IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY No S 57 of 2014

BETWEEN: **ANTHONY CHARLES HONEYSETT**
Appellant
And
THE QUEEN
Respondent

APPELLANT'S SUBMISSIONS

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PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: CONCISE STATEMENT OF ISSUES

2. Is "face mapping" and "body mapping" specialised knowledge within the meaning of s 79 of the Evidence Act (NSW)? What does 'specialised knowledge' mean and how should it be gauged?
3. Given that it is accepted that an expert's opinion must go beyond a mere "ipse dixit", to what extent does s 79 require that the expert disclose his or her
20 assumptions and methodology?
4. To what extent must purported expert evidence be independently validated before it is admitted pursuant to s 79?
5. If the word "knowledge" within s 79 applies to "any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds", to what extent must the techniques and methodology underpinning those "known facts" be demonstrated to be reliable?
6. Does the category of opinion evidence referred to as "ad hoc" expertise survive the introduction of ss 76 and 79 of the Evidence Act 1995 (NSW)?

Filed on behalf of the Appellant
The appellant's solicitor is: Michael Blair
Solicitor
PO BOX 20664
WORLD SQUARE NSW 2002
Tel: (02) 92676255
Fax: (02) 92676455
Ref: Michael Blair

7. If so, what are the criteria that must be satisfied before the witness is qualified as an "ad hoc" expert?

PART III: SECTION 78B NOTICES

8. The appellant considers that section 78B notices are not required in this appeal.

PART IV: REPORTED REASONS FOR JUDGMENT IN THE COURT BELOW

9. The reasons for judgment of the Court below are not reported but have been published electronically as *Honeysett v R* [2013] NSWCCA 135.

PART V: RELEVANT FACTS

10. The appellant was arraigned before Bozic DCJ on 24 January 2011 and pleaded not guilty to an offence of Armed Robbery contrary to s97 (2) of the *Crimes Act* (NSW).

11. The Crown case was that the appellant was one of three men who committed the offence at the Narrabeen Sands Hotel on 17 September 2008. CCTV footage from the hotel depicted the offender (allegedly the appellant) disguised from head to foot. The offender was wearing long trousers, a long top and his head was wrapped in either a pillow-slip or a white T-shirt. He was depicted on the CCTV footage wearing gloves and holding a pink-handled hammer. Subsequently the three offenders escaped in a stolen car. DNA consistent with that of the appellant was recovered from the hammer left at the scene. The get-away car was located on 25 November 2008. A bag located in the car at that time contained a t-shirt. DNA from the t-shirt was consistent with the DNA of the appellant.

12. The Crown proposed to call Professor Henneberg to give evidence that the appellant's physical appearance was similar to that of the offender in the CCTV footage. The appellant objected to the admissibility of the proposed evidence. A voir dire was held prior to the empanelment of the jury. Bozic DCJ ruled that the evidence was admissible. The trial then proceeded before the jury. On 11 March 2011 the jury returned a guilty verdict.[1]

13. Objection was taken to Prof Henneberg's evidence on the basis that it was not admissible under s79 of the *Evidence Act.* There was no area of specialised

1. On 26 August 2011 Bozic DCJ sentenced the appellant to serve a total term of 8 years imprisonment with a non-parole period of 3 years 10 months dating from 15 July 2017.

knowledge demonstrated or identified and his opinion was no different to that of a layperson.[2] The reports did not reveal a process of reasoning. There was no evidence of method and it was not possible to establish that his opinion was wholly or substantially based on his asserted area of specialised knowledge.[3] There was no evidence that he had done anymore than view the CCTV footage of the offence and the photographs of the appellant. This was no more than would be done by the jury and was therefore not capable of constituting expert opinion evidence.[4]

14. No oral evidence was taken on the voir dire. Bozic DCJ was provided with a copy of the indictment; the reports of Prof Henneberg, Dr Sutisno and Mr Porter, CCTV footage of the offence; colour photographs taken from the CCTV footage; photographs of the appellant in the dock and also participating in a forensic procedure in a police station.

15. In Prof Henneberg's first report he noted that he had been provided with CCTV footage from the offence and video and photographs of the appellant in a separate envelope. The appellant and the offender shared the following physical characteristics: both were adult males, of ectomorphic (thin or skinny) build, their shoulders were approximately as wide as their hips, both were of medium build, both carried themselves very straight, with hips forward and the small of the back bent forward ('lumbar lordosis'), both had short hair, the head shape when viewed from above was dolichocephalic (oval shaped), both had dark skin, a narrow root of the nose, medium shaped eyes and were right handed.[5] He concluded: *"There is a high degree of anatomical similarity between the Offender and Mr Anthony Charles Honeysett. My opinion is strengthened by the fact that I could not discern any anatomical dissimilarity between the Offender and Mr Honeysett."* [10][6]

16. Both Dr Sutisno, a forensic anatomist and Mr Porter, a Senior Lecturer in Forensic Science disputed the validity of Prof Henneberg's approach and his conclusions.

17. Dr Sutisno disputed Prof Henneberg's conclusion regarding the 'high degree of anatomical similarity' between the offender and the appellant. There was no scientific explanation made of the results obtained to deduce the level of image

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[2] Transcript 28 February 2011 p5-9
[3] Transcript 28 February 2011 p9.15 - 12
[4] Transcript 28 February 2011 p10
[5] Report paragraphs 7 and 8.
[6] Prof Henneberg actually expressed the opinion that the appellant was the offender depicted in the CCTV footage, however the Crown did not rely on this.

distortions for the various CCTV footage examined. There was no evidence of proper procedures or protocol and no scientific explanation made of the results obtained to determine the anatomical or morphological features identified as those of the person of interest or those of the appellant.[7]

18. In Dr Sutisno's opinion the deficiencies in the approach of Prof Henneberg rendered his findings and opinion 'subjective evidence' lacking 'any credible support for the match'. Prof Henneberg provided no information about the equipment he used to view the CCTV footage and the other evidence. He made no full disclosure of the protocol and analytical process applied to obtain his results and ultimately formulate his opinion. Dr Sutisno considered *"the scientific rigour of Professor Henneberg's process of analysis remains questionable."*[8]

19. Dr Sutisno considered it was incorrect to conclude there was a "high degree of anatomical similarity" between the offender and the appellant.[9] The forensic procedure images of the appellant were not sufficient for comprehensive comparative analysis with the CCTV footage of the crime scenes. The charge room footage was not sufficient for comprehensive comparative analysis with the CCTV footage from the crime scenes. Prof Henneberg's findings and final opinion were no more than 'subjective evidence' lacking a scientific basis.[10]

20. Dr Porter was provided with the same evidentiary materials as had been available to Prof Henneberg and Dr Sutisno,[11] together with their reports. After reviewing the relevant CCTV footage he observed: "*The POI (person of interest) is shown on each camera view. The sex of the POI cannot be determined. There are no clear anatomical features visible due to the clothing worn by the POI which includes; (sic) dark coloured pants and jumper, white shoes, white gloves and a white head garment. While there are times views that the eyes of the POI may be visible, due to poor image quality and unsuitable screen heights the features of the eyes are not clearly recognisable. The clothing of the POI is mostly void of shadow detail in the dark clothing and poor highlight detail in the white head piece, gloves and shoes.*

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[7] Report paragraph 22
[8] Report paragraphs 22, 25 and 26
[9] Report paragraph 40
[10] Report paragraphs 43,44, 48
[11] Mr Porter is a senior lecturer in Forensic Science.

There are no distinctive features (scars, mole, freckles, tattoos etc) visible to distinguish the POI."[12]

21. Mr Porter was unaware of any studies in the scientific literature regarding the processes used by Prof Henneberg, who had provided no information as to whether his method or capacity had been validated or proved to be reliable. Prof Henneberg had identified that there were 'image distortions' in the CCTV footage but aside from stating he 'took them into account', he made no effort to analyse the influence of the distortions in the context of the reliability of the evidence.[13]

22. Mr Porter considered that the ultimate conclusion of Prof Henneberg of the "high degree of anatomical similarity" between the offender and the appellant was actually based on a "low threshold of similarities" with no consideration of the frequency of the features in the general population: *"The fact that these claimed 'anatomical similarities' are not visible on the CCTV footage but beneath clothing is also a highly dangerous proposition to make..... Furthermore, to consider that a finding of 'high anatomical similarity' while in fact there is no clear unobstructed views of anatomical features and that the CCTV material presents serious image artefacts including distortion and image perspective that has affected the representation of shape and form, this finding must be considered with some degree of scepticism... Without any expression of limitations and how the findings relate to the population, the evidentiary value must be considered with great caution."*[14] He concluded: *I am also of the view that the findings of Prof Henneberg should be considered with great caution unless his methods can be validated and proven to be reliable."*[15]

The ruling on the voir dire

23. Bozic DCJ ruled Prof Henneberg's evidence was admissible regarding points of similarity between the offender and the accused. The proposed evidence as to similarity was capable of being circumstantial evidence and was therefore relevant. (11)

24. Prof Henneberg had specialised knowledge based on his training, study and expertise in relation to anatomy and anatomical features and that he had experience

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[12] Paragraph 17 of his report
[13] Report paragraphs 24 – 26.
[14] Report paragraph 27
[15] Report paragraphs 28-29.

in applying that anatomical knowledge to observations of CCTV images and still photographic images (12). Prof Henneberg's opinions regarding similarities between the offender and the appellant were based wholly or substantially on his specialised knowledge. Whilst Prof Henneberg's reasoning process was not fully disclosed, there had been sufficient disclosure of the factual material he had referred to and the nature of the methodology he had adopted, namely the inspection of the images. (14) The proposed evidence was of potentially significant probative value, particularly given the limited other evidence available to demonstrate the involvement of the appellant in the offence. His Honour declined to exclude the evidence pursuant to s135 or s137 of the *Evidence Act*.

Decision of the NSW Court of Criminal Appeal

25. The appellant appealed his conviction because Bozic DCJ had erred in admitting the evidence of Prof Henneberg that the appellant was similar in appearance to one of the offenders and because the verdict of the jury was unreasonable and unsupported by the evidence. The appellant's appeal was dismissed. *Honeysett v R* [2013] NSWCCA 135 (Macfarlan JA, Campbell J, Barr AJ).

PART VI: APPELLANT'S ARGUMENT

Ground 1: The Court of Criminal Appeal erred in the application of s 79 of the *Evidence Act 1995 NSW* in holding that the evidence of Henneberg involved an area of specialised knowledge based on training, study or experience, and that his opinion was wholly or substantially based on that area of specialised knowledge.

26. The CCA erred in holding that Prof Henneberg had specialised knowledge [60]. Although he was an expert anatomist, he held no qualifications with respect to the comparison of the depiction of an offender in CCTV footage from crime scenes with a suspect. In his evidence before the jury, he said he viewed the CCTV footage of the offence and then reviewed the CCTV footage of the appellant in the police station charge room, together with photographs taken of the appellant after he had been arrested.[16] He did this on his laptop. He had done it many times before. He took no still photographs and made no measurements.[17] He was given a limited

[16] Trial transcript p101, p122
[17] Trial transcript p122

sample that included the CCTV footage and reference images of the appellant only. The process was highly suggestive. Prof Henneberg knew, when undertaking his comparison, that the police believed the offender was the accused.

27. Professor Henneberg's evidence regarding the features of the offender and the applicant was given in chief. (T114-120) He told the jury he concluded the offender was an adult because he saw him against familiar objects and other persons. (T114) He was a male because he could not see breasts and there were no fat deposits around the hips and buttocks and no other female characteristics. (T114) The body shape was thin because he could not identify a protruding stomach and the shoulders were approximately the same width as the hips. (T 114) The presence of clothing to prevent identification of physical features was discounted by reason of the effect of gravity. If a person is obese the clothing will stand away from the centre of the body. In a thin person the clothing hangs down closer to the central line of the body. (T114) Height was calculated by making a comparison with other persons and the doorways. (T115) Straight posture was discerned because the offender's hips were forward whilst his back was clearly visible. (T115-117) The offender's hair was short because the head clothing that "looks like a t-shirt" is elastic and adhered closely to the brain case. (T117) The shape of the head was discernible because the fabric adhered to the offender's head and showed the shape of the brain case. The offender was right handed because he could be seen preferring to carry the hammer in his right hand and used his right hand to perform precise movements. (T117) His skin was dark in comparison with a hotel employee who was depicted in the CCTV footage and who was clearly of European origin. (T118)

28. Prof Henneberg simply relied upon his professional background to conduct anatomical comparisons from images.[18] His evidence did not identify the specialized knowledge. He did not explain how it was grounded in his 'training, study or experience', other than experience gained from having conducted the same task in previous cases, nor how it applied to the facts assumed or observed so as to produce the opinion propounded. The absence of reasoning pointed to the lack of any sufficient connection between relevant specialized knowledge and the comparison of images.

[18] Trial transcript p168

29. The fact that Prof Henneberg had conducted image comparison in previous cases does not of itself generate specialised knowledge. Specialised knowledge and expertise requires incorporation of ways to gauge reliability, validity and proficiency. Repeated past application of a flawed technique will not remedy the technique.

30. When asked about image distortion in CCTV footage, Prof Henneberg accepted it existed but merely stated that he took it into account when viewing the footage.[19] When asked if his methods had been accepted in the scientific community, he noted that there had been papers published on the subject, including by himself.[20] When asked if the method he used had been independently validated, he said: *"Well, in various ways they were but not by saying here's one image from CCTV ..... and here is a picture ..... and whether they are the same person..."*[21]

31. Opinion evidence is presumptively excluded by s76 of the Evidence Act. Expert evidence is admissible pursuant to s79 *Evidence Act* where a witness has specialized knowledge based on their 'training, study and expertise' and the opinion is 'wholly or substantially based' on that 'knowledge'. In *Tang v R* (2006) A Crim R 377 at [138] the Court adopted the definition of "knowledge" identified in *Daubert v Merrell Dow Pharmaceuticals Inc* 509 US 579 (1993) at 590, noting: *"The word 'knowledge' connotes more than subjective belief or unsupported speculation. The term applies to any body of known facts or to any body of ideas inferred from such facts on good grounds."*[22]

32. In defining 'knowledge', the US Supreme Court imposed a "*standard of evidentiary reliability*", stating: *"But, in order to qualify as 'scientific knowledge', an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation- i.e. 'good grounds', based on what is known. In short, the requirement that an expert's testimony pertain to 'scientific knowledge' establishes a standard of evidentiary reliability".*[23] In *Daubert* the Court specified that it is the word 'knowledge', not the words like

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[19] Trial transcript p108-9
[20] Trial transcript p123
[21] Trial transcript p123
[22] *R v Tang* (2006) 65 NSWLR 681 at [138]
[23] *Daubert v Merrell Dow Pharmaceuticals, Inc* 509 US 579,590 (1993) at 590

'scientific' that modify that word, which establishes a standard of evidentiary reliability.[24]

33. The New South Wales Court of Criminal Appeal has held that in exercising discretion pursuant to s 137 of the Evidence Act reliability is not to be taken into account.[25] Without a requirement of reliability in the context of s 79 there would be no place for any consideration of reliability in the admission of expert evidence in New South Wales, opening the gate to unreliable evidence and unsupported speculation in the guise of expertise.

34. If relevant, expert opinion evidence is an exception to the opinion rule, and thereby admissible because it provides specialised knowledge or experience which is sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience.[26] These requirements are necessary before expert opinion can in truth assist jurors in forming a sound judgment. Prof Henneberg's evidence was no more than a series of conclusions arising from his observations of the material he had been asked to watch, unconnected with his training as an anatomist, of the appearance of the offender on the CCTV footage and the appearance of the appellant.

35. In *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 the Court reinforced the need to identify underlying facts and assumptions as well as direct careful attention to the ability to rationally assess the opinion and the reasoning: "*the scientific or other intellectual basis of the conclusions reached*"([85]). Prof Henneberg's conclusions were unsupported by a statement of reasoning capable of revealing that the opinion was actually based on his expertise.[27] It did not rise above that of being a subjective belief or unsupported speculation.[28] As this Court stated in *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [42]: "*A failure to demonstrate that an opinion expressed by a witness is based on the witness's specialized knowledge based on training, study or experience is a matter that goes to the admissibility of the evidence, not its weight*".

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[24] *Kumho Tire Co v Carmichael* 526 US 137 (1999) at 141
[25] R v XY [2013] NSWCCA 121: R v Burton [2013] NSWCCA 335
[26] *HG v The Queen* [1999] 197 CLR 414 at [58]
[27] See *HG*; *Makita v Sprowles* (2001) 52 NSWLR 705 at [85]; *Dasreef Pty Ltd v Hawchar* [2011] HCA 21; 243 CLR 588 at [42]
[28] *Daubert v Merrell Dow Pharmaceuticals Inc* 509 US 579 (1993) at 590; *Murdoch v R* [2007] NTCCA; 167 A Crim R 329 at [262]

36. Many, indeed most, types of forensic science and medical evidence are capable of independent evaluation through validation studies or rigorous proficiency tests.[29] In this context, expert opinion of the type proffered by Prof Henneberg must be capable of independent validation.[30] The 'method' adopted by Prof Henneberg is not a description of a scientific process supported by published literature or formal evaluation, nor does it include an estimation of an empirically-predicated error rate. The 'method' adopted was not standardized through teaching institutions and there was no empirical evidence supporting its validity or reliability. In the absence of formal studies of validity, it is not possible to know whether his technique works, nor how reliable it may be. Similarly, the absence of a method for addressing CCTV image distortion in image capture, storage, collection, representation and comparison means, as noted by the CCA at [63], that Prof Henneberg's opinion was: *"necessarily subjective and not amenable to elaboration beyond the reasons he gave, or to measurement and calculation."*

37. All interpretive comparisons will involve a degree of subjectivity. However validity studies and proficiency testing is intrinsic to evidence that properly falls into the ambit of s 79.[31]

38. That the witness may be able to describe a comprehensible activity or process, such as close scrutiny of images, does not equate to a methodology capable of being based on specialised knowledge. Nor does it mean that the opinion rises above subjective belief or unsupported speculation.[32] In the absence of evidence about the validity and reliability of techniques, and/or Prof Henneberg's capacity to make accurate comparisons between images, there was no basis to conclude that Prof Henneberg's opinion was based on "known facts" or that his opinion was inferred from them on "good grounds".

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[29] The US National Academy of Sciences (NAS) report: Strengthening Forensic Science in the United States (The National Academies Press) 2009 at pp 9-10, 189

[30] NAS report, especially Recommendation 3. The NAS stated: "*One particular task of science is the validation of new methods to determine their reliability under different conditions and their limitations...To confirm the validity of a method or process for a particular purpose (eg for a forensic investigation), validation studies must be performed*" (p13), and "*All results for every forensic science method should indicate the uncertainty in the measurements that are made, and studies must be conducted that enable the estimation of those values...the accuracy of forensic methods resulting in classification or individualisation conclusions needs to be evaluated in well-designed and rigorously conducted studies. The level of accuracy of an analysis is likely to be a key determinant of its ultimate probative value." (pp184)*

[31] For example DNA evidence and fingerprint evidence.

[32] Contrast *Makita (Australia) Pty LTD v Sprowles* (2001) 52 NSWLR 705; *Wiki v Atlantis Relocations (NSW) Pty Ltd* (2004) 60 NSWLR 127 at [61]

39. The absence of specialised knowledge in the explanations proffered support the applicant's contention that Professor Henneberg's opinions did not rise above subjective assertions. He was not qualified to express his conjectures which paraded as scientific opinion.

40. The applicant contends that the CCA erred in its application of s 79. In the absence of evidence identifying how Professor Henneberg's comparison of images was grounded in his 'training, study or experience' and in the absence of evidence supporting the validity and reliability of his methods, the requirements of s79 were not satisfied. His opinion was based on no more than subjective belief. While Macfarlan JA did consider that Professor Henneberg's evidence was not "*clearly groundless*" he also noted: *"The view he expressed on this topic is necessarily subjective and not amenable to elaboration beyond the reasons he gave, or to measurement or calculation"*[at 63].

Ground 2(a): The Court of Criminal Appeal erred in determining that there was a category of evidence, namely "ad hoc" expert evidence, and that it is an exception to the opinion rule under s 76 of the *Evidence Act 1995 NSW*.
Ground 2(b): In the alternative, the Court of Criminal Appeal failed to determine the necessary requirements for the admissibility of such "ad hoc" expert evidence.

Ground 3: The Court of Criminal Appeal erred in holding that the evidence of Henneberg's consideration of the CCTV footage rendered him an "ad hoc" expert.

41. At [60] Macfarlan JA concluded that Prof Henneberg was an ad hoc expert: *"In addition to his specialized knowledge based upon his training, study or experience occurring prior to the present case, Prof Henneberg's detailed consideration over a lengthy period of the CCTV footage in the present case rendered him an ad hoc expert of the type referred to in Tang and other decisions to which I have referred."* In so concluding he noted the development of case law on the issue of ad hoc expertise at [41] – [46].

42. Section 76 of the Evidence Act is a proscriptive and exclusionary opinion rule intended to cover the field when it comes to the admissibility of opinion evidence.

If the opinion evidence does not satisfy the requirements of s79 (or some other statutory exception) then it is not admissible to prove identity or similarity between an offender and an accused.[33]

43. Although courts have recognized 'ad hoc expertise' as a category of admissible evidence, it is unclear as to whether, and if so how, opinion evidence proffered by 'ad hoc' experts complies with section 79.

44. There appears no consistency in approach in determining whether "ad hoc expertise" exists because there has been insufficient analysis of how this category of evidence complies with s 79. The first Australian authority that considered the issue of "ad hoc expertise" was *Butera v DPP (Vic)* (1987) 164 CLR 180 where this Court accepted that transcripts prepared by interpreters of covertly recorded conversations in languages other than English was admissible as an aide memoire. In cases where the prosecution relies on sound recordings, it is now a commonplace for a police officer to give evidence about the content of recordings and to positively identify the person(s) speaking. Until the late 1990s evidence arising from ad hoc expertise was restricted to the production of transcripts from sound recordings as an interpretive aid for the jury.[34] In *R v Leung* (1999) 47 NSWLR 405 the scope for ad hoc evidence was expanded to allow expert opinion that the identification of a person speaking on covert recordings was a particular individual.[35] By the time of the decisions in *R v Riscuta* [2003] NSWCCA 6 and *R v El-Kheir* [2004] NSWCCA 461 evidence from interpreters of voice identification was considered admissible without any consideration as to whether 'ad hoc expertise' existed or to the opinion rule and the need to identify "specialised knowledge". The witness need not have any prior experience or personal familiarity with the person speaking. No training, study or experience with voice identification is required. Interpreters have been permitted to give similar evidence, even where the interpreter does not possess expertise in voice comparison or even speak the same language.[36]

45. In *Smith v The Queen* (2001) 206 CLR 650 the plurality held that the evidence of identification from CCTV footage by police officers was not relevant and therefore

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[33] See *Papakosmas v The Queen* (1999) 196 CLR 297 at [10]; *Gattellaro v Westpac Banking Corp* (2004) 68 ALJR 394 at [17] and *R v Ellis* (2003) 58 NSWLR 700 at [70] – [73]
[34] See *Butera v DPP* (Vic) (1987) 164 CLR 180
[35] See also the NSWCCA decision of *Li v The Queen* (2003) 139 A Crim R 281
[36] *R v Riscuta* [2003] NSWCCA 6; *R v El-Kheir* [2004] NSWCCA 461

inadmissible, because a police officer was in no better position to make a comparison than a juror.[37] Kirby J considered the evidence was opinion evidence and, notwithstanding its relevance, there was no applicable exception to the exclusionary opinion rule.[38]

46. Following the decision in *Smith*, prosecutors relied upon witnesses who could demonstrate expertise in areas such as anatomy or physical anthropology to give evidence of identification by comparing facial features and sometimes body features and movement. In *R v Tang* [2006] 161 A Crim R 377, the CCA held that expert face and body mapping evidence was not admissible as opinion evidence of identity based on specialized knowledge, but was admissible as 'ad hoc expertise' that enabled an expert in anatomy to describe similarities between images of an unknown offender and an accused.

47. In *Murdoch v The Queen* [2007] 161 A Crim R 377, evidence of facial and body mapping was held to be admissible to establish similarities between a person of interest and a suspect but not to prove identity. [294], [296] The NTCCA determined that the technique employed by the Crown expert did not have a "sufficient scientific basis" for identification purposes but was admissible to "demonstrate similarities".[39] The witness was entitled to state that she had not identified any meaningful differences between Murdoch and the offender.

48. Whether the opinion evidence be given by an anatomist like Prof Henneberg, or a police officer or interpreter listening to a sound recording, it is apparent that the opinions expressed do not rely upon 'known facts' or inferences made on 'good grounds'. Because the category of expertise is 'ad hoc' and not based on 'knowledge' or closely linked to proven techniques from a validated discipline or field, it is not possible for the evidence to be equated with specialized knowledge. The expansion of the scope of 'ad hoc expertise' has seen the removal of the requirement that opinion evidence be based on specialized knowledge linked to a person's 'training, study or experience'. The protections provided by s76 and s79 of the Evidence Act have been removed.

49. In each of these areas there is no training, credible validation or reliability studies underpinning the various identification techniques. Instead, all that is required is

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[37] Gleeson CJ, Gaudron, Gummow and Hayne JJ

[38] See *Smith*, op cit at [XXX]

[39] The Crown witness was Dr Sutisno who gave a report in this case that was relied upon by the appellant.

'experience'. In so far as "experience" simply means the use of similar techniques in the past, it does not satisfy the requirements of section 79. 'Experience' in the context of the section must confer specialised knowledge rather than a process of subjective comparison. For evidence such as that given by Prof Henneberg to be admissible, it was necessary to demonstrate how the specialised knowledge is based on the particular 'study, training or experience' possessed by the witness.

50. This requirement was not met in the appellant's case. That Prof Henneberg has expertise as an anatomist did not confer specialized knowledge in the study of CCTV imagery. The specialised knowledge must be clearly based upon the referable 'experience'. "Ad hoc expertise" is not specialised knowledge and is not based on 'experience' that is closely linked to "knowledge". That there is a perceived need to resort to 'ad hoc expertise' suggests that there is no specialised knowledge or no legally recognizable experts able to conduct methodologically rigorous analysis.

Ground 4: The Court of Criminal Appeal erred in holding that the evidence of Henneberg "was not to the effect that the offender and the appellant were similar in appearance", and in distinguishing the decision in *Morgan v The Queen* (2011) 215 A Crim R 33.

51. The CCA rejected the appellant's submission that Prof Henneberg's evidence had been to the effect that the appellant was similar in appearance to the offender: *"He (Henneberg) did not express a conclusion as to the common identity of the persons or, in any general sense, any similarity between them."* [35] *"Henneberg stated that they had limited, identified characteristics in common, a statement that falls well short of asserting that 'the appellant was similar in appearance to one of the offenders'"*[67]

52. At [68] the CCA concluded, contrary to the appellant's submission, that the failure of Prof Henneberg to identify any differing characteristics between the appellant and the offender did not mean, when taken as a whole, that his evidence was that the offender and the appellant were similar in appearance: *"His evidence, and the CCTV footage itself, would have made it clear to the jury that the clothing of the offender made it very difficult to do more than identify a very limited number of characteristics."*

53. Bozic DCJ concluded, when ruling on the voir dire, that the evidence of Prof Henneberg was relevant "as circumstantial evidence of similarity".[40] The Crown, in arguing that the evidence was admissible, had submitted that it had "high probative value" for that reason.[41]

54. In the Crown's opening to the jury (2 March 2011 at T12.28) the significance of Professor Henneberg's evidence was said to be: "*Using his specialised knowledge he then forms an opinion about whether there were any similarities between the first offender and the Closed-Circuit Television images and the accused, and I anticipate that he will give evidence that there are similarities which included that he could tell it was, in his opinion, an adult male, that the person had (a) thin build, the width of his shoulders were approximately the same as his hips, that he was medium height, that he carries himself very straight so that his hips are standing forward whilst his back was very clearly – the small of his back is bent forward and overhung by his shoulders – his hair is short, he has dark skin, and that he is right handed in his actions. So you will hear evidence from him in relation to his opinions in relation to the similarities.*"

55. This was consistent with the Crown's position on the voir dire. On 28 February 2011 (at T21.12) the Crown submitted: "*We say the jury are not in a(s) good a position as Professor Henneberg to observe the similarities and dissimilarities because the CCTV footage is simply not clear enough to allow such an examination.*" The Crown asserted, regarding Professor Henneberg's evidence: "*...we say the probative value is high because identification is the only issue in the trial.*" (T 22.37) This submission was repeated at T23.04.

56. During his evidence before the jury (at T108) Professor Henneberg could not say that the offender and the applicant were 'identical' but did give evidence that there was a level of anatomical similarity. As noted at ASA [27] Professor Henneberg went on to tell the jury that he identified eight points of similarity and no points of difference. Prof Henneberg was permitted to give evidence before the jury that the offender shared the following characteristics with the appellant: both were male, both had a thin body shape, both had shoulders and hips of approximately the same width, both were of medium height, both carried themselves 'very straight' with

[40] Judgment 1 March 2011 p16
[41] Transcript 28 February 2011 p23.04

hips standing forward and the small of the back overhung by the shoulder area,[42] both had short hair and an oval or 'Dolichocephalic' shaped head, both were right handed and both had skin that was darker than a person of European extraction but not black.

57. The CCTV footage of the armed robbery was played whilst Prof Henneberg was giving evidence. He gave a commentary regarding the appearance of the persons depicted in the footage as it was played. He said that a suspect could be excluded if there was an obvious and consistent difference noted between the suspect and the person depicted. He found no differences between the person on the CCTV footage and the appellant. [T142]

58. The Crown described the various features Prof Henneberg had said were shared by the offender and the appellant as "similarities"[43] and stated: *"Henneberg, when he assessed then the accused from the known images he found all those characteristics to be the same."*[44] Furthermore the Crown emphasized that Professor Henneberg was a *"highly qualified anatomist"* who had identified some *"basic anatomical similarities"*.[45] The Crown invited the jury to accept the Professor's evidence *"because it's reliable science"*.[46]

59. After concluding his summing up and receiving a note from the jury, Bozic DCJ discussed the appropriate response with the parties before answering it. At SU33 his Honour noted that a component of the Crown case was the evidence of *"similarities described by Professor Henneberg"*. The Crown accepted this was so at SU 35.09.

60. His Honour directed the jury on the five aspects of the Crown case: *"The first is that the car used in the robbery and the car found at Clovelly were the same and I will come back to that in a moment. The second is the CCTV footage. The third is the description of the offenders by employees at the hotel, that is Ms Copperwheat, Mr Simm and the security guard. The fourth is the DNA evidence in relation to the hammer and the white t-shirt and <u>the fifth are what were described as the similarities observed by Professor Henneberg between the CCTV footage at the</u>*

[42] This observation appears no different to the opinion of Dr Sutisno regarding 'upright posture', excluded in *Tang,* supra at [4]-[5] as barely rising above a subjective belief and not amounting to 'specialised knowledge' within the meaning of s79.
[43] Transcript 9 March 2011 p9.41
[44] Transcript 9 March 2011 p9.33
[45] Crown closing address 9 March 2011 at 7:17-28
[46] Crown closing address 9 March 2011 at 9:35

Narrabeen Sands Hotel and the footage of the accused in custody at the police station."(emphasis added)(SU37.7)

61. The conclusion of the CCA set out above is at odds with the stated reason for the admission of the evidence and the use made of the evidence at trial. Contrary to the conclusions of Macfarlan JA at [67] – [68] the evidence was that there were no points of difference observed and the appellant could not therefore be excluded. The evidence was in truth that the appellant was of similar appearance to the offender.

62. Macfarlan JA distinguished the earlier decision of *Morgan v R* [2011] NSWCCA 257; 215 A Crim R 33, where the CCA had quashed the appellant's conviction on the basis that Prof Henneberg's evidence had been wrongly admitted. In *Morgan* Prof Henneberg had given evidence that the offender and the accused had "a high level of similarity". In this appeal it was submitted that the effect of Prof Henneberg's evidence was the same. Macfarlan JA rejected this: *"Critically, in the present case Prof Henneberg did not give evidence of any conclusions to be drawn from his observations of identified common characteristics."* [57]

63. Prof Henneberg's evidence is repeated at [74]-[76] in *Morgan.* He provided a description of the features of the offender, including his head shape, nose and face profile. [74] He provided a comparison of the features of the accused at [75] and said: *"there is a high level of anatomical similarity between the offender and the suspect (Mr Morgan). My opinion is strengthened by the fact that I could not observe on the suspect any anatomical detail different from those I could discern from the CCTV images of the offender."*

64. The criticisms made by other witnesses of the validity of the method and conclusions of Prof Henneberg are set out at [84] – [94] and [104] – [105] of the judgment. They are essentially the same as were made in the trial of the appellant.

65. Ground 1(a) of the appeal in *Morgan* was that the evidence of Prof Henneberg to the effect that the appellant was similar in appearance to one of the robbers should have been excluded. This ground was upheld. In this appellant's trial the essential feature of Prof Henneberg's evidence was that the appellant and the offender had numerous points of similarity and no points of difference. The language used was slightly different but the meaning was the same. This conclusion of similarity was inherent in the opinion evidence in the appellant's trial.

66. It was also submitted in *Morgan* that Prof Henneberg's evidence: "*did not involve any area of specialised knowledge based on the Professor's training, study or experience, and his opinion was not wholly or substantially based upon that knowledge.*" [131] It was argued that his evidence "*did not have the indicia of a scientific opinion*" as there was no evidence about the validity, reliability and error rate of the Professor's methods, together with the absence of any satisfactory evidence of peer review." [133]

67. Hidden J (Beazley JA and Harrison J agreeing) reached conclusions relevant to this application at [140] – [145]. The task was to make an anatomical comparison between relatively poor CCTV images of a person covered by clothing head to foot with images of the appellant. [140] Prof Henneberg's conclusion of being able to detect a 'high level of anatomical similarity' between the two persons was never adequately explained. [140] It was not apparent how the Professor's anatomical expertise equipped him to take account of the clothing worn by the offender on the CCTV footage. [141] He may have had a facility in taking account of the clothing worn by someone in determining anatomical characteristics of the torso and limbs, although how he could assess the thickness of the clothing and whether there were multiple layers of it was not clear. [143] The evidence did not convey that his experience extended to the observation of anatomical features of the head and face of a person whose head is entirely covered by a garment such as a balaclava. [143] His conclusions about the shape of the offender's head and face were vital to his conclusion that there was a high degree of anatomical similarity between that person and the appellant. [144] These observations were not based upon his specialised knowledge of anatomy. [144] Subject to expert evidence explaining the effect of photographic distortion in the CCTV images, the task of comparing the images of the offender with those of the appellant was one the jury could have done themselves. [144] In some respects the CCTV footage of the offender in this appeal made the task even more uncertain than in *Morgan*, where the offender was wearing a tight fitting balaclava. Here loose fitting fabric covered the offender's head and face. This is apparent at every point where the offender appears on the CCTV footage.

68. Despite all of this, Macfarlan JA distinguished *Morgan* at [55] – [58]. In so doing the CCA erred.

Ground 5: In the alternative, if the evidence of Henneberg was not to the effect that the offender and the appellant were similar in appearance (CCA at [68]), the Court of Criminal Appeal erred in holding that the evidence was relevant and admissible pursuant to s 55 of the *Evidence Act 1995 NSW*.

69. Section 76(1) expresses the opinion rule in a way that assumes that evidence of opinion is tendered "to prove the existence of a fact". As the plurality said in *Dasreef Pty Ltd v Hawchar (2011) 243 CLR 588 at [31]: "More particularly, it directs attention to the finding which the tendering party will ask the tribunal of fact to make. In considering the operation of s 79(1) it is thus necessary to identify why the evidence is relevant: why it is "evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding". That requires identification of the fact in issue that the party tendering the evidence asserts the opinion proves or assists in proving".*

70. The fact in issue in the trial was the identity of the appellant as the offender. The evidence of Prof Henneberg was tendered to assist in proving that fact. If it was the case, as found by Macfarlan JA at [68] that Prof Henneberg's evidence was not to the effect that the offender and the appellant were similar in appearance, then the evidence was not relevant and thereby inadmissible.

71. Further, the CCA relied on the fact that the images were of poor quality, and the evidence of the defence rebuttal witnesses, to conclude that the jury would have been unable to observe relevant features in the images or make useful comparisons between the CCTV footage and the reference images [60]. MacFarlan JA implicitly accepted the defence witness's evidence as to the deficiencies of the available material to justify the admission of the contested evidence on the basis that it would assist the jury in their task. However the fact that the images are 'incomprehensible' cannot, in and of itself, make the evidence of an expert relevant if there is no reliable basis to conclude that the expert witness is in fact able to draw any more meaningful conclusions than the lay observer.

72. This case did not involve a contest between experts as to opinion about similarity that simply went to weight. The defence witness's criticism went to the heart of

admissibility of Prof Henneberg's opinion in that the images did not allow for identification of features and that absent a valid methodology and transparent reasoning process with a demonstrable link to an area of specialised knowledge, Prof Henneberg's opinion was purely speculative.

73. The opinion, to be relevant, must be capable of *rationally* affecting the assessment of the probability of the existence of a fact in issue. In the absence of any independent evaluation of Prof Henneberg's claim to identify similarities by comparing photographic images and identification of a process reasoning based upon his "experience" as grounded in 'specialised knowledge', his opinion did not rise above the subjective and was therefore not relevant. He brought nothing to the task that the jury could not undertake for themselves.

PART VII: APPLICABLE STATUTORY PROVISIONS

Section 97 Crimes Act 1900 NSW
Sections 55, 76, 79, 135, 137 of the Evidence Act 1995 NSW

The applicable provisions are still in force, in that form, as at the date of the making of the provisions and are set out in Annexure A to these submissions.

PART VIII: ORDERS SOUGHT BY THE APPELLANT

1. That the Orders of the Court of Criminal Appeal of New South Wales made on 5 June 2013 be set aside.

2. The conviction is quashed.

3. A verdict of acquittal is entered, or in the alternative a new trial is ordered.

PART IX: ESTIMATE OF THE TIME REQUIRED FOR THE PRESENTATION OF THE APPELLANT'S ORAL ARGUMENT

74. It is anticipated that the time required for the presentation of the appellant's oral argument will be no more than 3 hours.

Dated: 22 April 2014

Dina Yehia
Carl Shannon Chambers

Tel: (02) 92683111
Fax: (02) 92683168

David Barrow
Forbes Chambers

(02) 93907777
(02) 92614600

Email: dina_yehia@agd.nsw.gov.au; davidbarrow@forbeschambers.com.au

IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY No. S 57 of 2014

BETWEEN: **ANTHONY CHARLES HONEYSETT**

Appellant

AND: **THE QUEEN**

Respondent

Annexure A to Appellant's submissions

Applicable legislative provisions (Part VII)

The applicable provisions are still in force, in the form set out below, as at the date of the proceedings.

Crimes Act 1900 NSW No 40

97 Robbery etc or stopping a mail, being armed or in company

(1) Whosoever, being armed with an offensive weapon, or instrument, or being in company with another person, robs, or assaults with intent to rob, any person, or stops any mail, or vehicle, railway train, or person conveying a mail, with intent to rob, or search the same, shall be liable to imprisonment for twenty years.

(2) **Aggravated offence**
A person is guilty of an offence under this subsection if the person commits an offence under subsection (1) when armed with a dangerous weapon. A person convicted of an offence under this subsection is liable to imprisonment for 25 years.

(3) **Alternative verdict**
If on the trial of a person for an offence under subsection (2) the jury is not satisfied that the accused is guilty of the offence charged, but is satisfied on the evidence that the accused is guilty of an offence under subsection (1), it may find the accused not

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Filed on behalf of the Appellant
The appellant's solicitor is: Michael Blair
Solicitor
PO BOX 20664
WORLD SQUARE NSW 2002
Tel: (02) 92676255
Fax: (02) 92676455
Ref: Michael Blair

guilty of the offence charged but guilty of the latter offence, and the accused is liable to punishment accordingly.

Evidence Act 1995 NSW No 25

55 Relevant evidence

(1) The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.

(2) In particular, evidence is not taken to be irrelevant only because it relates only to:

(a) the credibility of a witness, or
(b) the admissibility of other evidence, or
(c) a failure to adduce evidence.

76 The opinion rule

(1) Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.

(2) Subsection (1) does not apply to evidence of an opinion contained in a certificate or other document given or made under regulations made under an Act other than this Act to the extent to which the regulations provide that the certificate or other document has evidentiary effect.

79 Exception: opinions based on specialised knowledge

(1) If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.

(2) To avoid doubt, and without limiting subsection (1):

(a) a reference in that subsection to specialised knowledge includes a reference to specialised knowledge of child development and child behaviour (including specialised knowledge of the impact of sexual abuse on children and their development and behaviour during and following the abuse), and

(b) a reference in that subsection to an opinion of a person includes, if the person has specialised knowledge of the kind referred to in paragraph (a), a reference to an opinion relating to either or both of the following:

(i) the development and behaviour of children generally,

(ii) the development and behaviour of children who have been victims of sexual offences, or offences similar to sexual offences.

135 General discretion to exclude evidence

The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:

(a) be unfairly prejudicial to a party, or
(b) be misleading or confusing, or
(c) cause or result in undue waste of time.

137 Exclusion of prejudicial evidence in criminal proceedings

In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant.