Identification and Recognition Evidence: Determining Admissibility With Respect to Race

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Introduction

One of the greatest obstacles that the Crown faces in proving a case beyond a reasonable doubt is establishing the identity of an accused. Arguing identification of an accused is especially significant in cases where there is no dispute that the criminal act that took place, leaving the only issue for the trier of fact to determine as whether the accused was present at the time of the incident.\(^1\) Race becomes particularly important where the case is contingent on identification evidence.

However, this issue is muddied with the additional implications of recognition evidence. Recognition evidence is a subset of identification evidence. It is typically given more weight by a trier of fact. It can be said, “the level of familiarity between the accused and the witness may serve to enhance the reliability of the evidence.”\(^2\) As it has been demonstrated in the case law,\(^3\) sometimes differentiating between identification and recognition evidence can create obstacles for the trier of fact. The Crown may wish to characterize evidence as recognition evidence to persuade the trier of fact to give it more weight, whereas the defence will likely try to characterize it as identification evidence for their own benefit. As a result, some courts have rejected the distinction between identification and recognition evidence. However, where courts find a distinction, recognition evidence is often more persuasive.\(^4\)

This paper will explore the concept of identification and recognition of an accused in light of the influence of race. Specifically, how much weight should the court give to identification and recognition evidence regarding a black accused, where the victim is of another

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\(^1\) R v X, 2013 NSPC 127 at para 68, [2013] NSJ No.713, Derrick J [R v X].
\(^3\) R v Jack, 2013 ONCA 80 at para 22, 100 CR (6th) 164 [R v Jack].
racial background? This paper suggests that a difference in race inherently influences the ability of a witness to accurately describe an accused, creating difficulties in establishing reliable evidence. These difficulties may be so significant that the probative value is outweighed by its prejudicial effect against the accused, rendering the evidence inadmissible. Finally, I will suggest two measures of reform as better alternatives: 1) make police lineups presumptively inadmissible where cross-racial identification is involved, and 2) exclude weak identification or recognition evidence of any kind prior to introducing it to a jury, or potentially exclude identification evidence altogether where race is an issue.

**Background**

i. *Nature of Identification Evidence and Inherent Frailties*

Prior to engaging in a discussion of these issues, it is important to provide a brief history of identification evidence in order to understand the context within which it exists. It is widely recognized throughout criminal law and the law of evidence that eyewitness identification is inherently weak. Although the additional element of recognition can contribute to strengthening this form of evidence, it often remains insufficient. As Sopinka, J. discusses in *R. v. Burke*, “By reason of the many instances in which identification has proved erroneous, the trier of fact must be cognizant of the inherent frailties of identification evidence arising from the psychological fact of the unreliability of human observation and recollection.”

Based on this characterization, it is clear that identification evidence is fundamentally opinion evidence, which is not typically given very much weight. As a form of opinion evidence, identification is built largely into the human psyche and tends to be more illustrative of

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5 *R v Burke* [1996] 1 SCR 474 at para 52, 105 CCC (3d) 205, Sopinka J.
what humans perceive to be the truth, rather than what is actually the truth. As discussed by the Law Reform Commission of Canada:

…Simply by way of illustration, psychologists have shown that much of what one thinks one saw is really perpetual filling-in…since perception and memory are selective processes, viewers are inclined to fill in perceived events with other details, a process which enables them to create a logical sequence.7

This can result in incorrect eyewitness identification, which ultimately describes someone quite different from who is actually responsible.

Even if the initial identification was correct, memory is not like a photograph, which objectively depicts an image that cannot be modified. Rather, a memory is subjective and pliable so, “subsequent events [after the identification] can influence the stored information and thereby affect person recognition.”8 One type of barrier to accurate identification at the time of the incident includes “situational factors,” such as whether the crime took place in stressful circumstances, the degree to which the witness was distracted during the crime, time the victim was exposed to the witness, fear, etc. These are factors that are out of the control of the criminal justice system, which make them hard to gauge in a legal setting, adding to the precariousness of identification evidence. However, when a trier of fact is faced with the additional challenge of cross-racial identification, this has the potential to render the evidence inadmissible.

ii. Other-Race Effect


There are a number of ways that eyewitness identification is fallible. For the purposes of this paper, the most significant is known as the “other-race effect.”9 In essence, this means that members of one race have increased difficulties in identifying distinguishing characteristics present in members of different races. It can be said that, “when persons are identified as belonging to groups other than our own, we attribute more similarity among them than we attribute to persons perceived as belonging to our own group.”10 Thus, this impairment is not always a choice, meaning that the person identifying the accused is often not necessarily subjectively “racist.” Instead, more often than not, this is a matter of psychological exposure and personal history.

It is important to note that not all witnesses are equally inclined towards cross-racial misidentification.11 For example, it may be a mitigating factor if a white person grows up in a predominantly black neighbourhood. Unfortunately, historical influences have caused society to be largely segregated, maintaining historical boundaries around race-based neighbourhoods. This is evident in Halifax, Nova Scotia, where areas such as North Preston and Cole Harbour maintain strong African-Canadian roots, and are still predominantly black.

**Identification Evidence: The Impediment of Race**

i. Jurisprudence

The following jurisprudence provides evidence of the serious impediment of the other-race effect on accurate identification. Discussing the case law is a significant step in proving that

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10 ibid. p 170.
11 ibid. p 170.
the other-race effect is so detrimental as to deem identification evidence inadmissible in many circumstances. One example of this is a case from the Ontario Court of Appeal, *R v Richard*. In this case, the victims of a home invasion were also the most important witnesses. When presented with a police photo lineup of possible suspects, one of the witnesses candidly stated, “They all look the same to me.”\(^{12}\) At trial, the judge admitted the lineup evidence, and the accused was convicted. On appeal, the court found that the trial judge committed a number of errors including: 1) the trial judge failed to properly instruct the jury, 2) he failed to convey the significance of the defence case that the accused had a different appearance (he had a beard and the witnesses said he was clean shaven) at the time of the offence than that which the victim identified; 3) the trial judge neglected to inform the jury of the fact that one of the victims failed to identify the accused in a photo lineup six weeks following the incident; and 4) the trial judge failed to inform the jury of the effects of cross-racial identification and its inherent weaknesses. Ultimately, the court ordered a new trial excluding the identification evidence, since any selection she made from a list of individuals who would have been arbitrary.

This issue is also common where there has been some interaction between the witness and accused prior to the incident. In *R. v. Jack*, a black man was accused of having robbed two middle-eastern men at gunpoint at their workplace, AutoHire. The accused had a number of strong identifying features including two gold front teeth, a 7” scar on his jaw, and a tattoo on his hand.\(^{13}\) Significantly, in proving this case beyond a reasonable doubt, the Crown attempted to frame the evidence as recognition evidence instead of identification in order to give the evidence more weight, but was unsuccessful. The argument in favour of recognition evidence was based

\(^{12}\) *R v Richards*, [2004] OJ No. 2096 at para 32, 70 OR (3d) 737 [*R v Richards*].

\(^{13}\) *R v Jack*, at para 18.
on a brief number of encounters between the accused and the victims in the context of customer service at AutoHire. Epstein J.A. wrote:

The previous contacts between the victims and the appellant took place months earlier, were brief, and were in the normal course of business such that the men would have no particular reason to have made note of the appellant’s features. The best evidence of this is that neither witness remembered observing anything distinctive about the man’s face.\(^\text{14}\)

The facts of this case provide an ideal context to demonstrate the inaccuracies where an individual of a different race is put in a position to identify a black accused. Here, one of the victims described the accused as a 5’8” “black guy,” and did not remember any of the previously described unusual features. Similarly, the other victim described him as a black male, 5’9”, with a medium build. He also neglected to mention any of his outstanding features.\(^\text{15}\) This inability to properly assess the characteristics of a black individual, even when the victim has had previous encounters with them, speaks to the extreme caution that judges must exercise in instructing a jury regarding the weight of identification evidence. It is imperative that cultural issues be considered in cases of identification where the accused is of a different race in order to properly carry out the administration of justice. Based on these examples, it is evident that the frailties of eyewitness identification are exacerbated by the other-race effect.

**Recognition Evidence**

i. *Jurisprudence*

It is important to discuss recognition evidence in comparison to identification evidence. This discussion will demonstrate that although it is frequently given more weight than identification evidence, recognition evidence is still grossly inadequate as a tool to counteract the

\(^\text{14}\) ibid. para 25.  
\(^\text{15}\) ibid. para 8.
other-race effect. This is demonstrated in an Ontario Court of Appeal case, *R. v. Yigzaw*.\textsuperscript{16} Here, the victims and the accused were members of different races. There were two robberies, where three of the five victims involved in the first robbery were also involved in a subsequent robbery by the same accused. Both robberies took place within the same month at the same location. The appellant was arrested outside the second incident immediately after it took place. The police conducted a photo lineup for the benefit of four of the victims, three of which were present during both robberies, and one of which was only present for one of them. All four victims positively identified the black appellant as one of the robbers.

At trial, five of the victims testified. Once again, all of them positively identified the appellant as being the black robber in both incidents. However, none of them were able to provide a detailed description of the appellant. Again, the appellant had identifying features including facial hair and recognizable clothing that none of the witnesses identified. Furthermore, their account of the accused’s height varied greatly. One of the victims testified that he recognized the appellant because of his skin colour and face. He did not mention the facial hair. He described the accused by saying “[he] looked black to [me] that day.”\textsuperscript{17} Overall, the appeal court found that “the eyewitness identification evidence contains significant frailties, even in situations where there is other evidence implicating the accused, it may be incumbent on the trial judge to caution the jury of those specific frailties.”\textsuperscript{18}

This case is significant because it demonstrates a situation where the victims had the opportunity to encounter the appellant on more than one occasion, putting themselves in a position to recognize the appellant from the prior encounter. Importantly, the victims were able

\textsuperscript{16} *R v Yigzaw*, 2013 ONCA 547, 109 WCB (2d) 13.
\textsuperscript{17} ibid. para 26.
\textsuperscript{18} ibid. para 50.
to identify the white co-accused, “Mike,” as wearing a do-rag, as well as a number of other qualifying features. However, in the instance of a young black man, there were strong inconsistencies and a sense of vagueness, overwhelming the victim’s ability to recognize the accused.

Another important case as it applies to racialized recognition is *R v X*.\(^\text{19}\) This case is important in addressing the weight of the recognition evidence where both parties are members of the same race, and provides an example of circumstances where recognition evidence is most salient. In this case, the issue was whether the Crown could prove beyond a reasonable doubt that it was “X” who shot “Y.” This was inherently linked to the reliability of the victim’s evidence. Although there was video evidence of the incident occurring, it was impossible to make out the face of the gunman.\(^\text{20}\) Thus, the victim, “Y,” as well as a friend who was present, “Z”, provided the main source of evidence used to identify the accused.

In “Z’s” evidence, he was clear that the shooter was “X.”\(^\text{21}\) He had grown up with “X,” and said that he saw him on a weekly basis around the community. During the incident, “Z” said he was able to view “X” for five seconds prior to the shot being fired. He had also seen “X” at the basketball court where the incident took place a half hour before the shooting. “Z’s” evidence was considered honest and reliable. Similarly, the victim “Y” had also grown up with “X.” “Y” testified that when the accused pointed the gun at him, he froze. At this point, all he could do was stare at his assailant. During this time, he said that his eyes, eyebrows and forehead were all visible.\(^\text{22}\) Having found “Y’s” evidence to be truthful, Judge Derrick concerned herself with the

\(^{19}\) *R v X*, 2013 NSPC 127 [2013] NSJ No.713.
\(^{20}\) ibid. para 28.
\(^{21}\) ibid. para 35.
\(^{22}\) ibid. para 57.
reliability of the recognition evidence. In doing so, she found that “five to seven seconds is not a fleeting glance. It is ample time in which to recognize a well-known person.”

In contrast to many other recognition cases, neither witness was able to point to any distinguishing features of the accused. However, given these circumstances, Judge Derrick said, “…Truly distinguishing features are not always present.” Overall, their lifetime acquaintance with “X” was more than enough to establish a strong basis for recognition regardless of the minutiae of their testimony. In contrast with R v Yigzaw, this case is an example where recognition evidence was given a great deal of weight. Thus, in comparing the amount of weight allocated to identification evidence versus recognition evidence, it appears that courts give the most weight to the category of recognition evidence, where the parties belong to the same race.

**Probative Value v. Prejudicial Effect: Where Do We Go From Here?**

When it comes to the matter of both identification and recognition, there is a clear lapse in our criminal justice system that has not only been historically ingrained, but can also be influenced by a psychological predisposition. In my opinion, no amount of cultural competence, or education can entirely remedy this problem. Nevertheless, there is a responsibility on behalf of the court and counsel to take precautions where this may arise.

I suggest that there are two key ways to address this flaw in the criminal justice system in the context of cross-racial identification: 1) make police lineups presumptively inadmissible where cross-racial identification is involved, and 2) exclude weak identification or recognition evidence of any kind prior to introducing it to a jury, or potentially exclude identification evidence.

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23 ibid. para 78.
24 ibid. para 100.
evidence altogether where there is cross-racial identification. Only the latter of these options is sufficient to fully mitigate the issues surrounding eyewitness identification and recognition.

i. Police Lineup as Presumptively Inadmissible Where Cross-Racial Identification is an Issue

I suggest that where the subject of the lineup is someone of a different race than the witness, the lineup should be rendered presumptively inadmissible. However, this presumption can be rebutted by strong contextual factors demonstrating the witness’ ability to accurately identify someone of a different race, i.e. growing up in a neighbourhood predominantly composed of people of that race, etc. There are a number of potential inconsistencies with police photo lineups, including improper instructions to the witness, the arrangement of the photos (sequentially as opposed to array arrangement), suggestion by the police officer, and whether a record was kept of all the witness’ reactions and responses.25 As the law stands, “the general rule in Canada is that improprieties in police procedures in conducting lineups do not destroy the resulting identification evidence or render it inadmissible- defects go to weight, not admissibility.”26 In reality, diminishing the weight of the evidence in a jury trial means very little. To a member of the jury, assessing a trial on the “beyond a reasonable doubt” standard, prejudicial evidence goes a long way in influencing their decision, regardless of the instructions on weight made by the judge.27 Even if a member of the jury makes an effort to give less weight to questionable evidence, one cannot “un-learn” something that would otherwise be very persuasive.

25 Santoro, p 197.
26 ibid. p 200, emphasis added.
There is usually some police recording done at the time of the line-up. Police officers take notes, sometimes extensively. However, these notes do not and cannot possibly accurately portray the selection process by the witness. Nor will these notes ever acknowledge or address any flaws in the police conduct. Human nature impairs us from being self-reflective in analyzing how we could have contributed to the decision making of another. An officer is unlikely to note that “she chose suspect B on my suggestion,” or “prior to making her selection, I told her ‘this one is the accused.’”

There have been many suggestions made to address these concerns. Following the wrongful conviction of Thomas Sophonow for the strangling murder of a sixteen-year-old girl, a comprehensive inquiry was completed, detailing necessary measures of reform to prevent this from happening again. One of the key pieces of evidence contributing to his wrongful conviction was identification by an eyewitness. Recommendations regarding the use of police lineups include 1) using larger lineups with a minimum of ten people, 2) using sequential lineup procedure as opposed to array, 3) the conducting officer should not speak the witness following the lineup, and 4) using video clips rather than photographs. Without a doubt, these recommendations are a step in the right direction. Nonetheless, progressive as these reform measures are, they do not address the unique issues related to cross-racial identification.

The pre-existing defects previously mentioned that go to the weight of police lineup evidence are exacerbated by the other-race effect. As this paper has discussed, members of one race typically have greater difficulty in identifying members of another race. This is aggravated when presented with a sample of photos of individuals who already fit a certain description. At

29 ibid. p 77.
least if all the photos are of people who are the same race as the witness, the greatest obstacle is differentiating similar features on individuals they can otherwise basically distinguish from one another. However, when there is a witness like the one described in *R v Richard* who already cannot distinguish between black people, then show her a lineup of black people with intentionally similar physical characteristics, then this witness is basically guessing. This renders police lineups in the context of cross-racial identification not only inaccurate, but also a threat to the administration of justice.

It may be argued that recognition evidence is more cogent than identification evidence in the context of police lineups, even where the other-race effect is a consideration. For instance, if the witness is well acquainted with the accused, or has spent a significant amount of time around them in the past. However, the relevance of this will vary depending on the type of crime in question. Statistics show that in most assault cases against men, the perpetrator is a complete stranger. In comparison, in sexual assaults against both men and women, the victim more often knows the accused. Therefore, depending on the context, recognition evidence can still potentially render the police lineup admissible. Overall, based on the implications of the other-race effect, compounded by the pre-existing frailties of police lineups, I suggest that police lineups should be presumptively inadmissible where cross-racial identification is a factor in the case of both identification and recognition evidence.

ii. *Exclusion of Weak Evidence from the Jury, or the Exclusion of Evidence Altogether*

Unless a judge addresses it with a jury, it is highly unlikely that cross-racial identification will be considered in a jury’s deliberations. This, if nothing else, is because of societal norms and

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a desire to avoid appearing “racist,” by suggesting all people of a certain race look alike.\textsuperscript{31} Thus, in order for the quality of eyewitness identification to be included in the constellation of facts a jury is asked to assess, wherever identification is an issue a judge should be compelled to bring the other-race effect to the jury’s attention.

In \textit{R v Richard}, Justice Feldman determined “it is incumbent on the trial judge to not only instruct the jury as to the general frailties of the identification evidence, but also as to the specific problems presented by the case before the court.”\textsuperscript{32} Yet, expert evidence regarding the quality of identification and recognition evidence is often excluded. In \textit{R v Mohan}, the court established four criteria for admitting expert evidence: a) relevance; b) necessity in assisting the trier of fact; c) the absence of any exclusionary rule; and d) a properly qualified expert.\textsuperscript{33} Interestingly, expert evidence on the matter of cross-racial identification is rarely considered admissible based on these criteria.\textsuperscript{34} This is because it is generally accepted in the legal world that cross-racial identification is an important issue and an existing problem, so the trier of fact can take judicial notice of its existence. However, this overlooks the fact that jurors are laymen and women by necessity, and it is wrong to presume that they are aware of their inherent bias. Thus, this paper suggests that where cross-racial identification is at issue, expert evidence should not only be permitted, but mandatory where there is a jury to ensure this is a matter they address.

Although excluding identification evidence altogether may appear to be extreme, I believe this suggestion is correlative of the gravity of incorrect identification. Furthermore, this abides by the fundamental presumption of innocence. Particularly, in cases where identification

\textsuperscript{31} Chance, p 173.
\textsuperscript{32} \textit{R v Richards}, para 28.
\textsuperscript{33} \textit{R v Mohan}, [1994] 2 SCR 9 at para 3, 114 DLR (4\textsuperscript{th}) 419.
\textsuperscript{34} \textit{R v McIntosh}, [1997] OJ No. 3172 at paras 19-22, 35 OR (3d) 97.
evidence is the only evidence available, is it worthwhile to take the chance? Statistics show that when a white person is asked to identify a white accused, they are correct 70-75% of the time.\(^\text{35}\) In comparing these statistics to those of cross-racial identification, “when White subjects view other-race faces, correct choices are some-what fewer, and, of even greater importance for the legal system, false positive responses increase when the pictures tested belong to other race persons.”\(^\text{36}\) These false positives are even more worrisome then the inability to identify the accused, since this can lead to wrongful conviction.

In my opinion, “somewhat fewer” than 70-75% is too low an accuracy rate to be permitted. In reviewing a number of studies, it is challenging to pin down a percentage reflective of what the wording “somewhat fewer” actually describes. However, there are numerous studies indicating that there is high statistical significance in the results of a white person identifying their own race positively far more frequently than that of a black person. One study even compared results to a test where the subjects were incentivized to identify the photos correctly with a lottery ticket for every correct response, and a loss for every incorrect response. In this study, the statistics still demonstrate that the witness is less likely to make a positive identification if the subject is of a different race.\(^\text{37}\) The authors of this study conclude that not only is there a chance that cross-racial identification will lead to false identifications, but it is likely to occur.\(^\text{38}\) Under these circumstances, this essentially becomes a situation where the criminal justice system is taking an educated guess as to who committed a crime. This is offensive to modern social mores, and fails to reflect how the public expects to see justice carried

\(^{35}\) Chance, p.171.
\(^{36}\) ibid. p 171.
\(^{38}\) ibid. p 263.
out. Where cross-racial identification and recognition evidence is relevant, the evidence should be presumptively inadmissible, where the burden to rebut the presumption is on the Crown to show that there are contextual factors that prove the ability of the witness to accurately identify a person of a different race.

**Conclusion**

Human nature, both on behalf of the witness and the jury, renders identification and recognition evidence ineffective where the other-race effect is relevant. As I have illustrated through an analysis of the background of identification and recognition evidence, the relevant jurisprudence, and potential solutions, this is a complex and high stakes issue, with a lack of certainty on behalf of the courts.

Ultimately, the question is the following: does the probative value of identification or recognition evidence in the circumstances of cross-racial identification outweigh the prejudicial effect? In this author’s opinion, it typically does not. The other-race effect is too prevalent to assume that either identification or recognition evidence is enough to demonstrate culpability absent corroborating evidence. Based on this research, the mechanisms currently used to acquire identification and recognition evidence such as police lineups have inherent flaws that force the hand of the witness with a good faith desire for justice. Thus, identification and recognition evidence must be presumptively inadmissible when cross-racial identification is at issue, unless there is strong evidence to rebut that presumption. This procedural reform is essential to avoid wrongful conviction and uphold the values of our criminal justice system.
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