between identification evidence and hearsay; a witness identified Mr Reynolds in a photo montage but prior to trial, became unwell and so was incapable of giving evidence.[47] The Court acknowledged the difficulty:

> [13] The application of s 18 to the visual identification evidence is more legally problematic.
>
> [14] That is because the admissibility of visual identification evidence is expressly governed by s 45 and there is arguably a conflict between ss 45 and 18. "[V]isual identification evidence" is defined in the Act and defined in such a way as to include an account of the identification by someone other than the identifier. In this case, that would be the police officer who observed Ms Osborne select the photo of Mr Reynolds. Section 45 provides that if a formal procedure is followed, then the identification is presumed reliable and the evidence admissible unless the defence proves to the contrary on the balance of probabilities. In contrast, under s 18 it is a condition of admissibility that the prosecution show the circumstances relating to the statement provide reasonable assurance the statement is reliable. Those circumstances arguably involve wider considerations than the factors taken into account in a s 45 reliability assessment.

The Court did not provide a definitive answer, finding that whether the reliability assessment was undertaken under ss 45 or 18, the threshold was met (although ruling the evidence inadmissible under s 8). The Court nonetheless stressed "we do not wish to be taken as saying that hearsay statements relating to identification are never capable of being admitted under s 18."[48]

The Law Commission's March 2019 report considered whether amendment to the Act was needed to clear up the procedure to be followed for hearsay identification evidence. The

47 *R v Reynolds* [2017] NZCA 61.
48 At [25].

Commission concurred with the authors of *Mahoney on Evidence* that hearsay identification evidence needed to satisfy both the admissibility requirements for identification evidence and the hearsay rules in order to be admissible.[49] The Commission nonetheless did not recommend an amendment:

> We are not persuaded that an amendment to the Act is necessary or desirable. There are three reasons for this. First, we are not aware of this issue causing problems in practice. Second, our preferred approach is available as a matter of statutory interpretation. Third, we consider it would be preferable to leave the appellate courts to provide further guidance in this area (the issue having only been briefly discussed in the Court of Appeal to date).

Section 126

- Section 126 applies to both voice and visual identification.

- ***When should you warn the jury?***

  a. Note the qualifying wording of s 126(1):
     - " ... wholly or substantially".
     - "... on the correctness of one or more visual ... identifications."
     - "... of the defendant or any other person".

  The warnings provision is therefore wider than the scope of s 45 and covers the identification of people other than the defendant.[50]

- ***Wording/requirements***

  a. Although the wording isn't prescribed, the warning must meet the three mandatory requirements in s 126(2). For example, where the Judge omitted requirement (a), only the proviso to s 385(1) of the Crimes Act saved the guilty verdict.[51] In *Fukofuka v R*, the Supreme Court held that the trial judge had failed "to inject into his summing up the appropriate and statutorily required level of

---

49 Law Commission *The Second Review of the Evidence Act 2006 – Te Arotake I te Evidence Act 2006* (NZLR R142, 2019) at [8.41]-[8.43].

50 *R v Peato* [2009] NZCA 333, [2010] 1 NZLR 788.

51 *R v Uasi* [2009] NZCA 236; [2010] 1 NZLR 733. See now s 232 of the Criminal Procedure Act 2011 as discussed in *Wiley v R* [2016] NZCA 28.

scepticism".[52] This standard requires a sufficient degree of structure and even-handed judicial scrutiny of the arguments:

> [35] More generally, the structure of the summing up was far from ideal. The Judge did not himself identify the strengths and weaknesses of the identification evidence… Instead of analysing the evidence, the Judge contented himself with a paraphrase of the arguments of counsel. If done succinctly and in an orderly way, this approach may suffice. But the Judge's paraphrase of the arguments of counsel was neither succinct nor orderly. He did not deal with the competing arguments together. Instead he interposed a discussion about the appellant's evidence between his review of the Crown and defence submissions as to identification. This was distracting because it interrupted what should have been a coherent analysis of the quality of the identification relied on by the Crown.

b. In *Old v R*, the Court of Appeal considered the scope of a warning when the VIE was given by someone who knew the defendant well:[53]

> [27] Mr Mayor's evidence was that he had known Shane Old for about four years and that he and Mr Old had been living together for about six months before the incident of 6 February 2014. His account was that the two of them had been drinking and watching television when Mr Old suddenly attacked him. No-one else was there. In those circumstances, if the trial Judge had given a full s 126 compliant warning to the jury "the jury would rightly wonder whether he, the Judge, has taken leave of his senses because most of the [warning] would in those circumstances be quite unnecessary". That a s 126 warning was unnecessary in this trial, indeed positively inappropriate, doubtless explained why the Judge did not give one. Yet, as this Court pointed out in *R v Turaki*, "even in such circumstances a full s 126 warning is required". We note this Court, in *Turaki*, expressly directed that a copy of its judgment be provided to the Ministry of Justice and the Law Commission, drawing their attention to the need for amendment to s 126 of the Evidence Act, so that it can be applied by trial judges in a practical and common sense way. In its recent review of the Evidence Act, the Law Commission did not recommend legislative change. Rather, it considered a satisfactory position has been reached: a full s 126 warning is required (unless the case involves observation evidence where identity is not an issue). If a s 126 warning is not given, the court must determine whether the failure to give such a warning has resulted in a miscarriage of justice.

---

52 [2013] NZSC 77, [2014] NZLR 1 at [38].

53 [2015] NZCA 252 (footnotes omitted). Application for leave to appeal dismissed: [2015] NZSC 175.

- ***Tailor your warning to the circumstances of the case***:

  a. Refer to all the relevant factors internal and external to the witness. If it is recognition evidence, explain and analyse the "quality" of the recognition evidence.[54] In *Harney v Police* the Supreme Court quoted the classic summary of these sort of factors that the English Court of Appeal gave in *R v Turnbull:*

> [30] In order to assess whether the identification evidence should be admitted under subs (1), the judge will also need to determine whether the ability of the witness to recognise the defendant from prior contact has translated into a reliable identification in the particular circumstances. All the circumstances in which the witness claims to have recognised the defendant and which may have enhanced or detracted from the quality of the recognition (lighting, distance, duration of observation, eyesight of the witness etc) will need to be taken into account. The remarks in the leading English case of *R v Turnbull*, although discussing directions to a jury, are apposite to a consideration by a judge under s 45:
>
> > How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?

  Other matters to bear in mind are whether it is a cross-racial identification and whether the witness may have been distracted by the presence of a weapon.[55] Be aware of the fact that even recognition evidence can be mistaken. Again, *Harney* cited the classic statement of this in *Turnbull*:[56]

> Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

Dock identifications

- The definition of VIE includes a dock identification. In terms of s 45, a dock identification can still be admissible. For instance, where there was no good reason

54 *R v Turaki* [2009] NZCA 310 at [80], [81] and [88].
55 See *Evidence: Total Recall? The Reliability of Witness Testimony* (NZLC MP13, 1999) and *Evidence: Code and Commentary* (NZLC R55, 1999) at C398.
56 *Harney v Police* at [30] referring to *R v Turnbull* [1977] QB 224 (CA) at 228.

for not following a formal procedure, but the prosecution discharges the s 45(2) test, which the Court of Appeal has said "is highly unlikely".[57] Or where there was good reason for not following a formal procedure and the defendant fails to prove the dock identification is unreliable under s 45(1).

- But both the Supreme Court and Court of Appeal have stressed the unsatisfactory nature of a dock identification, and that it should be permitted only exceptionally. In *Harney v Police* the Supreme Court commented:[58]

> … as Lord Hoffmann said in *Goldson* (at [13]) with reference to a jury trial, if an identifying witness has not made a previous identification of an accused, a dock identification is unsatisfactory and ought not to be allowed. Indeed, only in the most exceptional circumstances should any form of dock identification be permitted: *Constance v The State* [1999] UKPC 56, [2000] 4 LRC 118 at [13]-[14] and *R v Young* [2009] NZCA 453 at [29].

- What the Court of Appeal said in *R v Young* at [26] was: [59]

> To expose the jury to the charade of a pretended dock identification, when the real identification has been by photographs is not only demeaning to the judges of fact in the case, but a distraction from their function of appraising the true evidence. In an identification case, it will usually be essential that they understand exactly what the process of identification has been.

- The Court of Appeal has since reiterated a similar comment in *R v Peato*, though it acknowledged that the objection to a dock identification is less marked where it is confirmatory of a prior identification made by a formal procedure.[60]

- Although perhaps obvious, a dock identification is unsatisfactory because the accused will be sitting in the dock or at a table beside or behind counsel. So, the exercise is a bit like asking a school child to identify the teacher in a classroom.[61]

---

57 *R v Fraser* [2009] NZCA 520 at [23] (the "lions" case).
58 *Harney v Police* at [20], fn 19.
59 *R v Young* [2009] NZCA 453 at [26].
60 *R v Peato* at [65].
61 See also *Tido v R* [2011] 2 Cr App R 23 (PC) at [21].

- If a dock identification does occur (even unintentionally), a properly tailored warning in terms of s 126 should still be given.[62]

Recognition evidence

- Recognition evidence is within the definition of "VIE" and thus comes within s 45.[63]

- The fact that the VIE takes the form of recognition evidence can constitute a good reason for not following a formal procedure, because it:

    a. Would reduce the real force of the spontaneity of the witness's identification, and would not identify any error in the witness's recognition.[64]

    b. May create a false impression of the reliability of the identification: the jury may think the witness had somehow confirmed the identification when in reality the witness has simply pointed (in the photo montage) to a person previously known to the witness.[65]

- The alleged offender must be sufficiently well known to the witness before the time of the alleged offending that a formal procedure would be of no utility.[66] The issue of the utility of a formal procedure is highly circumstances-dependent. There cannot be any formulaic requirement, such as that the defendant must have been "well" known to the witness.[67]

- If the defendant does not accept that he was well known to the identification witness before the alleged offending a formal procedure will almost certainly be of utility. It may also have value if the last contact between the witness and defendant was not recent, although that will not in itself mandate the use of a formal procedure.[68]

---

62 *Ake v R* [2015] NZCA 23 at [10].
63 *Harney v Police* at [16].
64 *Mukoko v R* at [51].
65 *Harney v Police* at [17] and [26]; *Higgins v R* at [15]; *Woods v R* [2017] NZCA 427 at [16].
66 *Harney v Police* at [27].
67 *Harney v Police* at [28].
68 *Harney v Police* at [29].

Observation evidence

- There is also a difference between observation evidence and identification evidence. Observation evidence is evidence of a person's actions, including of an offender's alleged participation in the offence. It can stand alone where the presence of the offender at the scene is not in dispute.[69]

- Take, for example, a case where a suspect disputes her participation in the alleged offence, but accepts she was present at the scene of the criminal activity. In such a case, identification of the suspect is not an issue, and s 45 is not engaged in relation to evidence of a witness who observed the suspect's participation – or lack of it – in the criminal activity.[70]

- However, the Court of Appeal has rejected the argument that identification can never be at issue where the accused accepts they were present at the scene.[71] Whether evidence is subject to the identification rules should depend not on a strict classification process but rather on whether the concerns that are traditionally raised by identification evidence are present.[72]

---

69 *R v Edmonds* at [42]; *R v Turaki* at [65]-[73].

70 *R v Edmonds* at [43]; *R v Chen* [2001] EWCA Crim 885 at [40]. See also *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at 146ff.

71 *E (CA113/09) v R (No 2)* [2010] NZCA 280 at [65]; *R v Peato* at [22]-[23].

72 *R v Eruera* at [67].

Current best practice for conducting eye witness identification procedures

1. *Line-ups should contain only one suspect*:

- Research by Neil Brewer and Matthew Palmer concludes that single-suspect line-ups yield the lowest rates of false identification.[73] The more suspects in the line-up, the more difficult it is for the Police to recognise witness error. With single-suspect line-ups, identifications can be classified as suspect identifications or known errors, with only the former potentially leading to prosecution. By contrast, in an identification in an all-suspect line-up there is a greater risk that a suspect will be identified by chance.

- The Evidence Act does not explicitly prohibit more than one suspect in a formal identification procedure, though arguably that is the intent of s 45(3)(b). In *R v Briggs,*[74] Duffy J considered Parliament had not intended that more than one suspect should be present in the same photo montage. The Judge was concerned that otherwise a witness may recognise one suspect through the witness's memory of some associations that suspect had with another suspect, and not because the witness actually recognised the suspect as one of the offenders. In *Matehaere v R*, the Court of Appeal said that limiting each photo to one suspect is in accordance with best practice.[75]

2. Foils (non-suspects):

- Should capture the key features of the witness's description and be plausible matches for, but not too similar in appearance to, the suspect.

- Evidence suggests there should be at least three plausible foils to minimise false identification rates.[76]

---

73 Neil Brewer and Matthew Palmer "Eyewitness Identification Tests" (2010) 15 Legal and Criminological Psychology 77. See also Hon Justice Glazebrook "Evidence and the Courts" in *Criminal Law* (NZLS CLE Ltd, 2013) 3 at 17 ff.

74 *R v Briggs* HC Whangarei CRI 2008-027-660, 19 March 2009 at [20].

75 [2011] NZCA 306 at [9].

76 Brewer and Palmer at 79.

- Foils should be similar in appearance to the witness's description, rather than to the appearance of the suspect located by the Police. Evidence suggests that promotes true recognition and therefore yields superior correct identification results.[77] It also guards against the line-up being influenced by a confirmation bias on the part of the Police. The accuracy/vagueness of the witness description(s) will impose practical limitations.

3. *Don't be preoccupied with the line-up presentation medium as there are other more important factors:*

- Although we might intuitively expect live identification parades to produce the best results, there is no sound body of research bearing this out.[78]

- The Evidence Act expresses no preference as between live parades, photo montages, computerised photographic image montages or video parades.

4. *Double-blind line-up administration should be preferred:*

- Research suggests that the rate of correct identification will improve if the line-up administrator does not know who is the suspect and who are the foils.[79]

- The reason for this is that the research shows a person can inadvertently influence the response of another if he is aware of the correct suspect. This is the result of "confirmation bias" – the subconscious propensity to bias the evidence towards confirming the hypothesis. Experiments have shown that non-verbal reinforcement can encourage false identification, and that what the line-up administrator says to the witness can also change the witness's tentative opinion into a firm one.

---

77 Brewer and Palmer at 80.

78 According to Brewer and Palmer, review of most of the available evidence found no meaningful differences identification performance between live parades and photo montages.

79 Brewer and Palmer, referring to Sarah Greathouse and Margaret Kovera "Instruction Bias and Lineup Presentation Moderate the Effects of Administrator Knowledge on Eyewitness Identification" (2009) 33 Law and Human Behav 70; R Haw and R Fisher "Effects of Administrator-Witness Contact on Eyewitness Identification Accuracy" (2004) 89 Journal of Applied Psychology 1106.

- This is not reflected in the Evidence Act. The Law Commission yielded to a Police submission that security reasons required that the attending officer(s) know who the suspect was.

- Arguably, a Court could take any failure to exclude the investigating officer from administration of the line-up into account when assessing reliability under s 45(1) or (2).

5. *Witnesses who have previously seen a suspect's face in a mug shot search or show up should not subsequently view a line-up for that suspect:*

- That is because research indicates that, if an innocent face viewed in a mug shot appears in a later line-up, it is more likely to be chosen. That likelihood is even greater if the witness identified the face during a mug shot search.

- Research has found that showups (presentation of a single suspect to a witness) produce a higher rate of false identification of innocent suspects than line-ups. That may be because showups are too suggestive of the subject's guilt.

- Although the Evidence Act doesn't expressly prohibit prior mug shot search or show up, they may fall foul of s 45(3)(a) and/or (c).

6. *Ensure unbiased instructions providing clear warnings regarding possible offender absence:*

- This is reflected in s 45(3)(c) and (d). It is also in the formal photographic identification instructions used by the Police.

- Research has found that the proportion of witnesses who make false identifications when told that the offender may ***not*** be in the line-up is significantly reduced. And there is no reduction in accurate identifications where that warning ***is*** given and the offender ***is*** in the line-up.

- Implying that the suspect is in the line-up invites/pressures the witness to make a relative rather than accurate selection – to select the person who looks most like the offender, rather than to rely on the memory of what they actually saw.

7. *Immediately after the identification decision, ensure there is an independent record of the witness's exact identification response, confidence in the decision, time taken to make it and any comments the witness made:*

- On average, accurate identifications are made faster.

- There is an obvious difference between the response "The robber is definitely the man in photo 3" and "It's quite close between photos 3 and 4, but the man in photo 3 looks most like the robber".

- So long as the witness's confidence is gauged immediately following the identification and before the witness receives any feedback about the decision, the research suggests a correlation between confidence and the accuracy of the identification. (Previously this wasn't thought to be the case.) For example, one set of research suggested that, probabilistically speaking, it may be appropriate for jurors to disbelieve witnesses whose confidence is 70% or less, as they were correct less than 60% of the time.

- The witness's confidence in the witness box is not an indicator of reliability. Yet researchers believe jurors regard it as "the most powerful single determinant" that the witness has made a correct identification.

- The recommendation that a confidence statement be taken at the time of identification is designed to prevent "confidence inflation" between the time of identification and the time of trial (you will be familiar with prosecutors asking identification witnesses at trial how confident they were in their identification).

- While s 45(3)(e) requires a written record of the procedure, it doesn't specifically require a record of the witness's confidence in the identification.

- Nor does it seem that the New Zealand Police identification instruction sheet requires that confidence statements and latency be recorded.

8. *Avoid giving disconfirming feedback to witnesses following an initial identification decision if there is a chance that the witness may subsequently be asked to view another line-up:*

- Research indicates that disconfirming feedback following an initial line-up is very likely to impair accuracy in respect of a second line-up – the witness is highly likely to think the offender will be in the second line-up.

- Same applies to confirming feedback. Research indicates it can affect not just the witness's confidence in their identification but also what they say as to the view they got of the defendant, how much attention they were paying etc.

- Beyond s 45(3)(d), the Evidence Act does not deal with this issue. The Police instruction sheet does not forbid the officer giving disconfirming or confirming feedback. It does warn witnesses not to discuss their evidence.

9. *Discount courtroom expressions of identification evidence and other witness perceptions of encoding and the line-up:*

- Although the Evidence Act does not expressly prohibit a dock identification there are at least three decisions of the Court of Appeal criticising a dock identification.[80] Identification in Court for the first time is particularly undesirable, as the defendant's identity will be obvious and the witness has no opportunity to differentiate the accused from others of similar appearance.[81]

In 2014 the National Academy of Science (Washington, DC) published the report of the Committee on Scientific Approaches to Understanding and Maximising the Validity and Reliability of Eyewitness Identification: *Identifying the Culprit: Assessing Eyewitness Identification.* The Committee made the following recommendations:

---

80 *R v Young* [2009] NZCA 453; *R v Fraser* [2009] NZCA 520; *R v Peato* at [59].
81 *R v Peato* at [59].

Recommendation 1:

Train All Law Enforcement Officers in Eyewitness Identification

The committee recommends that all law enforcement agencies provide their officers and agents with training on vision and memory and the variables that affect them, on practices for minimizing contamination, and on effective eyewitness identification protocols.

Recommendation 2:

Implement Double-Blind Line-up and Photo Array Procedures

The committee recommends blind (double-blind or blinded) administration of both photo arrays and live line-ups and the adoption of clear, written policies and training on photo array and live line-up administration.

Recommendation 3:

Develop and Use Standardised Witness Instructions

The committee recommends the development of a standard set of easily understood instructions to use when engaging a witness in an identification procedure.

Recommendation 4:

Document Witness Confidence Judgments

The committee recommends that law enforcement document the witness' level of confidence verbatim at the time when she or he first identifies a suspect.

Recommendation 5:

Videotape the Witness Identification Process

The committee recommends that the video recording of eyewitness identification procedures become standard practice.

Recommendation 6:

Conduct Pre-trial Judicial Inquiry

The committee recommends that, as appropriate, a judge make basic inquiries when eyewitness identification evidence is offered.

Recommendation 7:

Make Juries Aware of Prior Identifications

The committee recommends that judges take all necessary steps to make juries aware of prior identifications, the manner and time frame in which they were conducted, and the confidence level expressed by the eyewitness at the time.

Recommendation 8:

Use Scientific Framework Expert Testimony

The committee recommends that judges have the discretion to allow expert testimony on relevant precepts of eyewitness memory and identifications.

Recommendation 9:

Use Jury Instructions as an Alternative Means to Convey Information

The committee recommends the use of clear and concise jury instructions as an alternative means of conveying information regarding the factors that the jury should consider.