
**VISUAL IDENTIFICATION:
IS THE CURRENT LAW SUFFICIENT
TO PROTECT AGAINST
MISIDENTIFICATION?**

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INTRODUCTION

“Eyewitness testimony is the crack cocaine of the criminal justice system. Law officers know the potential risks but are addicted to its power to convict.”¹

This paper will explore the admissibility of visual identification evidence of a defendant in New Zealand pursuant to the Evidence Act 2006.² Eyewitness identification plays an important role in criminal proceedings, during the investigatory stage and at trial. An informal survey of the New Zealand Police estimated that identification of the offender is an issue in approximately 20 to 25 per cent of criminal trials.³

The public are often unaware of the true predictors of eyewitness accuracy and thus are relatively poor at discriminating between accurate and inaccurate identifications.⁴ Some of the factors that influence the accuracy of a visual identification are counter-intuitive. For example, it is often thought that stressful situations, such as witnessing a violent offence, results in vivid and accurate eyewitness identification of the offender. In reality, stress can have a detrimental effect on identification accuracy.⁵ Most people believe that eyewitness identification is very accurate; thus, visual identification is one of the most compelling types of evidence.⁶ An eyewitness stating ‘I saw the defendant commit the offence’ can be extremely persuasive to a judge or jury, even when other evidence disputes the identification.⁷ Consequently, achieving the admissibility of visual identification of a defendant goes a long way towards obtaining a conviction.

The overreliance on visual identification evidence has led to numerous mistaken identifications of innocent suspects and consequently wrongful convictions.⁸ In approximately 75 per cent of DNA exonerations in the United States, mistaken identification

¹ Margery Koosed “Reforming Eyewitness Identification Law and Practices to Protect the Innocent” (2008-2009) 42 Creighton L Rev 595 at 598.

² All references to a section refer to the Evidence Act 2006, unless otherwise specified.

³ Law Commission *Evidence: Total Recall? The Reliability of Witness Testimony* (NZLC MP13, 1999) at [29] [Total Recall?].

⁴ Richard Schmechel and others “Beyond the Ken? Testing Jurors’ Understanding of Eyewitness Reliability Evidence” (2005-2006) 46 *Jurimetrics* 177 at 204.

⁵ Brian Bornstein, Sid O’Bryant and Douglas Zickafoose “Intuitions about Arousal and Eyewitness Memory: Effects on Mock Jurors’ Judgments” (2008) 32 *Law & Psychol Rev* 109 at 111.

⁶ Jill Copeland “Helping Jurors Recognize the Frailties of Eyewitness Identification Evidence” (2002) 46 *Crim L Q* 188 at 200.

⁷ Edward Connors and others *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial* (National Institute of Justice, 1996) at 24 <www.nij.org>.

⁸ Angela Baxter “Identification Evidence in Canada: Problems and a Potential Solution” (2006-2007) 52 *Crim L Q* 175 at 175.

was the principal cause of wrongful conviction.⁹ Furthermore, in 80 to 90 per cent of all DNA exonerations at least one eyewitness made a mistaken identification.¹⁰ A wrongful conviction results in two injustices. The first tragedy is to the innocent person. The second is to any victim of the offence and to society, because the real offender is not brought to justice.¹¹ Wrongful convictions undermine the credibility of the legal system. Furthermore, public faith in the criminal justice system is diminished when reforms that could prevent a wrongful conviction are not implemented.¹²

Psychological science research is useful in ascertaining the accuracy of eyewitness identification under various conditions. Laboratory experiments can determine which identification procedures produce the most reliable identification. While psychological testing cannot imitate the reality of real crime, many studies involve a staged crime in which the eyewitness is not told the true experimental goal until after he or she has made an identification.¹³ Procedures for obtaining visual identification evidence should follow current psychological best practice for achieving the most reliable identification.

Chapter one will outline the process and factors affecting the accuracy of memory, and will then summarise various visual identification procedures. In chapter two I will discuss the admissibility of visual identification evidence under the Evidence Act 2006. Chapter three considers further protection in relation to visual identification that is available throughout a criminal trial. Chapter four examines the formal procedure for obtaining visual identification evidence and analyses whether the legal requirements are consistent with current psychological research. Chapter five will explore the good reasons for not following a formal procedure to obtain a visual identification. I conclude that reforms ought to be made to increase the reliability of admissible visual identification evidence.

⁹ Paul Giannelli and Myrna Raeder (eds) “Achieving Justice: Freeing the Innocent, Convicting the Guilty” (2008) 37 Sw U L Rev 763 at 771.

¹⁰ Connors and others, above n 7, at 15.

¹¹ Peter Sankoff “Wrongful convictions and the ‘shock wave’ effect” [2006] NZLJ 134 at 135.

¹² Richard Wise, Clifford Fishman and Martin Safer “How to Analyze the Accuracy of Eyewitness Testimony in a Criminal Case” (2009-2010) 42 Conn L Rev 435 at 511.

¹³ Copeland, above n 6, at 204.

CHAPTER ONE: VISUAL IDENTIFICATION

Visual identification is essentially a memory task. This chapter outlines the memory process, the factors that affect the accuracy of visual identification and different procedures used to obtain an identification. Memory is inherently unreliable and prone to distortion. An eyewitness to an offence does not simply record the visual appearance of the offender in his or her brain. Memory is an active procedure, which involves a decision making process whereby conclusions are drawn after the available details are evaluated. Accordingly, internal and external sources of additional information influence the accuracy of memory.¹⁴ The legal system should control the way in which an eyewitness identifies an offender in order to minimise factors adversely affecting identification accuracy.

1.1 The Process of Memory

The memory process consists of three stages: acquisition, storage and retrieval. Certain factors can affect the accuracy of memory at each one of these stages. Therefore, the reliability of eyewitness identifications depends on far more than just what the eyewitness observed.

Acquisition is the first stage in the memory process. This involves perceiving an event and encoding the information in memory. The eyewitness's attention, eyesight or age can affect the quality of memory at the acquisition stage. External circumstances, such as the duration of the witnessed event, visibility or lighting will also affect what is encoded in the witness's memory.¹⁵

Storage involves retaining encoded information until later recollection. During this period, memory quality can decline. A person's memory declines rapidly in the immediate hours after encoding, after which this decline becomes more gradual.¹⁶ Furthermore, stored memories are susceptible to distortion due to intervening knowledge. An eyewitness may integrate post-event information into the original memory, affecting the reliability of the memory. Such knowledge may arise from discussions with other witnesses, investigating officers or news sources.¹⁷

¹⁴ Wise, Fishman and Safer, above n 12, at 456.

¹⁵ Copeland, above n 6, at 193.

¹⁶ Copeland, above n 6, at 195; Wise, Fishman and Safer, above n 12, at 456.

¹⁷ John Turtle, RCL Lindsay and Gary Wells "Best Practice recommendations for Eyewitness Evidence Procedures: New Idea for the Oldest Way to Solve a Case" (2003) 1 Canadian Journal of Police and Security Services 5 at 6.

The final stage of memory is retrieval. This requires an eyewitness to recall the information. The way in which the witness recalls the memory can affect the accuracy of the recollection. Cues such as questions and photographs can affect retrieval by providing sources of suggestion that may result in alteration of the memory. The social context in which the eyewitness recalls the information can also affect the recollection; for example, a witness may feel pressure from the Police to identify a suspect.¹⁸

1.2 Memory in the Context of Visual Identification

The variables that affect eyewitness identification accuracy can be divided into two categories: estimator variables and system variables.¹⁹ Estimator variables are the factors over which the legal system has little or no control over. Conversely, system variables are factors that the legal system can control. By appropriately adjusting the system variables, the legal system can reduce the chance of a mistaken identification.²⁰

(a) Estimator Variables

Estimator variables usually affect the accuracy of visual identification at the acquisition and storage stages. Characteristics of the eyewitness may affect the quality of the identification. These include factors such as intelligence, ethnicity, fatigue, stress and sobriety.²¹ The characteristics of the offender can also influence identification accuracy. For example, the facial distinctiveness of the offender may make him or her easier to remember, while wearing a disguise could adversely affect a later identification.²² Furthermore, factors inherent in the event can affect the ability of the eyewitness to perceive the event accurately. Event factors include viewing time, violence, presence of a weapon and weather.²³

The effects of estimator variables on the accuracy of visual identifications can only be estimated as opposed to controlled. Thus, such factors will be useful only for assessing the reliability of an identification.²⁴

¹⁸ Turtle, Lindsay and Wells, above n 17, at 6.

¹⁹ Gary Wells and Elizabeth Olson “Eyewitness Testimony” (2003) 54 *Annu Rev Psychol* 277 at 279.

²⁰ *Ibid*, at 279-280.

²¹ *Ibid*, at 280.

²² Calvin TerBeek “A Call for Precedential Heads: Why the Supreme Court’s Eyewitness Identification Jurisprudence is Anachronistic and Out-of-Step With the Empirical Reality” (2007) 31 *Law and Psychol Rev* 21 at 24.

²³ Copeland, above n 6, at 194-195.

²⁴ Turtle, Lindsay and Wells, above n 17, at 6-7.

(b) System Variables

System variables usually concern the retrieval stage of memory. The main system variables involve the identification procedure, including instructions and structure.²⁵ The process by which an eyewitness makes an identification can be controlled to minimise the effect of system variables. Compared to estimator variables, system variables can help prevent inaccurate identifications. Therefore, the Police should conduct identification procedures in such a way to improve the reliability of identification.²⁶ The control of identification procedures in New Zealand and suggested reformation is discussed in this paper.

1.3 Visual Identification Procedures

There are a number of ways in which to obtain an identification from an eyewitness. Identification procedures aim to test the recognition memory of an eyewitness. Recognition memory is the ability of the witness to remember the person they saw committing the offence, as opposed to merely recalling the offender's appearance or physical description.²⁷ The identification procedure utilised has important implications on the reliability of the witness's identification.

(a) Offender versus Suspect

A discussion about identification requires a distinction to be made between the *suspect* and the *offender*. A suspect is the person who is *believed* to be the perpetrator of an offence. The offender is the person who actually *is* the perpetrator of the offence.²⁸ Police identification procedures always contain a suspect; however, this person may or may not be the offender. An identification procedure in which the suspect is innocent is known as an offender-absent procedure. Conversely, a lineup in which the suspect is guilty is known as an offender-present procedure.²⁹

An identification procedure can result in several possible outcomes. The witness may identify the suspect; identify another person in the lineup (a distractor); be unable to make an identification; or positively state that the offender is not present in the procedure.³⁰ In an offender-present procedure the correct outcome is for the witness to identify the suspect.

²⁵ Wells and Olson, above n 19, at 285.

²⁶ Turtle, Lindsay and Wells, above n 17, at 7.

²⁷ Gary Wells "What Do We Know About Eyewitness Identification?" (1993) 48 *American Psychologist* 553 at 556.

²⁸ TerBeek, above n 22, at 27.

²⁹ Also referred to in the literature as target-absent/culprit-absent and target-present/culprit-present procedures: Wells and Olson, above n 19, at 279.

³⁰ Andrew Roberts "Pre-Trial Defence Rights and the Fair Use of Eyewitness Identification Procedures" (2008) 71 *Modern Law Review* 331 at 336.

However, the correct result in an offender-absent procedure is for the witness to state that none of the members in the procedure is the offender. If the witness identifies the suspect in an offender-absent lineup this is an incorrect identification because the suspect is innocent. This misidentification could lead to a wrongful conviction.³¹

Psychological experiments can control whether an identification procedure is offender-present or offender-absent. Research has shown that different approaches to constructing and conducting an identification procedure affect the accuracy of identifications. The affect of some of the strategies depends on whether the procedure is offender-present or offender-absent. A method that may increase the accuracy of identifications in offender-present procedures may reduce the accuracy of identifications in an offender-absent procedure. For example, presenting an identification procedure simultaneously results in more correct identifications for an offender-present procedure but leads to more misidentifications in an offender-absent procedure.

In a real life situation, it is usually unknown whether the suspect is the offender. Some commentators estimate that 10 to 15 per cent of the time the suspect is not the offender.³² Due to the implications that different approaches to identification procedures have on the accuracy of identifications, it is suggested that we err on the side of caution, by using strategies that increase the accuracy of offender-absent procedures. This will result in fewer misidentifications of an innocent suspect, thus increasing the reliability of visual identifications made by an eyewitness. These implications are examined in chapter four.

(b) Showup

A showup is an informal procedure that involves presenting a single suspect to the eyewitness for identification. The Police use showups for convenience and may conduct a showup in a variety of ways.³³ A showup may be biased because it suggests to the witness that the suspect is the offender and there is no way to prove whether the witness was mistaken.³⁴ Due to potential unreliability, visual identification evidence of a defendant obtained using a showup will be more difficult to offer as evidence in his or her criminal trial.³⁵

³¹ Wells and Olson, above n 19, at 286.

³² British Psychological Society *Guidelines on Memory and the Law: Recommendations from the Scientific Study of Human Memory* (2010) at 33 <www.bps.org.uk>.

³³ Law Commission *Total Recall?*, above n 3, at [79].

³⁴ AM Levi “Some Facts Lawyers Need To Know about the Police Lineup” (2002) 46 Crim L Q 176 at 180.

³⁵ See Chapter Two: Admissibility of Visual Identification Evidence.

(c) Dock Identification

A dock identification refers to the situation where a witness identifies the defendant as the offender during a criminal trial. This involves the witness stating that the person in the dock is the offender, whether having previously identified the defendant out-of-court or not.³⁶ However, the identity of the defendant is usually clear to all in the courtroom. Thus, a dock identification will provide little probative value with potentially significant prejudicial effect. This led the Court of Appeal in *R v Peato* to suggest that dock identifications, where the witness is purporting to identify the defendant for the first time, would be inadmissible under ss 45 and 8(1).³⁷ Furthermore, the Supreme Court in *Harney v Police* expressed that a dock identification should only occur in “the most exceptional circumstances”.³⁸

(d) Lineup

A lineup is a formal procedure in which the suspect is placed among other people to see whether the eyewitness can identify the suspect as the offender. Lineups may be performed either live or by using photographs. Lineups have clear advantages for obtaining identifications compared to informal procedures.

The other members of a lineup, called distractors, are known to be innocent. The distractors provide a safeguard on misidentifying an innocent suspect. It is therefore possible to know whether the witness is mistaken in certain circumstances. If a witness identifies a distractor as the offender, the Police would dismiss the identification as an error on behalf of the witness.³⁹ Distractors also help control for chance, decreasing the likelihood that an eyewitness who is merely guessing will identify the suspect. Furthermore, the use of distractors helps ensure that the identification is based on recognition memory, testing the witness’s memory by using similar looking people.⁴⁰

A lineup takes place under strict conditions that are aimed at controlling for potential sources of bias and unreliability in an identification. Thus, a lineup results in a more reliable identification, compared to the use of an informal procedure such as a showup.

³⁶ *R v Young* [2009] NZCA 453 at [29].

³⁷ S 8(1)(a) of the Evidence Act 2006 requires the judge to exclude evidence if its probative value is outweighed by the risk that the evidence will have an unfairly prejudicial effect on the proceeding; *R v Peato* [2009] NZCA 333, [2010] 1 NZLR 788 at [59] and [65].

³⁸ *Harney v Police* [2011] NZSC 107 at footnote 20.

³⁹ Elizabeth Luus and Gary Wells “Eyewitness Identification and the Selection of Distractors for Lineups” (1991) 15 *Law and Human Behaviour* 43 at 44.

⁴⁰ *Ibid*, at 45.

1.4 Conclusion

The nature of memory means that visual identification is inherently unreliable. Controls on the admissibility of visual identification of a defendant are required to minimise mistaken identifications. Furthermore, some of the factors affecting identification accuracy are within the control of the legal system. Therefore, as discussed in chapter four, the Police should utilise an identification procedure that minimises the adverse effect of system variables to increase the reliability of visual identification evidence.

CHAPTER TWO: VISUAL IDENTIFICATION EVIDENCE UNDER THE EVIDENCE ACT 2006

As outlined in the previous chapter, memory is inherently unreliable and the influence of eyewitness identification on a jury results in a risk of a wrongful conviction. Therefore, the Evidence Act 2006 codifies the admissibility of evidence involving the visual identification of a defendant in a criminal proceeding. This scheme, pursuant to s 45, intends to promote the reliability of admissible visual identification evidence to help protect against wrongful convictions due to mistaken identification. This chapter focuses on the admissibility regime pursuant to s 45.⁴¹

2.1 Definition of Visual Identification Evidence

Under s 45, the admissibility of evidence identifying a defendant as the offender in a criminal proceeding applies only to “visual identification evidence”. Section 4 defines “visual identification evidence” as:⁴²

- (a) an assertion by a person, based wholly or partly on what that person saw, to the effect that a defendant was present at or near a place where an act constituting direct or circumstantial evidence of the commission of an offence was done at, or about, the time the act was done; or
- (b) an account (whether oral or in writing) of an assertion of the kind described in paragraph (a).

The significance of the words “to the effect” allows for visual identification evidence where there is some uncertainty concerning the identification.⁴³ This reflects a practical reality, as due to the inherent inaccuracy of memory, there will always be some uncertainty surrounding a visual identification. Paragraph (a) covers a witness identifying the defendant in court, after giving evidence about an out-of-court identification of the alleged offender. Paragraph (b) covers an account given in court about an out-of-court identification.⁴⁴ While the Law Commission was of the view that a dock identification would fall within paragraph (a), the Courts have accepted that dock identifications purporting to identify the defendant for the first time in court should not be admissible.⁴⁵

⁴¹ For complete text of s 45 of the Evidence Act 2006, see Appendix 1.

⁴² Evidence Act 2006, s 4, definition of “visual identification evidence”. Complete text of s 4 is also contained in Appendix 1.

⁴³ Richard Mahoney and others *The Evidence Act 2006: Act and Analysis* (2nd ed, Brookers, Wellington, 2010) at [EV4.44.01].

⁴⁴ Law Commission *Evidence: Code and Commentary* (NZLC R55 - Volume 2, 1999) at [C39] [Code].

⁴⁵ *R v Peato* [2009] NZCA 333, [2010] 1 NZLR 788 at [59]; see Chapter One at 1.3(c) dock identification.

Evidence that the defendant shares certain attributes with the accused, based on a witness describing the offender, is known as resemblance evidence. It requires the fact-finder to infer that the defendant matches the description of the offender, and thus is circumstantial evidence.⁴⁶ Resemblance evidence does not purport to identify the defendant as “present at or near...the commission of an offence”;⁴⁷ therefore it does not fall within the definition of visual identification evidence.⁴⁸

Identification of the offender based on prior familiarity between the witness and the person identified is classed as recognition evidence. Recognition of the alleged offender by a witness falls within the definition of visual identification evidence. This is because recognition amounts to an assertion based *partly* on what a person saw.⁴⁹ In *Harney v Police*, the Supreme Court held that recognition could arise through personal contact, photograph, or film, even where the witness does not know the person by name.⁵⁰ In the earlier case of *Tararo v R*, the Court of Appeal held that an undercover officer’s evidence identifying the defendant based on a photograph the officer had seen an hour prior to witnessing the offence did not amount to recognition evidence.⁵¹ Similarly, identifying someone based on a photograph previously seen by the witness was not held to be recognition evidence in *Lord v R*.⁵² However, such an identification still amounted to visual identification evidence. The decisions of *Tararo* and *Lord* are not inconsistent with the proposition in *Harney*, because the extent of familiarity with the photographs in both of the earlier decisions was very limited, thus not reaching the standard of recognition. Safeguards on the admissibility of recognition identification are required because recognition may nevertheless result in a mistaken identification, especially where familiarity is low between the witness and person identified.⁵³

The Court of Appeal in *R v Turaki* drew a distinction between visual identification and observation evidence. On the facts, the defendant had admitted his presence at the scene of the offence, but disputed the evidence of the witness describing him as the principal attacker.⁵⁴ The Court decided that visual identification evidence purports to identify a person as near or at the scene of an offence, while observation evidence concerns the actions of an alleged offender, including participation in an offence.⁵⁵ The Court considered that the words in the definition of visual identification evidence supported its conclusion, because the s 4 definition refers to identification of a person *at or near a place* and not identification of a

⁴⁶ *R v Ismail* [2010] NZCA 569 at [16].

⁴⁷ Evidence Act 2006, s 4, definition of “visual identification evidence”.

⁴⁸ *R v Turaki* [2009] NZCA 310 at [57] and [58].

⁴⁹ *Turaki* [2009], above n 48 at [62]; *R v Edmonds* [2009] NZCA 303, [2010] 1 NZLR 762 at [38].

⁵⁰ *Harney*, above n 38, at [26].

⁵¹ *Tararo v R* [2010] NZCA 287, (2010) 24 CRNZ 888 at [74].

⁵² *Lord v R* [2011] NZCA 117 at [31].

⁵³ For example, in *Harney v R* [2010] NZCA 264 at [7] and [8] the identification witness had had two prior dealings with the alleged offender and these were over five years before the offence in question took place.

⁵⁴ *Turaki*, above n 48, at [65].

⁵⁵ *Ibid*, at [84] and [92].

person as the alleged offender.⁵⁶ Thus, the evidence of the witness was observation evidence and not visual identification evidence. Following *Turaki*, the Court in *R v Edmonds* applied the distinction between identification evidence and observation evidence.⁵⁷ However, *Peato* did not apply this approach, where the Court considered that the definition of visual identification evidence was wide enough to cover observation evidence.⁵⁸ Evidence identifying a defendant as the offender based on the witness's observations also implies that the defendant was present at or near the scene of the offence. Therefore, evidence identifying a person as the perpetrator of an offence will amount to visual identification evidence.

The approach of *Peato* is preferable regarding observation evidence because it is in line with the purpose of controlling the admissibility of visual identification evidence in a criminal proceeding. This promotes the reliability of such evidence as an observation of the offender's actions hinges on whether the witness reliably identified the maker of the actions as the defendant. Therefore, observation evidence should fall within the definition of visual identification evidence.

If the evidence of a witness identifying a defendant satisfies the definition of visual identification evidence, then the procedures in s 45 will govern the admissibility of the evidence.⁵⁹

2.2 The Test for Admissibility: s 45 of the Evidence Act 2006

Section 45 aims to determine the admissibility of visual identification evidence based on reliability. This reflects scientific research, which suggests that visual identification is often inaccurate. The rationale behind s 45 is that identification evidence obtained following a formal procedure is more likely to result in a reliable identification.⁶⁰

The Law Commission proposed that this section should govern the admissibility of identification evidence of the defendant and of other people whose identification is crucial to the case, such as a victim.⁶¹ However, s 45 only covers identification evidence relating to a suspect, as a "person alleged to have committed an offence".⁶²

⁵⁶ *Turaki*, above n 48, at [73].

⁵⁷ *R v Edmonds* [2009] NZCA 303, [2010] 1 NZLR 762 at [42].

⁵⁸ *R v Peato* [2009] NZCA 333, [2010] 1 NZLR 788 at [29]-[31].

⁵⁹ The definition of "visual identification evidence" in s 4 of the Evidence Act 2006 is wide enough to cover other evidence placing the defendant at or near the scene of an offence. For example, a witness may identify the defendant's car. However, s 45 only covers "persons alleged to have committed an offence". See Mahoney and others, above n 43, at [EV45.01(2)].

⁶⁰ Law Commission *Evidence: Reform of the Law* (NZLC R55 – Volume 1, 1999) at [201] [*Reform*].

⁶¹ Law Commission *Code*, above n 44, at [C219].

⁶² Evidence Act 2006, ss 45(1) and 45(2).

Where the arresting officer identifies the suspect as the alleged offender, s 45 does not apply to the admissibility of the identification evidence. The Law Commission considered that inserting the s 4 definition of visual identification evidence into s 45(1) gives the result that the section is only concerned with identification evidence received by an officer from another person.⁶³ The absence of a good reason for not following a formal procedure under s 45(4) reinforces the Commission's view. However, where an officer witnesses an offence but does not immediately arrest the alleged offender s 45 will apply to the admissibility of the visual identification evidence.⁶⁴

The admissibility of visual identification evidence is a question of law, as opposed to a matter of discretion, whereby the judge acts as the gatekeeper.⁶⁵ It is up to the judge to determine whether the jury can legitimately rely upon the identification. However, it is the function of the jury to assess whether the identification was in fact accurate.⁶⁶ Section 45 places a burden of proof relating to the reliability of the visual identification on either the prosecution or defence. Discharging this burden determines the admissibility of visual identification evidence.⁶⁷

(a) Admissibility under s 45(1)

Pursuant to s 45(1), if the visual identification evidence was obtained following a formal procedure⁶⁸ or if a good reason⁶⁹ existed for not following a formal procedure, the evidence is admissible, unless the defendant proves that the identification is unreliable. For the evidence to be inadmissible, the defendant must prove this burden on the balance of probabilities.⁷⁰

Section 45(1) requires the defendant to prove that the *evidence is unreliable*. This wording indicates that the determination as to whether a defendant has satisfied the burden involves a broad inquiry. The Court of Appeal in *Edmonds* considered that this allows a court to take into account all relevant circumstances.⁷¹ In *R v Aleki* the Court held that evidence beyond the circumstances of the identification is relevant to the assessment of whether the defendant has discharged the onus under s 45(1).⁷² The Supreme Court in *Harney* affirmed the approach of taking into account other evidence in the case under s 45(1).⁷³ The Court of Appeal in *Aleki* considered that an incriminating admission made by the defendant verified the reliability of

⁶³ Law Commission *Code*, above n 44, at [C218].

⁶⁴ See *Tararo*, above n 51; *Lord*, above n 52.

⁶⁵ *R v Aleki* [2010] NZCA 442 at [25], following *R v Gwaze* [2010] NZSC 52, [2010] 3 NZLR 734 at [49]-[50].

⁶⁶ *Aramoana v R* [2010] NZCA 315 at [13], approving *Edmonds*, above n 57, at [105].

⁶⁷ Evidence Act 2006, s 45(1) and 45(2).

⁶⁸ As provided by s 45(3) of the Evidence Act 2006; see Chapter Four.

⁶⁹ As provided by s 45(4) of the Evidence Act 2006; see Chapter Five.

⁷⁰ Evidence Act 2006, s 45(1).

⁷¹ *Edmonds*, above n 57, at [111].

⁷² *Aleki*, above n 65, at [26].

⁷³ *Harney*, above n 38, at [32].

the witness's identification.⁷⁴ Thus, the Court was satisfied that the defendant had failed to prove that the evidence was unreliable and the evidence was admissible under s 45(1).⁷⁵

In *R v Thomson-Wiari* the defendant satisfied the burden, proving that his identification in relation to a robbery was unreliable. The Court reached this conclusion because the eyewitness, who had previously employed the defendant, had known that another witness had already identified the defendant prior to making her own identification.⁷⁶ Long delays between the report of an offence and a formal identification procedure will also affect the burden of proof under s 45(1), making it easier for the defendant to prove, on the balance of probabilities, that the identification evidence is unreliable.⁷⁷ In *Aleki* a delay of two weeks did not significantly affect the reliability of the identification and was insufficient to discharge the burden.⁷⁸

The Court of Appeal in *Aramoana v R* concluded that the identification evidence of a witness was inadmissible, as it was likely that the witness had confused the defendant with one of his co-accused.⁷⁹ The Court reached this conclusion due to the description the witness gave about the actions of the man she identified and that the witness could not identify anyone from a photo montage she was shown in court.⁸⁰ This provided a strong argument that the defendant had proved that the identification was unreliable.⁸¹ However, notwithstanding an admission from another witness during cross-examination that she may have been mistaken as to her identification of the defendant, the Court held that it was open to the judge to decide that the burden of proving that the evidence was unreliable had not been satisfied. Thus, the identification evidence of that witness was admissible under s 45(1).⁸²

Under s 45(1), the admissibility of visual identification evidence, subject to a burden of proof on the defendant to show that the evidence is unreliable, encourages the Police to obtain visual identification evidence following a formal procedure. Because a formal procedure aims to obtain the most reliable identification evidence, this incentive will help discourage unreliable identification procedures.

⁷⁴ *Aleki*, above n 65, at [31].

⁷⁵ *Ibid*, at [32]-[33].

⁷⁶ *R v Thomson-Wiari* [2009] NZCA 562 at [28]-[29].

⁷⁷ *Malone v R* [2010] NZCA 59 at [18].

⁷⁸ *Aleki*, above n 65, at [27].

⁷⁹ *Aramoana*, above n 66, at [16].

⁸⁰ *Ibid*, at [8]-[10].

⁸¹ The identification evidence of this witness was ultimately excluded pursuant to ss 7 and 8 of the Evidence Act 2006 as it had no probative value and was unfairly prejudicial; *Aramoana*, above n 66, at [16]-[17].

⁸² *Aramoana*, above n 66, at [14].

(b) Admissibility under s 45(2)

Pursuant to s 45(2), if the visual identification evidence is obtained without following a formal procedure⁸³ and there was no good reason⁸⁴ for not following a formal procedure, the evidence is inadmissible, unless the prosecution proves that the circumstances in which the identification was obtained have produced a reliable identification. For the evidence to be admissible, the prosecution must prove this burden beyond reasonable doubt.⁸⁵

When determining whether the prosecution has discharged the onus under s 45(2), the Court can consider the number of formal procedure requirements that were followed in obtaining the identification evidence.⁸⁶ While high compliance with the formal identification procedure contained in s 45(3) will count towards reliability, this should not be the only factor considered by the Court.⁸⁷

The burden of proof under s 45(2) relates to the *circumstances in which the identification was made*. Due to the difference in the wording, the Courts have interpreted this as providing a more limited inquiry than the assessment under s 45(1).⁸⁸ Thus, when determining whether the prosecution has satisfied the burden, the Court in *Edmonds* held that this includes assessment of the internal witness factors, external factors and the method of collecting the identification evidence.⁸⁹ The Supreme Court in *Harney* endorsed this approach for determining the admissibility of identification evidence under s 45(2).⁹⁰

In *R v Briggs*, Duffy J concluded that the inquiry under s 45(2) includes any prior knowledge the witness has of the person whom they identified as the person committing the offence.⁹¹ Her Honour also considered relevant the fact a witness gave the police an accurate description of the unique characteristics of the alleged offender, which matched the suspect.⁹² The Supreme Court in *Harney* accepted that prior knowledge of the defendant could be taken into account under s 45(2).⁹³ However, the assessment under s 45(2) does not allow the strength of other evidence to be taken into account.⁹⁴ This was applied in *Lord*, where an

⁸³ As provided by s 45(3) of the Evidence Act 2006.

⁸⁴ As provided by s 45(4) of the Evidence Act 2006.

⁸⁵ Evidence Act 2006, s 45(2).

⁸⁶ *Edmonds*, above n 57, at [100].

⁸⁷ *Ibid*, endorsing the view of the Law Commission in *Law Commission Code*, above n 44, at [C223].

⁸⁸ *Edmonds*, above n 57, at [110] and [112].

⁸⁹ *Ibid*, at [112].

⁹⁰ *Harney*, above n 38, at [32].

⁹¹ *R v Briggs* HC Whangarei CRI-2008-027-000660, 19 March 2009 at [41].

⁹² *Ibid*, at [42].

⁹³ *Harney*, above n 38, at [32].

⁹⁴ *Edmonds*, above n 57, at [115].

incriminating statement made by the defendant could not be taken into account to support the reliability of the identification evidence.⁹⁵

In *Lord* the identification evidence of an undercover police officer was inadmissible in relation to drugs charges. A formal procedure was not followed and the Court found that no good reason existed under s 45(4), thus the admissibility of the identification evidence was determined under s 45(2).⁹⁶ The undercover officer had viewed several photographs before going to a house with the aim of purchasing cannabis. The officer had observed the defendant on two occasions throughout one day. Although the observations were brief, they were within close quarters, and the officer made a statement confirming his identification straight afterwards.⁹⁷ However, the Court of Appeal held that the prosecution had not discharged the burden under s 45(2), as the process followed by the officer risked the assumption that the man he encountered was the man from the photograph.⁹⁸

In *Police v Clifton*, after weighing up the factors for and against reliability, Judge O'Dwyer held that there was a substantial risk of error because the defendant was identified while sitting in the back of a police car.⁹⁹ This is akin to a showup and due to the suggestiveness of the procedure, the prosecution was unable to prove beyond reasonable doubt that the identification was reliable.

The prosecution successfully satisfied the burden under s 45(2) in *R v Tamihana*. The witness made an unprompted identification of the defendant, whom she recognised, which occurred in good lighting shortly after the alleged offence took place. Thus, Andrews J was satisfied that the identification evidence was admissible.¹⁰⁰

The high burden to establish admissibility under s 45(2) is in keeping with the aim of promoting the reliability of visual identification evidence, ensuring that the judge is sure that the evidence is sufficiently reliable to be put to the jury.¹⁰¹ As the case law demonstrates, admissibility of under s 45(2) is a high standard for the prosecution to satisfy. This should encourage the Police to obtain identification evidence by following a formal procedure, thus meeting the easier admissibility test under s 45(1).

⁹⁵ *Lord*, above n 52, at [16].

⁹⁶ *Lord*, above n 52, at [17] and [29].

⁹⁷ *Ibid*, at [32].

⁹⁸ *Ibid*, at [33].

⁹⁹ *Police v Clifton* DC Dunedin CRI-2010-012-004152, 21 October 2010 at [40].

¹⁰⁰ *R v Tamihana* HC Whangarei CRI-2008-090-002932, 3 March 2009 at [27].

¹⁰¹ *Edmonds*, above n 57, at [107].

(c) Guidance for Determining Reliability

When determining admissibility of visual identification evidence under s 45, the judge must assess the reliability of the identification. This requires the judge to recognise the circumstances that may influence an identification and know how these factors affect the reliability of the identification. However, judicial ability to appreciate the signs of an accurate identification is sometimes dubious.

The Court of Appeal in *Aleki* declined to attribute any significance to a statement by the identification witness that he selected the person that “mostly fitted his description”.¹⁰² This may indicate that the witness was merely guessing. While it may not have changed the overall outcome as to the admissibility of the identification evidence, the Court should have at least considered this possibility. The identification evidence in *Harney* was found to be admissible by the District Court, High Court and Court of Appeal before the Supreme Court held that the evidence was inadmissible. A fleeting glance by the police officer, who had had two prior dealings with the defendant over five years before the alleged offending, combined with the officer’s statement that he was “very sure”, was sufficient for the Court of Appeal to find that the circumstances surrounding the identification were conducive to an accurate identification.¹⁰³ In contrast, the Supreme Court decided that these circumstances were unlikely to result in a reliable identification.¹⁰⁴

Guidance for assessing reliability may be provided by the Law Commission’s discussion of factors affecting the reliability of an identification.¹⁰⁵ While the issues are in the context of the judicial warning about visual identification, these factors will also be relevant to the reliability assessment under s 45(1) or (2).¹⁰⁶ Furthermore, the Supreme Court in *Harney* adopted remarks concerning a judicial direction in the leading English case of *R v Turnbull* as appropriate for a judge to consider when determining reliability.¹⁰⁷

The confidence of an identification witness is often thought to indicate the accuracy of an identification. As a result, many people place a substantial amount of weight on witness confidence when deciding whether the witness made an accurate identification.¹⁰⁸ However, the confidence of a witness is often a poor predictor of accuracy in visual identification. Research has shown that witness confidence is highly malleable. Positive feedback

¹⁰² *Aleki*, above n 65, at [27].

¹⁰³ *Harney v R* [2010] NZCA 264 at [28].

¹⁰⁴ *Harney*, above n 38, at [38].

¹⁰⁵ Law Commission *Code*, above n 44, at [C398]. These guidelines were adopted as a useful guide in *Turaki*, above n 48, at [90].

¹⁰⁶ Bruce Robertson (ed) *Adams on Criminal Law - Evidence* (online looseleaf ed, Brookers) at [EA45.09].

¹⁰⁷ *R v Turnbull* [1977] QB 224 (CA) at 228; *Harney*, above n 38, at [30]-[32].

¹⁰⁸ Gary Wells and others “Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads” (1998) 22(6) *Law Human Behav* 603 at 620.

confirming the identification and repeated questioning can easily inflate confidence; therefore, witnesses tend to be overconfident about the accuracy of their identifications.¹⁰⁹ Nevertheless, confidence can be a reliable predictor of accuracy when it is expressed immediately after the witness makes an identification.¹¹⁰

The Courts consistently take into account the reported confidence of a witness in relation to the reliability of his or her identification evidence.¹¹¹ The Supreme Court in *Harney* considered that a judge could take into account witness confidence when determining reliability under s 45(1) and (2). However, due to the complicated relationship between witness confidence and identification accuracy, the Court suggested that a judge should not give too much weight to the witness's confidence.¹¹² The Court also made clear that less weight would be given to confidence expressed after the time the identification was first made.¹¹³ The Supreme Court's assessment of confidence in *Harney* is consistent with current psychological research, which suggests that confidence assessed immediately after the first identification is a useful guide to assessing accuracy. To ensure that a confidence statement is available for the court, the written record required by s 45(3)(e) could include an assessment of the identification witness's confidence.

2.3 Conclusion

The admissibility of visual identification evidence is determined pursuant to s 45. An identification obtained following a formal procedure or good reason is admissible under subsection (1) on the balance of probabilities, unless proved unreliable. The formal procedure and good reasons will be analysed in chapters four and five. An identification obtained by other means will be inadmissible, unless the circumstances are proved beyond reasonable doubt to have produced a reliable identification. This higher test reflects the concern surrounding mistaken identification.

¹⁰⁹ Daniel Wright and Elin Skagerberg "Postidentification Feedback Affects Real Eyewitnesses" (2007) 18(2) *Psychological Science* 172 at 177; Amy Douglass and Nancy Steblay "Memory Distortion in Eyewitnesses: A Meta-Analysis of the Post-identification Feedback Effect" (2006) 20 *Appl Cognit Psychol* 859 at 865.

¹¹⁰ Siegfried Sporer and others "Choosing, Confidence, and Accuracy: A Meta-Analysis of the Confidence-Accuracy Relation in Eyewitness Identification Studies" (1995) 118(3) *Psychological Bulletin* 315 at 324; Neil Brewer and Gary Wells "The Confidence-Accuracy Relationship in Eyewitness Identification: Effects of Lineup Instructions, Foil Similarity, and Target-Absent Base Rates" (2006) 12 *Journal of Experimental Psychology: Applied* 11 at 25.

¹¹¹ See *Luafui v R* [2011] NZCA 287 at [13] and [14]; *Police v Clifton* DC Dunedin CRI-2010-012-004152, 21 October 2010 at [36].

¹¹² *Harney*, above n 38, at [33].

¹¹³ *Ibid*, following *Edmonds*, above n 57, at [117]-[120].

CHAPTER THREE: SAFEGUARDS AT TRIAL

Pursuant to s 45, visual identification evidence is only admissible if the judge considers it reliable. However, reliability does not amount to accuracy. Even where identification evidence is deemed sufficiently reliable to go to the jury, there is still a risk that the identification was inaccurate and the defendant was wrongly identified. The law provides additional protections to guard against a wrongful conviction based on mistaken identification evidence. Cross-examination, judicial warning and expert evidence may be used during a trial to help combat the inherent unreliability of visual identification evidence.

3.1 Cross-examination

Courts frequently cite the availability to cross-examine an identification witness as sufficient to highlight potentially inaccurate visual identifications.¹¹⁴ However, an identification witness may be mistaken, yet honestly believe that his or her identification is correct, resulting in unwavering testimony. Furthermore, effective cross-examination of a mistaken eyewitness requires the defence lawyer and the jury to appreciate the factors that affect the accuracy of visual identifications.¹¹⁵ As discussed previously, layperson knowledge of assessing the accuracy of a visual identification is limited.¹¹⁶ The Court of Appeal in *Turaki* noted the limitations of cross-examination in mitigating the risks of inaccurate identification evidence.¹¹⁷ Therefore, these factors prevent cross-examination from being an effective tool in helping a jury establish the accuracy of a visual identification.

3.2 Judicial Warning: s 126

Section 126 provides for a mandatory judicial warning regarding the dangers of visual identification.¹¹⁸ This warning aims to safeguard against wrongful convictions due to mistaken identifications. While this section also applies to visual identifications that are outside the application of s 45, for the purposes of this paper I will focus on the warning as it applies to visual identification evidence, as defined by s 4.¹¹⁹ Where visual identification evidence is admissible pursuant to s 45(1) or (2), a warning will be required where the case against the defendant depends wholly or substantially on the accuracy of the identification.¹²⁰

¹¹⁴ *R v Phillips* HC Wellington CRI-2009-020-4936, 27 August 2010 at [31].

¹¹⁵ Copeland, above n 6, at 202.

¹¹⁶ See Introduction.

¹¹⁷ *Turaki*, above n 48, at [47].

¹¹⁸ For complete text of s 126 of the Evidence Act 2006, see Appendix 1.

¹¹⁹ For a detailed discussion about the application of the judicial warning in s 126 of the Evidence Act 2006 see: Robertson (ed), above n 106, at [EA126].

¹²⁰ Evidence Act 2006, s 126.

In *E (No 2) v R*, the Crown submitted that “wholly or substantially” relates to cases in which identification is in issue.¹²¹ The Court held that a s 126 warning was required in respect of the evidence of one witness identifying the defendant as the offender. However, as the evidence of another witness was solely about the actions of the defendant, a warning was not required in respect of the evidence from that witness.¹²² This argument relates to the controversy surrounding observation evidence. However, as discussed in chapter two, observation should fall within the definition of visual identification evidence, thus requiring a judicial warning pursuant to s 126.¹²³

Where a judicial warning is required under s 126, the judge must warn the jury that a mistaken identification can result in a serious miscarriage of justice, alert the jury that a mistaken witness may be convincing and in the case of multiple identifications, warn that all of them may be mistaken.¹²⁴ The judge must also tailor the warning to the facts of the case. The Law Commission provided guidance on additional matters that affect the quality of identifications, which could be included in the warning.¹²⁵ The Court in *Turaki* adopted these suggestions as guidance for judge considering appropriate directions beyond those contained in s 126(2).¹²⁶ The failure to include the full warning, including the elements under s 126(2) constitutes an error of law.¹²⁷ Therefore, lack of reference to avoiding a miscarriage of justice due to a mistaken identification will be sufficient to set aside a conviction.¹²⁸

Legal professionals and eyewitness experts question the effectiveness of a judicial direction in preventing the jury from relying on an inaccurate identification to convict a defendant.¹²⁹ The judicial warning in s 126 merely requires the judge to point to certain factors that may have affected the accuracy of the identification in the particular case. The judge is not required to explain how and to what extent those factors can affect a visual identification.¹³⁰ Furthermore, the warning is given at the conclusion of a trial, by which time the jury has already heard the identification evidence. This prevents the jury from using the content of the warning to evaluate the accuracy of the identification evidence. Prior to the warning, jurors may have already reached a conclusion and this is unlikely to change based on a judicial

¹²¹ *E (No 2) v R* CA113/2009, cited in Robertson (ed), above n 106, at [60].

¹²² *E (No 2) v R* CA113/2009 [2010] NZCA 280 at [66]-[67].

¹²³ See Chapter Two at 2.1.

¹²⁴ Evidence Act 2006, s 126(2).

¹²⁵ Law Commission *Code*, above n 44, at [C398].

¹²⁶ *Turaki*, above n 48, at [90].

¹²⁷ *Ibid*, at [87].

¹²⁸ However, the Court will consider whether to apply the proviso under s3 85(1) of the Crimes Act 1961 and uphold the conviction, *R v Uasi* [2009] NZCA 236, [2010] 1 NZLR 733 at [39].

¹²⁹ Kristy Martire and Richard Kemp “Knowledge of Eyewitness Identification Issues: Survey of Public Defenders in New South Wales” (2008) 15 *Psychiatry Psychol and L* 78 at 86.

¹³⁰ Kristy Li “Who Did You See? An Evaluation of the Criminal Justice System’s Response to the Danger of Eyewitness Misidentification (2010) 16 *Auckland U L Rev* 217 at 234.

direction.¹³¹ Finally, the judge gives the visual identification warning within the overall instructions about the jury's task and the legal principles relevant to the case. This may diminish the intended effect of the warning.¹³²

3.3 Expert Evidence: s 25

Pursuant to s 25, expert evidence is admissible regarding the reliability of visual identification evidence, providing it meet the test of substantial helpfulness.¹³³ Expert testimony may aid the judge in deciding whether the visual identification evidence is admissible pursuant to s 45, or could help the jury decide whether to rely on admissible identification evidence. However, scientific research suggests that expert evidence does not improve a person's ability to distinguish between accurate and inaccurate visual identifications.¹³⁴ Admitting expert evidence about visual identification evidence will increase the time and cost involved in a proceeding. There is also a concern that allowing expert testimony will turn into a battle of the experts, which could result in confusing the jurors.¹³⁵ Therefore, it is unlikely that expert evidence regarding the accuracy of visual identifications will meet the test of substantial helpfulness required for admissibility.¹³⁶ A statement by the Court of Appeal in *Turaki* lends support for this conclusion, where the Court acknowledged the inconsistent effect of expert testimony on juror performance.¹³⁷

3.4 Conclusion

The law provides additional safeguards during the trial process to help prevent a wrongful conviction due to mistaken identification evidence. Most commonly, these include cross-examination and a judicial warning about the dangers of visual identification. In reality, these safeguards have a contested effect on juror decision-making and as such are insufficient to protect against a wrongful conviction due to misidentification. Due to the dangers of mistaken identification, it is suggested that the formal procedure under s 45(3) be reformed so that it is in line with current scientific research.¹³⁸ This would ensure that the witness makes

¹³¹ Sandra Thompson "Beyond a Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification Testimony" (2007-2008) 41 UC Davis L Rev 1487 at 1517.

¹³² Li, above n 130, at 236.

¹³³ For complete text of s 25 of the Evidence Act 2006, see Appendix 1. Contrary to previous law, this test allows an expert opinion to be expressed about the ultimate issue in a case or a matter of common knowledge, Evidence Act 2006, s 25(2). For further information regarding s 25 see, Robertson (ed), above n 106, at [EA25].

¹³⁴ Kristy Martire and Richard Kemp "Can experts help jurors to evaluate eyewitness evidence? A review of eyewitness expert effects" (2011) 16 Legal & Criminological Psychology 24 at 33; Bornstein, O'Bryant and Zickafoose, above n 5, at 131.

¹³⁵ Roger Park "Eyewitness identification: expert witnesses are not the only solution" (2003) 2 Law Prob Risk 305 at 306-307.

¹³⁶ Evidence Act 2006, s 25(1).

¹³⁷ *Turaki*, above n 48, at [47].

¹³⁸ Lynne Weathered "Investigating Innocence: The Emerging Role of Innocence Projects in the Correction of Wrongful Conviction in Australia" (2003) 12 Griffith L Rev 64 at 70.

the identification under conditions aimed at achieving a reliable identification. Increasing the reliability of visual identification evidence before any subsequent trial will negate some of the issues that jurors have distinguishing accurate from inaccurate identifications, which cross-examination, judicial direction and expert evidence do not solve.

CHAPTER FOUR: THE FORMAL PROCEDURE UNDER S 45(3)

This chapter analyses the legal requirements for conducting a formal procedure to obtain visual identification evidence. The formal procedure under s 45(3) is intended to produce reliable identification evidence, reflecting scientific research included in a Law Commission report on witness testimony.¹³⁹ Section 45(3)(a) to (f) sets out six requirements that constitute a formal procedure. Paragraph (g) allows for the possibility of further requirements to be made in regulations pursuant to s 201.¹⁴⁰ However, there are currently no such regulations. As illustrated by current psychological research, s 45(3) does not reflect current best practice for obtaining visual identification evidence. To guard against wrongful convictions based on mistaken identification evidence, the formal procedure should be amended in line with current best practice to increase the reliability of visual identification evidence.

4.1 “Officers of an Enforcement Agency”

The admissibility of visual identification evidence pursuant to either s 45(1) or (2) depends on whether or not a formal procedure has been followed by “officers of an enforcement agency”.¹⁴¹ As defined in s 4, “enforcement agency” includes the New Zealand Police and other agencies that have a statutory responsibility for the enforcement of an enactment, for example, the New Zealand Customs Service.¹⁴² Mallon J in *R v Phillips* considered that the scheme of s 45 was intended to apply only to the agency enforcing the enactment under which the visual identification is to be offered as evidence. Her Honour assumed that corrections officers were not “officers of an enforcement agency” in a case where the identification evidence pertained to charges under the Crimes Act 1961.¹⁴³ Where visual identification evidence is offered in relation to the Corrections Act 2004, under which corrections officers have powers of enforcement, then there may be scope for corrections officers to fall within the definition of an “enforcement agency”.¹⁴⁴ This outcome has led some commentators to believe that the inclusion of the definition within s 45 was unintentional.¹⁴⁵

¹³⁹ Law Commission *Total Recall?*, above n 3.

¹⁴⁰ See Evidence Act 2006, s 201(k).

¹⁴¹ Evidence Act 2006, ss 45(1) and 45(2).

¹⁴² Evidence Act 2006, s 4, definition of “enforcement agency”.

¹⁴³ *Phillips*, above n 114, at [38].

¹⁴⁴ Evidence Act 2006, s 4, definition of “enforcement agency”.

¹⁴⁵ Mahoney and others, above n 43, at [EV4.13.01].

4.2 Medium

Section 45(3) does not mandate the use of a specific medium to obtain visual identification evidence, such as conducting a lineup by way of either a live parade or a photographic montage.¹⁴⁶ This is supported by current psychological research. While photographs do not display information about the height, build or movement of the suspect, a meta-analysis of lineup research found that the medium used did not significantly affect identification accuracy.¹⁴⁷ Compared to a photographic lineup, there is more time and expense involved in organising a live lineup. A national photograph database containing images of prisoners allows efficient construction of photographic lineups.¹⁴⁸ Using photographs also ensures that identification procedures can be carried out with as little delay as possible. While the Court of Appeal has expressed a preference for live parades, it accepted that the use of photographic montages is now commonplace in New Zealand.¹⁴⁹

4.3 The Requirements of a Formal Procedure

(a) *Time Limit: s 45(3)(a)*

A formal procedure must take place as soon as practicable after the alleged offence has been reported to an officer of an enforcement agency.¹⁵⁰ This is to ensure that the identification witness's memory is not subject to undue delay and distortion. Although the time period in s 45(3)(a) runs from the date on which the offence was reported, the Court of Appeal in *Malone v R* held that the date at which it is first possible to carry out a formal procedure will be the date at which a named suspect is identified.¹⁵¹ The Court reached this conclusion because s 45 assumes that there is a person identified as a suspect and the absence of such a suspect would result in no person to identify in the formal procedure.¹⁵² Thus, when determining whether a formal procedure complies with subsection (3)(a) the focus is on the time between identifying a named suspect and the time when the formal procedure took place.¹⁵³ The Court considered that this inquiry might include consideration of the available means and resource of the enforcement agency; however, it generally will not include a detailed examination of the investigative procedures of the police.¹⁵⁴ While there was a delay of just over two months between the date the offence was reported before the suspect was

¹⁴⁶ Law Commission *Code*, above n 44, at [C217].

¹⁴⁷ Brian Cutler and others "Conceptual, practical, and empirical issues associated with eyewitness identification test media" in David Ross, JD Read and Michael Togli (eds) *Adult Eyewitness Testimony: Current Trends and Developments* (Cambridge University Press, New York, 1994) 163 at 181.

¹⁴⁸ Law Commission *Total Recall?*, above n 3, at [82].

¹⁴⁹ *Daniels v R* [2011] NZCA 234 at [11].

¹⁵⁰ Evidence Act, s 45(3).

¹⁵¹ *Malone*, above n 77, at [13].

¹⁵² *Ibid.*

¹⁵³ *Ibid.*, at [17].

¹⁵⁴ *Ibid.*, at [15], [16] and [19].

identified, a formal procedure was carried out five days afterwards.¹⁵⁵ The Court held that this was as soon as practicable in terms of s 45(3)(a).¹⁵⁶

In *R v Ngaau* a District Court Judge considered that when a named suspect is identified, if the witness is unavailable due to illness or absence, it would not be practicable to conduct a formal procedure.¹⁵⁷ Provided that the formal procedure was carried out as soon as the witness was available, section 45(3)(a) would be satisfied. In *Ngaau* the witnesses were available, but uncooperative. Judge de Ridder was prepared to hold that it would only be practicable to hold a formal procedure once the witnesses were willing to cooperate.¹⁵⁸

There must be a time limit on the ‘as soon as practicable’ test under s 45(3)(a). It is logical that this time must run from the date a suspect is named. However, if the test were to include the availability of a witness, as proposed in *Ngaau*, this could further prolong the delay between the original sighting by the witness and the subsequent formal identification. During any time delay, the witness’s memory is subject to deterioration and possible distortion. The use of photographic lineups could put limitations on the availability test, especially in the case of an ill witness, as the lineup could easily be conducted outside the vicinity of the police station.

(b) Distractors: s 45(3)(b)

The formal procedure mandates the number and the method for choosing the distractors. Pursuant to s 45(3)(b), the person to be identified is to be compared to no fewer than seven other persons who are similar in appearance to the person to be identified.¹⁵⁹

Where a suspect is innocent, the number of distractors in a lineup reduces the risk that a witness will mistakenly identify the suspect. If a witness is merely guessing rather than making a positive identification, there is a chance that the witness will wrongly choose an innocent suspect. The distractors control for chance, because if an eyewitness guesses and selects a distractor, the police know this identification must be wrong.¹⁶⁰ Thus, increasing the size of the lineup will decrease mistaken identifications of an innocent suspect.¹⁶¹ While a larger lineup is a better lineup, there is no correct number of distractors to have in a lineup.

¹⁵⁵ Ibid, at [5].

¹⁵⁶ Ibid, at [20].

¹⁵⁷ *R v Ngaau* DC Whangarei CRI-2008-088-000161, 28 May 2010 at [20].

¹⁵⁸ The absence of evidence as to why a formal procedure could not have been followed during an earlier time period, when a different officer was in charge of the case, led his Honour to conclude that s 45(3)(a) was not satisfied. *Ngaau*, above n 157, at [20]-[21].

¹⁵⁹ Evidence Act, s 45(3)(b).

¹⁶⁰ This is because the distractors are people who the police already know to be innocent, see Chapter One at 1.3(d) Lineup.

¹⁶¹ Giannelli and Raeder (eds), above n 9, at 777.

Identification researchers recommend lineup sizes of between five and twelve.¹⁶² Therefore, the Evidence Act requirement that a lineup contain seven or more distractors is sufficient and in line with current guidelines produced by psychological research.

The formal procedure in s 45(3) does not specify how many suspects can be included within one lineup. Where a witness is attempting to identify multiple suspects involved in one offence, an officer may be tempted to include multiple suspects in a lineup. However, in *Briggs*, Duffy J concluded that a lineup should contain only one suspect. The danger is the possibility of a witness recognising a suspect not due to the suspect's presence at an offence, but through that suspect's association with another suspect recognised from the offence.¹⁶³ Furthermore, if there was one alleged offender, yet multiple suspects were included in the lineup, there would be no way to tell if the witness was mistaken in his or her identification. Multiple suspects being included in a lineup is a risk best avoided. While the courts have acknowledged this danger, legislative reform making explicit that a formal procedure consists of one suspect per lineup is preferable.

Members of a closed group to which the person to be identified belongs should not be included in the identification procedure.¹⁶⁴ The recognition of one person from the group may prompt the witness to recognise the others, even though the witness may not have identified these people if they were compared to others of similar appearance from outside that group.¹⁶⁵ Likewise, in *Daniels v R* the Court considered that the lineup did not have to contain other people present during the alleged offence, because s 45(3)(b) only mandates that there be seven other people who are similar looking to the suspect.¹⁶⁶

Similarly, in *Lewis v Police*, Clifford J held that s 45(3)(b) has not been complied with where a witness recognises or already knows some of the distractors who were included in the identification procedure. Such recognition enables the witness to eliminate some of the distractors from being the offender, which means there are less than seven others of similar appearance to which the person being identified is compared.¹⁶⁷

While the number of distractors in a lineup is important, of more significance is the quality of the distractors. Visual identification researchers have identified two strategies to pick suitable distractors for a lineup. The first is the match-to-suspect strategy. This involves analysing the characteristics of the suspect and choosing distractors that match these characteristics.¹⁶⁸ The match-to-suspect strategy raises a problem about the appropriate extent of similarity to the

¹⁶² Turtle, Lindsay and Wells, above n 17, at 10; Giannelli and Raeder (eds), above n 9, at 821-822.

¹⁶³ *Briggs*, above n 91, at [20].

¹⁶⁴ For example, inmates of a prison cell block. *Ibid*, at [22].

¹⁶⁵ *Ibid*.

¹⁶⁶ *Daniels*, above n 149, at [12].

¹⁶⁷ *Lewis v Police* HC Wellington CRI-2009-485-18, 12 June 2009 at [24].

¹⁶⁸ Luus and Wells, above n 39, at 48.

suspect. Distractors too similar to the suspect may result in confusion for the witness, making identification or rejection of the individuals impossible, rendering the lineup of little use. Conversely, distractors too dissimilar may lead to a high risk of the witness easily identifying the suspect, who may be innocent.¹⁶⁹ For example, this could occur where the suspect was the only member of the lineup with a large nose.

Under s 45(3)(b), distractors are to be chosen based on being similar in appearance to the suspect, thus the Act follows a match-to-suspect strategy. Duffy J in the High Court held that this requires more than the distractor having similar hair, skin and eye colour to the suspect. It also includes similarity of the amount of facial hair present and similar facial features, such as jaw, lip, nose and face shape.¹⁷⁰ Whether the distractors in the identification procedure are similar in appearance will also include the presence of any distinctive facial tattoos.¹⁷¹

Another way to select distractors in a line up is the match-to-description strategy. The distractors are chosen based on their similarity to the witness's description of the offender. One reason why a suspect usually is a suspect is that he or she matches the description provided by the witness. The match-to-description strategy helps eliminate guessing on behalf of the witness, as an identification cannot be made based on which member best fits the witness's description.¹⁷² Furthermore, as a witness's description is finite, usually containing several broad descriptors, the match-to-description approach makes it easier for an enforcement agency to select the distractors.¹⁷³ Where the suspect does not match the witness's description, the distractors should be chosen based only on the features mentioned in the description. Thus, the mismatched features should be resolved by using the suspect's features. For example, if the description was "white male, 21-25 years old, a protruding chin, dark hair, about 165 pounds, and 5'9" tall", and the suspect was actually approximately 35 years old with a receding chin, the distractors should be white males, around 35 years old, with a receding chin, dark hair, about 165 pounds and 5'9" tall.¹⁷⁴ If this suspect had a hooked nose, the distractors would not be required to have hooked noses. This provides a degree of variance among the lineup members, helping the witness to identify the suspect based on the witness's memory for the offender and not by the features the witness remembers the offender having, as provided in the description. Conversely, if the suspect is innocent the presence of a hooked nose will not influence the witness's decision.¹⁷⁵ Therefore, where the suspect is innocent, research has shown that distractors matched-to-

¹⁶⁹ Luus and Wells, above n 39, at 47-48.

¹⁷⁰ *Briggs*, above n 91, at [30].

¹⁷¹ *Malone*, above n 77, at [23].

¹⁷² Giannelli and Raeder (eds), above n 9, at 822.

¹⁷³ For example; gender, race, age, height, hair; Ian McKenzie "Psychology and Legal Practice: fairness and accuracy in identification parades" (1995) *Crim L R* 200 at 204.

¹⁷⁴ Luus and Wells, above n 39, at 53.

¹⁷⁵ *Ibid.*

description, compared with match-to-suspect distractors, helps reduce the risk that the witness mistakenly identifies the suspect.¹⁷⁶

The requirement under s 45(3)(b) relates only to the similarity of the other people in the identification procedure to the suspect. Thus, the similarity between any distractors in the identification procedure and the description of the offender provided by the witness is not of concern under s 45(3)(b).¹⁷⁷ However, to improve the accuracy of visual identification evidence and protect against misidentification, the formal procedure should stipulate the match-to-description strategy for choosing distractors in a lineup.

(c) *Eliminating Bias: s 45(3)(c)*

The third requirement of a formal procedure under s 45(3)(c) is that no indication can be given to the person making the identification as to which person in the procedure is the suspect. This requires that the suspect is not obvious in comparison with the other images contained in the procedure.¹⁷⁸ The Court of Appeal in *Daniels v R* indicated that a photo with a different coloured background to the others in an identification procedure would not infringe s 45(3)(c).¹⁷⁹

Section 45(3)(c) also aims to ensure that the officer conducting the formal procedure does not cue the response of the witness. There is potential for an officer who knows the identity of the suspect in the lineup to influence the witness's decision by a variety of verbal or non-verbal behaviours, such as nodding, smiling or directing the witness's attention to a particular photograph.¹⁸⁰ Even where an officer does not intentionally seek to bias the witness's response, the officer may provide unconscious behavioural cues.¹⁸¹ This is dangerous as it increases the risk that a witness will mistakenly identify an innocent suspect.¹⁸² Thus, it is important that the officer conducting the formal procedure is unaware as to who in the lineup is the suspect.¹⁸³ This is known as a double-blind procedure because both the suspect and the conducting officer are blind in relation to which member is the suspect.¹⁸⁴ The Law

¹⁷⁶ Steven Clark and Jennifer Tunnicliff "Selecting Lineup Foils in Eyewitness Identification Experiments: Experimental Control and Real-World Simulation" (2001) 25(3) *Law Hum Behav* 199 at 212.

¹⁷⁷ *R v Faifua* [2011] NZCA 152 at [21].

¹⁷⁸ For example, the procedure cannot contain one mug shot as this might prompt the witness to identify this photo as the offender.

¹⁷⁹ *Daniels*, above n 149, at [13].

¹⁸⁰ Mark Phillips and others "Double-Blind Photoarray Administration as a Safeguard Against Investigator Bias" (1999) 84(6) *Journal of Applied Psychology* 940 at 941.

¹⁸¹ Turtle, Lindsay and Wells, above n 17, at 10.

¹⁸² Phillips and others, above n 180, at 948.

¹⁸³ The Police Instructions mandate that where possible a sergeant or senior sergeant should conduct the identification procedure and not the officer in charge of the case. However, this is limited to parades and not photographic lineups. See Mahoney and others, above n 43, at [EV45.06(4)].

¹⁸⁴ Compared to a single-blind procedure where the conducting officer is aware which member of the lineup is the suspect.

Commission originally proposed that identification procedures be conducted double-blind. However, the Commission agreed with commentators that this was undesirable, as safety reasons would require the conducting officer to know which member of the lineup is the suspect.¹⁸⁵ The majority of identification procedures in New Zealand are conducted using photographs,¹⁸⁶ eliminating the safety concern. Therefore, conducting a formal procedure should be explicitly limited to officers who do not know which lineup member is the suspect. This will reduce potential bias to the witness's identification and increase the reliability of visual identification evidence.

Requiring double-blind formal procedures may put a strain on police resources, especially in smaller stations that could find it hard to find an officer who is blind to the identity of the suspect. This may result in the employment of special identification administrators, increasing the costs of the procedure. However, overseas jurisdictions have found that double-blind administration was relatively easy to implement using officers not involved in the case.¹⁸⁷ In any case, ignoring the safeguard of blind administration on economic grounds would undermine the credibility of the criminal justice system.¹⁸⁸

The formal procedure does not mandate what is required when there are multiple eyewitnesses purporting to identify an offender. Suggestion about the identity of the suspect may arise from other eyewitnesses. Therefore, eyewitnesses should individually take part in an identification procedure to ensure that an eyewitness works independently in attempting to identify the suspect.¹⁸⁹

(d) Warning to Witness: s 45(3)(d)

A witness may feel pressure to make an identification from the lineup. Many witnesses assume that a lineup will contain a suspect and that the suspect will indeed be the offender.¹⁹⁰ This may promote guessing on behalf of the witness, which could result in the witness mistakenly identifying an innocent suspect. Research has shown that a cautionary instruction prior to conducting an identification procedure reduces the risk that a witness will make a mistaken identification.¹⁹¹ This is the rationale behind s 45(3)(d).¹⁹² This section requires a

¹⁸⁵ Law Commission *Reform*, above n 60, at [206].

¹⁸⁶ Yvette Tinsley "Identification Procedures and Options for Reform" (2000) 31 Victoria U Wellington L Rev 117 at 122.

¹⁸⁷ Kenneth Patenaude "Police Identification Procedures: A Time For Change" (2006) 4 Cardozo Pub L Policy and Ethics J 415 at 418; Shirley Glaze "Selecting the Guilty Perpetrator: An Examination of the Effectiveness of Sequential Lineups" (2007) 31 Law and Psychol Rev 199 at 208.

¹⁸⁸ Tony Watkin "In the dock - an overview of the decisions of the High Court on dock identifications in the magistrates' court" (2003) Crim L R 463 at 466.

¹⁸⁹ Mahoney and others, above n 43, at [EV45.06(4)].

¹⁹⁰ Wise, Fishman and Safer, above n 12, at 461.

¹⁹¹ Nancy Steblay "Social Influence in Eyewitness Recall: A Meta-Analytic Review of Lineup Instruction Effects" (1997) 21 Law and Hum Behav 283 at 294.

formal procedure to contain a warning to the identification witness, prior to taking part in a formal procedure, that the person to be identified may or may not be one of the individuals present in the identification procedure.¹⁹³ The warning attempts to reduce the pressure on the witness to make an identification from the lineup. However, the current wording of the warning may reinforce that the suspect is present in the lineup. The phrase “person to be identified” suggests that the suspect is included in the identification procedure. Thus, the warning should be reworded to state “the person you saw committing the offence may or may not be among the persons in the procedure”.¹⁹⁴ Furthermore, the warning in s 45(3)(d) does not make explicit that it is acceptable for the witness to reject the lineup by refusing to make an identification. Therefore, the warning should also instruct the witness that it is just as important to clear the innocent from suspicion as well as identifying the guilty perpetrator, making clear that the police will continue to investigate the case regardless of whether or not the witness makes an identification.¹⁹⁵ This reform will help ensure the reliability of identification by reducing the pressure on the witness to identify a member of the lineup.

(e) Recording the Procedure: s 45(3)(e) and (f)

The final two requirements of a formal procedure require the officer who conducted the procedure to prepare and certify as true, both a written and pictorial record.¹⁹⁶ These records must be provided to the Judge and the defendant at the hearing. While the records are not required to be provided to the jury, it is possible for the records to be entered into evidence where necessary.¹⁹⁷ This enables the judge and the defence lawyer to ensure compliance with s 45(3) and identify any factors that may have affected the reliability of the identification.

4.4 Method of Presentation

Section 45(3) does not specify the method of presenting a formal procedure. For live and photographic lineups, there are two methods by which the lineup can be conducted. The method utilised can have a profound effect on the accuracy of an identification.

The New Zealand Police use the simultaneous method for conducting a live or photographic lineup.¹⁹⁸ The simultaneous method involves presenting the witness with all members of the lineup at the same time, for example in a photographic montage.¹⁹⁹ This format allows the

¹⁹² Law Commission *Reform*, above n 60, at [207].

¹⁹³ Evidence Act 2006, s 45(3)(d).

¹⁹⁴ Mahoney and others, above n 43, [EA45.06(6)].

¹⁹⁵ Turtle, Lindsay and Wells, above n 17, at 11.

¹⁹⁶ Evidence Act 2006, s 45(3)(e) and (f).

¹⁹⁷ *Malone*, above n 77, at [24].

¹⁹⁸ Law Commission *Total Recall?*, above n 3, at [97].

¹⁹⁹ Nancy Steblay and others “Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison” (2001) 25 *Law and Hum Behav* 459 at 459.

witness to make a direct comparison between the lineup members. Researchers believe that this leads to the use of relative judgment, resulting in the witness selecting the person from the lineup whom most resembles the offender.²⁰⁰ Where the suspect is indeed the offender this is an acceptable outcome. However, when the suspect is innocent, relative judgment may result in a mistaken identification of the suspect.²⁰¹

An alternative method is sequential presentation, which involves presenting the members of the lineup individually. The witness is asked whether the individual is the offender, if the witness rejects this lineup member then the next member is shown. However, once the witness makes an identification the procedure stops, even if the witness has not been shown all of the lineup members.²⁰² It is theorised that this method prevents a witness from using relative judgment to the same extent. A reliable witness should not have to view all the members at the same time to identify the offender. Ideally, the witness should be comparing each individual to the memory of the offender and using absolute judgment to decide if that person is the offender.²⁰³ This effect is strongest when the witness is unaware of the total numbers of members in the lineup. Knowledge about the size of the lineup may reduce the effectiveness of sequential presentation as the witness may resort to guessing as they near the end of the lineup.²⁰⁴

Research has demonstrated that when compared to simultaneous presentation, sequential presentation results in a lower rate of identification.²⁰⁵ However, the reduction in overall identifications is not as worrying as first appears. While sequential presentation results in slightly lower identifications of a guilty suspect, it drastically reduces the rate of misidentifying an innocent suspect.²⁰⁶ The reduction of error rates in sequential presentations outweighs the benefit of the greater number of overall identifications produced by simultaneous presentation. Thus, the sequential procedure produces identifications that are more accurate compared to the simultaneous procedure.²⁰⁷

The superiority of the sequential lineup compared to the simultaneous lineup depends on whether the officer conducting the lineup has knowledge of which member is the suspect. This result occurs because it is easier to cue the response of the witness when the lineup members are presented individually.²⁰⁸ Thus, sequential presentation requires a double-blind procedure to be effective. The Law Commission considered that it was too premature to

²⁰⁰ Ibid, at 459.

²⁰¹ Wells, above n 27, at 561.

²⁰² Steblay and others, above n 199, at 460.

²⁰³ Ibid.

²⁰⁴ Wells, above n 27, at 561-562.

²⁰⁵ Steblay and others, above n 199, at 471.

²⁰⁶ Nancy Steblay, Jennifer Dysart and Gary Wells “Seventy-Two Tests of the Sequential Lineup Superiority Effect: A Meta-Analysis and Policy Discussion” (2011) 17 *Psychology, Public Policy, and Law* 99 at 122-123.

²⁰⁷ Ibid, at 119; Nancy Steblay and others, above n 199, at 471.

²⁰⁸ Phillips and others, above n 180, at 948.

recommend that identifications be presented sequentially, in part because investigator knowledge may cause problems.²⁰⁹ However, as the double-blind procedure also increases the reliability of identification,²¹⁰ it is suggested that the formal procedure under s 45(3) requires a double-blind sequential presentation of individuals or photographs. This will help reduce mistaken identifications of innocent suspects, and therefore increase the accuracy of identifications that followed a formal procedure.

4.5 Number of Identification Procedures

In *Briggs*, Duffy J concluded that Parliament intended that a formal procedure be carried out once only, as the first way an enforcement agency obtains identification evidence. Her Honour considered that following a faulty procedure with an adequate formal procedure opens up the possibility that the witness will identify the suspect based on the first procedure and not due to the suspect being the offender.²¹¹ In *Briggs* the visual identification evidence did not result from a valid formal procedure due to other inadequacies related to s 45(3). However, her Honour found that the evidence was admissible under s 45(2); accordingly, the repetitive identification procedures did not affect the reliability of identification.²¹²

Mallon J came to a different conclusion in *Phillips*. Her Honour concluded that s 45 does not mandate that the enforcement agency can only obtain one form of visual identification evidence.²¹³ Where the police have used an informal procedure to obtain identification evidence, Mallon J considered that it is possible for a later formal procedure to be conducted, even where a good reason existed at the time of the first procedure.²¹⁴

It would be unworkable to require a formal procedure to be the first way in which an enforcement agency obtains visual identification evidence. Situations where people at the scene of an offence ask the victim who the offender was would invalidate a later formal procedure. Furthermore, in certain circumstances the police may consider that it is unnecessary to conduct a formal procedure, but it later becomes apparent that a formal procedure would be required. For example, where the witness names an offender due to recognition, but familiarity between the witness and alleged offender is low, so the police seek to confirm the identification by using a formal procedure. However, once a witness has taken part in a suggestive identification procedure, it is unlikely that a later fair procedure

²⁰⁹ Law Commission *Total Recall?*, above n 3, at [101].

²¹⁰ See Chapter Four at 4.3(c) Eliminating Bias.

²¹¹ *Briggs*, above n 91, at [35]-[36].

²¹² As discussed in *Phillips*, above n 114, at [27].

²¹³ *Ibid*, at [28].

²¹⁴ *Ibid*, at [28]-[29]. However, the Crown can only lead evidence of one of the identification procedures, unless s 35(2) or (3) of the Evidence Act 2006 applies. This section concerns previous consistent statements, see *Phillips*, above n 114, at [43]-[48].

will produce a reliable identification.²¹⁵ This is because repetitive identification can taint the eyewitness's memory, providing a source of suggestion that the suspect is the offender and thereby artificially increasing confidence.²¹⁶ The potential unreliability of repetitive identifications will be relevant when a judge is determining the admissibility of visual identification evidence under s 45(1) and (2). Thus, under s 45(1) the defendant may be able to have the identification evidence excluded if it can be demonstrated, on the balance of probabilities, that an identification following a formal procedure was unreliable due to a prior suggestive identification procedure. This provides a safeguard for situations where an identification complying with s 45(3) may be tainted by a previous identification.

4.6 Conclusion

The formal procedure under s 45(3) aims to produce circumstances that will result in a reliable identification. However, as currently enacted, s 45 is not in line with modern research that demonstrates the means of obtaining the most accurate visual identification.²¹⁷ To increase the reliability of visual identification evidence, s 45 should be reformed to reflect current best practice. This would include mandating that there be one suspect per formal procedure, that the match-to-description method for selecting distractors be used, that eyewitnesses take part individually, that the warning to witnesses be reworded, and that a double-blind sequential presentation method be adopted.

²¹⁵ Richard Wise, Kirsten Dauphinais and Martin Safer "A Tripartite Solution to Eyewitness Error" (2006-2007) 97 *J Crim L and Criminology* 807 at 852.

²¹⁶ Koosed, above n 1, at 615.

²¹⁷ Sankoff, above n 11, at 136; Sue Ewart (ed) "Victims focus for criminal justice forum" (2008) 714 *Law Talk* 19 at 19.

CHAPTER FIVE: GOOD REASONS UNDER S 45(4)

As discussed in the previous chapter, visual identification evidence obtained following a formal procedure is admissible, unless the defendant proves the identification unreliable. Where a visual identification was obtained without following a formal procedure, the admissibility of the evidence depends on whether a good reason existed for not following a procedure. If a good reason for not following a formal procedure existed, the admissibility of the identification evidence will be determined under s 45(1). However, where there was no good reason for not following a formal procedure, the admissibility of visual identification evidence will be determined under s 45(2). As discussed in this chapter, there are six good reasons set out in s 45(4). Because the existence of a good reason assures admissibility, it is important that they only apply in limited circumstances, where it will be unnecessary or impractical to conduct a formal procedure.²¹⁸

5.1 Good Reasons

(a) Refusal: s 45(4)(a)

Pursuant to s 45(4)(a), the person to be identified may refuse to take part in an identification procedure. The person may also refuse to allow a photograph or video record to be taken of them.²¹⁹ This paragraph will only apply where no photograph or video record of the suspect is available to the enforcement agency. The Law Commission considered that a photograph of the suspect is likely to be available because a formal procedure will usually take place after the suspect's arrest.²²⁰

(b) Singular Appearance: s 45(4)(b)

The singular appearance of the person to be identified, being of a nature that cannot be disguised, is a good reason for not following a formal procedure under s 45(4)(b). Thus, the singular appearance of the suspect means that a formal procedure cannot be conducted that conforms with s 45(3)(b).

R v Fraser involved a group wearing costumes attacking another group on a bus. While there were two men in lion costumes, only one was involved in the assault.²²¹ The police did not follow a formal procedure in identifying the defendant as the offender. However, the trial

²¹⁸ Law Commission *Reform*, above n 60, at [211].

²¹⁹ Evidence Act 2006, s 45(4)(a); this right is confirmed by s 344B of the Crimes Act 1961.

²²⁰ Law Commission *Reform*, above n 60, at [213].

²²¹ *R v Fraser* [2009] NZCA 520 at [5] and [8].

Judge found that a good reason existed under s 45(4)(b) due to the difficulty in finding other people similar in appearance to the defendant and wearing a lion suit.²²² Disagreeing with the trial Judge, the Court of Appeal held that a good reason did not exist for not following a formal procedure. The police should have been able to find seven others similar looking to the defendant. Furthermore, it was not necessary for the procedure to consist of people wearing lion suits, because the formal identification procedure tests whether the witness can identify the suspect from his face and not the lion costume.²²³ The Court considered that if it was necessary to compare the defendant with similar looking men in lion suits, then the police could have achieved this by digitally altering all the photographs so that the men were in lion costumes.²²⁴

The limits of disguise under s 45(4)(b) are unclear. Where the suspect has a distinctive facial scar it could easily be covered by a plaster and the other members of the lineup would be required to wear a plaster in the same place. Digital alteration of photographs may also be used to comply with the ‘similar in appearance’ requirement in s 45(3)(b).²²⁵ However, there may be cases where disguising the singular appearance of a suspect is undesirable, such as where the description of the witness is so unique that it would be unlikely to find any people, other than the suspect, matching this description.²²⁶

(c) Substantial Change in Appearance: s 45(4)(c)

Section 45(4)(c) provides a good reason where there was a substantial change in the appearance of the person to be identified before it was practicable to hold a formal procedure.²²⁷ This addresses the problem where a witness would not be able to identify the suspect due to the suspect’s change in appearance since the commission of the crime. Where a suspect has made superficial changes to his or her appearance, such as cutting or dying their hair, paragraph (c) is unlikely to provide a good reason for not following a formal procedure. This is because the aim of a visual identification is to identify an alleged offender from his or her face. While witnesses often provide details of hair length and colour in their description of the offender, these features are also the most general and do not provide sufficient basis for an accurate identification. Therefore, where a suspect has made superficial changes to his or her appearance, the enforcement agency should still follow a formal procedure.

²²² *Fraser*, above n 221, at [17].

²²³ *Ibid*, at [20].

²²⁴ *Ibid*, at [22].

²²⁵ *Ibid*.

²²⁶ For example, where the witness describes the alleged offender as a male approximately one metre tall, with a pink heart tattoo on his left cheek, the word ‘peace’ tattooed across his forehead and he only has one arm.

²²⁷ For example, the suspect has had plastic surgery that significantly altered his or her appearance.

(d) Identification Not Anticipated to be in Issue: s 45(4)(d)

Where no officer involved in the investigation or prosecution of the alleged offence could reasonably anticipate that identification would be an issue at trial, the prosecution can establish the existence of a good reason pursuant to s 45(4)(d). This requires an objective assessment.²²⁸ The prosecution relied on s 45(4)(d) in *Tamihana*, submitting that a formal procedure was not followed because the identification witness had known the accused and the accused had made a statement that was generally consistent with the evidence of the witness.²²⁹ However, the Judge rejected this argument, deciding that the conflicting statements as to the time at which the defendant was in the area should have alerted the police that identification of the defendant would have been an issue at trial.²³⁰

In *Harney* the Supreme Court held that the identification evidence in that case did not fall within s 45(4)(d) because from the time of his arrest the defendant did not accept he was guilty. This factor, coupled with the officer's limited sighting, would signal that identification was likely to be an issue at trial.²³¹

The Court of Appeal in *Turaki* held that where the accused accepts that he or she was present at or near the scene of the offending, identification will not be an issue at trial. In such a case, the only issue will be whether the accused took part in the offending.²³² In *Edmonds* the Court questioned whether the Crown was right to concede that s 45(4)(d) did not apply.²³³ The identification witness knew the offenders, giving evidence about the defendants' actions during an attack and the defendants' presence at the scene of the offence. Based on the distinction between observation and identification evidence, the Court considered that a reasonable police officer would have anticipated that the defendants would challenge the witness's observation of who was involved in the offence.²³⁴ However, an officer may have reasonably thought that the identification evidence merely placing the accused at the scene would not have been an issue at trial.²³⁵ On the facts in *Edmonds*, the officers should have been aware that identification would be an issue at trial, because one of the accused had filed an alibi notice; therefore, the accused was disputing his presence at the scene.²³⁶ A differently constituted Court of Appeal in *Peato* rejected the distinction between observation and identification evidence, further stating that an admission by the accused as to being present at

²²⁸ *Edmonds*, above n 57, at [41].

²²⁹ *Tamihana*, above n 100, at [19].

²³⁰ *Ibid*, at [21].

²³¹ *Harney*, above n 38, at [34].

²³² *Turaki*, above n 48, at [93].

²³³ *Edmonds*, above n 57, at [41].

²³⁴ *Ibid*, at [44].

²³⁵ *Ibid*, at [45].

²³⁶ *Ibid*, at [46] and [47].

the scene of an offence does not necessarily mean that identification will not be in issue.²³⁷ However, the Court in *Harney v R* considered that the conflict between the authorities related to whether an identification warning was required under s 126 and not to the admissibility of visual identification evidence under s 45.²³⁸

Under s 45(4)(d), the approach of the Court in *Peato* is preferable as it takes into account the possibility of identification being an issue at trial, even where the suspect admits his or her presence during the commission of an offence. This results in a conservative approach to obtaining visual identification evidence, by narrowing the scope of the good reasons for not following a formal procedure, the reliability of visual identification evidence is increased. In a strict sense, if the accused has admitted being present at an offence but disputes his or her actions, where the accused has an appearance distinct from others also present at the scene, s 45(4)(d) may be satisfied.

(e) Identification Soon After Offence Reported: s 45(4)(e)

Section 45(4)(e) anticipates the situation where an identification is made by a witness to an officer of an enforcement agency soon after the offence was reported. To fall within paragraph (e), the witness must make the identification to the officer in course of the officer's initial investigation.²³⁹ The Law Commission proposed that this would only apply where there has been no break in the officer's investigation. This may require the identification being made before the gathering of more than minimal evidence.²⁴⁰ When considering whether the identification was made *soon after* the time examined is between the report of the offence and the making of the identification.²⁴¹ In *Tamihana* the Judge accepted that s 45(4)(e) is confined to the "red hot" situation immediately after the offence is reported.²⁴² For example, no formal procedure needs to be held where police arrive at the scene of an alleged offence and a witness makes an identification. However, the Court in *Edmonds* held that a delay of one day between the report of the offence and the identification satisfied s 45(4)(e). In *Police v Clifton* the witness made an identification soon after the report of the offence. However, there was the break in the sighting of the offender by the witness, and as the police brought the suspect to the scene where the witness identified him as the offender, it was not a spontaneous, unprompted identification. This was enough for the Judge to find that s 45(4)(e) could not apply.²⁴³

²³⁷ *Peato*, above n 58, at [22] and [23].

²³⁸ *Harney v R*, above n 103; this aspect of the judgment was not discussed in the appeal to the Supreme Court, *Harney*, above n 38.

²³⁹ Evidence Act 2006, s 45(4)(e).

²⁴⁰ *Mahoney and others*, above n 43, at [EV45.07(6)].

²⁴¹ *Edmonds*, above n 57, at [48].

²⁴² *Tamihana*, above n 100, at [25].

²⁴³ *Clifton*, above n 99, at [26], [29] and [32].

In contrast, the Law Commission proposed that the good reason under s 45(4)(e) was confined to identifications made soon after the offence was *committed*.²⁴⁴ This good reason is intended to utilise the fresh memory of the witness in circumstances where there has been little opportunity for distortion of the identification evidence. The Commission's recommendation would better promote the purpose of the paragraph and uphold the reliability of admissible visual identification evidence.²⁴⁵ Thus, the good reason under s 45(4)(e) should be amended from the period soon after the offence was reported to cover identifications made to an officer soon after the offence was committed.

(f) *Chance Meeting: s 45(4)(f)*

The final good reason provided by s 45(4)(f) involves a witness making an identification to an officer due to a chance encounter between the witness and the person alleged to be the offender. This is confined to meetings after the commission of the offence that are purely up to chance. Thus, a deliberately planned meeting, for example, one set up by a police officer, will not satisfy paragraph (f). This provision only applies where a witness to the offence makes a later identification to an officer. It does not cover the situation where an undercover officer makes the identification, as was the case in *Lord*.²⁴⁶ Where an undercover officer goes to an address with the goal of identifying someone who is suspected of undertaking a criminal activity, the Court recommended that the officer record a written description of the offender. The officer should then take part in a formal procedure complying with s 45(3).²⁴⁷

5.2 Is s 45(4) Exhaustive?

While the Law Commission intended s 45(4) to provide an exhaustive list of good reasons for not following a formal procedure,²⁴⁸ the Courts have interpreted that the current wording of the section allows scope for the creation of additional good reasons.²⁴⁹ The Court of Appeal has warned about taking a cautious approach before extending the list of good reasons in s 45(4), suggesting that any additional good reasons were regarding generic situations, as opposed to being confined to the facts of a particular case.²⁵⁰

The Court in *Edmonds* accepted that when a witness identifies an alleged offender based on recognition, then there could be an additional good reason, beyond s 45(4), for not

²⁴⁴ Law Commission *Reform*, above n 60, at [210].

²⁴⁵ *Mahoney and others*, above n 43, at [EV45.07(6)].

²⁴⁶ *Lord*, above n 52, at [23] and [24].

²⁴⁷ *Ibid*, at [36].

²⁴⁸ Law Commission *Reform*, above n 60, at [210]; see Law Commission *Code*, above n 44, at [C226] and 132, where the draft Code contained “the circumstances referred to in the following paragraphs, and no others, are good reasons” in the equivalent to s 45(4) of the Evidence Act 2006.

²⁴⁹ *Edmonds*, above n 57, at [64]; *Harney*, above n 38, at [25].

²⁵⁰ *Tararo*, above n 51, at [82].

conducting a formal procedure. However, recognition will not be a good reason where following a formal procedure would serve a useful purpose.²⁵¹ The Supreme Court in *Harney* accepted this approach.²⁵² The Court held that whether the witness is sufficiently familiar with the defendant's appearance and thus the potential utility of a formal procedure depends on the facts of the individual case.²⁵³ Thus, the prior circumstances regarding the basis for the witness's familiarity with the defendant's appearance are important when determining whether the witness could have accurately identified the defendant. The identification witness in *Harney* had had two prior dealings with the alleged offender and these were over five years before the offence in question took place. The Court concluded that there was inadequate evidence about the witness's prior knowledge of the defendant on which to conclude that there was sufficient familiarity of the defendant's appearance. Therefore, in this case a formal procedure would have been useful.²⁵⁴ Discussing the utility of a formal procedure, the Supreme Court held that where the witness has only slight familiarity with the defendant's appearance, conducting a formal procedure is likely to be of value.²⁵⁵ Furthermore, the Court considered that a formal procedure might be useful when the defendant disputes that he or she was well known to the witness, or where the last contact between the witness and defendant was not recent.²⁵⁶

The Law Commission proposed that recognition would provide a good reason for not following a formal procedure under s 45(4)(d).²⁵⁷ Thus, where the witness is very familiar with the alleged offender, an officer could reasonably anticipate that identification would not be an issue at trial. Under the test in *Harney*, recognition will provide a good reason, unless a formal procedure would serve a useful purpose. In some situations where a formal procedure would serve a useful purpose, for example due to slight familiarity, the officer should reasonably anticipate that identification would be an issue at trial.²⁵⁸ Thus, recognition of the alleged offender by the identification witness could fall within s 45(4)(d) and not into an additional category of recognition as a good reason provided by the courts.

Conversely, where a witness identifies a defendant based on strong recognition evidence, the defendant may still dispute his or her presence, resulting in identification being an issue at trial. In such circumstances, a formal procedure would serve no useful purpose. It would be likely that the witness would simply identify the person they claimed to recognise; therefore,

²⁵¹ *Edmonds*, above n 57, at [73].

²⁵² *Harney*, above n 38, at [26]-[27].

²⁵³ *Ibid*, at [28].

²⁵⁴ The prosecution could not establish that the visual identification was reliable beyond reasonable doubt under s 45(2) of the Evidence Act 2006, as such it was inadmissible; *Harney*, above n 38, at [35]-[38].

²⁵⁵ *Harney*, above n 38, at [28].

²⁵⁶ *Ibid*, at [29].

²⁵⁷ Law Commission *Reform*, above n 60, at [210].

²⁵⁸ *Mahoney and others*, above n 43, at [EV45.07(5)].

the formal procedure would be unable to discover whether the recognition was mistaken.²⁵⁹ This has led the Courts to accept that recognition may provide an additional good reason outside those provided by s 45(4).²⁶⁰ However, s 45 provides statutory guidelines for the admissibility of visual identification evidence, which aim to promote the reliability of visual identification evidence.²⁶¹ Extending the list of good reasons too readily would undermine the rationale behind s 45. Due to the inherent unreliability of visual identification, the good reasons provided by s 45(4) should be exhaustive. Extension of the good reasons in s 45(4) is best left to the legislature. This would require careful consideration of the surrounding research and policy issues rather than allowing the Courts to slowly erode the reliability scheme provided under s 45.²⁶² Recognition should not constitute a good reason unless it falls within s 45(4)(d). If a case of recognition does not fall within that section, the prosecution should be subject to the higher admissibility test under s 45(2).²⁶³

5.3 Conclusion

The good reasons provided by s 45(4) reflect circumstances in which it is impractical or unnecessary to conduct a formal procedure. Thus, in the absence of a formal procedure, a good reason ensures that visual identification evidence is admissible, unless proved unreliable by the defendant.²⁶⁴ To promote the reliability of visual identification evidence, the good reason under s 45(4)(e) should be reformed to cover the time between the commission of the offence and the identification, as opposed to the report of the offence. Because the existence of a good reason for not following a formal procedure is subject to the easier test for admissibility it is important that s 45(4) is exhaustive, so as not to undermine the reliability scheme created by s 45.

²⁵⁹ *Harney*, above n 38, at [26], endorsing the approach in *Edmonds*, above n 57, at [57].

²⁶⁰ *Harney*, above n 38, at [26].

²⁶¹ *Lord*, above n 52, at [28].

²⁶² *Mahoney and others*, above n 43, at [EV45.07(1)].

²⁶³ Recognition evidence outside of paragraph (g) will still be admissible provided the prosecution proves that it is reliable beyond reasonable doubt.

²⁶⁴ Evidence Act 2006, s 45(1).

CONCLUSION

In criminal proceedings where the identification of the offender is disputed, eyewitness identification can be extremely persuasive. However, the inherent unreliability of memory, combined with the difficulty of determining the accuracy of an identification, leads to a risk of mistaken identification and potentially, a wrongful conviction.

The Evidence Act 2006 codifies the admissibility of visual identification evidence to promote the reliability of an identification. Under s 45, the judge determines whether the jury can legitimately rely upon the identification. However, reliability does not amount to accuracy. Additional safeguards may be available during a criminal trial, including cross-examination, judicial warning and expert evidence, which aim to protect against a jury relying on inaccurate identification evidence. In reality, such safeguards have a contested effect on juror decision-making and thus are insufficient to protect against the risk of mistaken identification. Therefore, the police should use an identification procedure that increases the reliability of visual identification evidence. Increasing the rigor of the identification process prior to any trial will mitigate some of the dangers associated with visual identification evidence.

The formal procedure under s 45(3) sets out conditions aimed at achieving a reliable identification. Therefore, the easier test of admissibility pursuant to s 45(1) encourages the Police to obtain visual identification evidence following a formal procedure. Furthermore, the high burden of establishing the admissibility of an identification obtained without following a formal procedure under s 45(2) discourages unreliable identification procedures.

As currently enacted, the formal procedure is not in line with current scientific research that demonstrates the means of obtaining the most accurate visual identification. To guard against wrongful convictions based on mistaken identification evidence, the formal procedure should be amended in line with current best practice. These reforms include utilising the match-to-description method, rather than the match-to-suspect method, for selecting distractors in the lineup. Decreasing pressure on the witness would involve mandating a double-blind procedure, which would reduce the potential for the conducting officer to bias the identification. Furthermore, rewording the warning and instructing the witness that it is just as important to clear the innocent from suspicion as it is to identify the guilty perpetrator will help prevent the eyewitness from resorting to guesswork. To ensure that the witness makes the identification under conditions aimed at achieving a reliable identification the Act should require a formal procedure to be sequentially presented. Furthermore, a formal procedure should contain only one suspect and eyewitnesses should individually take part in an identification procedure. These amendments would increase the reliability of visual

identifications obtained using a formal procedure, reducing the possibility of a mistaken identification being relied upon by the jury.

If a good reason exists for not following a formal procedure, visual identification evidence will be admissible pursuant to the easier route under s 45(1). Thus, it is important that s 45(4) is exhaustive, so as not to undermine the reliability scheme created by s 45. Furthermore, the good reason provided by s 45(4)(e) should be amended from the period soon after the offence was reported to cover identifications made soon after the offence was committed. Limiting this period utilises the fresh memory of the witness in circumstances where there has been little opportunity for distortion of the identification evidence, thus promoting the reliability of the identification.

A wrongful conviction is one of the worst errors of the criminal justice system. Alarming, mistaken identification is one of the principal causes of the conviction of an innocent person. Psychological research demonstrates conditions aimed at achieving a reliable identification. To guard against wrongful convictions based on mistaken identification evidence, the formal procedure should be amended in line with current research to increase the reliability of visual identification evidence.

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APPENDIX 1: SELECTED PROVISIONS FROM THE EVIDENCE ACT 2006

- 4** *visual identification evidence* means evidence that is—
- (a) an assertion by a person, based wholly or partly on what that person saw, to the effect that a defendant was present at or near a place where an act constituting direct or circumstantial evidence of the commission of an offence was done at, or about, the time the act was done; or
 - (b) an account (whether oral or in writing) of an assertion of the kind described in paragraph (a)

45 Admissibility of visual identification evidence

- (1) If a formal procedure is followed by officers of an enforcement agency in obtaining visual identification evidence of a person alleged to have committed an offence or there was a good reason for not following a formal procedure, that evidence is admissible in a criminal proceeding unless the defendant proves on the balance of probabilities that the evidence is unreliable.
- (2) If a formal procedure is not followed by officers of an enforcement agency in obtaining visual identification evidence of a person alleged to have committed an offence and there was no good reason for not following a formal procedure, that evidence is inadmissible in a criminal proceeding unless the prosecution proves beyond reasonable doubt that the circumstances in which the identification was made have produced a reliable identification.
- (3) For the purposes of this section, a *formal procedure* is a procedure for obtaining visual identification evidence—
 - (a) that is observed as soon as practicable after the alleged offence is reported to an officer of an enforcement agency; and
 - (b) in which the person to be identified is compared to no fewer than 7 other persons who are similar in appearance to the person to be identified; and
 - (c) in which no indication is given to the person making the identification as to who among the persons in the procedure is the person to be identified; and
 - (d) in which the person making the identification is informed that the person to be identified may or may not be among the persons in the procedure; and
 - (e) that is the subject of a written record of the procedure actually followed that is sworn to be true and complete by the officer who conducted the procedure and provided to the Judge and the defendant (but not the jury) at the hearing; and
 - (f) that is the subject of a pictorial record of what the witness looked at that is prepared and certified to be true and complete by the officer who conducted the

procedure and provided to the Judge and the defendant (but not the jury) at the hearing; and

- (g) that complies with any further requirements provided for in regulations made under section 201.
- (4) The circumstances referred to in the following paragraphs are *good reasons* for not following a formal procedure:
- (a) a refusal of the person to be identified to take part in the procedure (that is, by refusing to take part in a parade or other procedure, or to permit a photograph or video record to be taken, where the enforcement agency does not already have a photo or a video record that shows a true likeness of that person):
 - (b) the singular appearance of the person to be identified (being of a nature that cannot be disguised so that the person is similar in appearance to those with whom the person is to be compared):
 - (c) a substantial change in the appearance of the person to be identified after the alleged offence occurred and before it was practical to hold a formal procedure:
 - (d) no officer involved in the investigation or the prosecution of the alleged offence could reasonably anticipate that identification would be an issue at the trial of the defendant:
 - (e) if an identification of a person alleged to have committed an offence has been made to an officer of an enforcement agency soon after the offence was reported and in the course of that officer's initial investigation:
 - (f) if an identification of a person alleged to have committed an offence has been made to an officer of an enforcement agency after a chance meeting between the person who made the identification and the person alleged to have committed the offence.

126 Judicial warnings about identification evidence

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

25 Admissibility of expert opinion evidence

- (1) An opinion by an expert that is part of expert evidence offered in a proceeding is admissible if the fact-finder is likely to obtain substantial help from the opinion in understanding other evidence in the proceeding or in ascertaining any fact that is of consequence to the determination of the proceeding.
- (2) An opinion by an expert is not inadmissible simply because it is about—
 - (a) an ultimate issue to be determined in a proceeding; or
 - (b) a matter of common knowledge.
- (3) If an opinion by an expert is based on a fact that is outside the general body of knowledge that makes up the expertise of the expert, the opinion may be relied on by the fact-finder only if that fact is or will be proved or judicially noticed in the proceeding.
- (4) If expert evidence about the sanity of a person is based in whole or in part on a statement that the person made to the expert about the person's state of mind, then—
 - (a) the statement of the person is admissible to establish the facts on which the expert's opinion is based; and
 - (b) neither the hearsay rule nor the previous consistent statements rule applies to evidence of the statement made by the person.
- (5) Subsection (3) is subject to subsection (4).