

# IDENTIFICATION EVIDENCE — PROOF AND DOUBT: AN EXPERIENTIAL TEACHING AND LEARNING STRATEGY TO PROMOTE DEEP ANALYTICAL UNDERSTANDING COMBINED WITH INCREMENTAL DEVELOPMENT OF PRACTICAL LEGAL SKILLS

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## I. INTRODUCTION

Identification of a defendant is a complex and fascinating issue that frequently arises in criminal trials. Important rules apply in relation to the admissibility, and warnings as to the use, of identification evidence in criminal proceedings. In other litigation contexts, issues of identification are less often encountered and the evidentiary rules are not as stringent. Notwithstanding that, it is apparent that similar considerations as to questions of weight and the making of rational inferences from facts leading to proof of, or doubt about, identity arise in all such contexts.

In contemplating student learning in this difficult area of evidence law, it is important to employ teaching strategies that promote deep learning through analysis and synthesis of facts in the specific legal context, and also to allow students the opportunity to learn by doing. At the same time, such strategies must be designed to provide for and foster the transfer of this learning to similar but different situations,<sup>1</sup> as ‘knowledge of evidence will help [students] in almost any function they may perform as lawyers, since so much depends, in shaping any legal transaction, upon what the parties contemplate would happen if the matter went to court ... and a careful lawyer always has an eye on what could be proved.’<sup>2</sup>

A problem scenario relating to the commission of crimes and the evidentiary rules applying to identification of a defendant in criminal proceedings is used for the experiential teaching and learning strategy devised for the identification evidence topic in the author’s Evidence course. This is a compulsory course within the Bachelor of Laws (LLB) program at the University of Newcastle. The analytical and advocacy skills that are developed by students through this experience as they ‘get a feeling for how evidence actually plays out in the courtroom and in other stages of litigation’<sup>3</sup> will be readily transferable to different legal contexts. This transference has become apparent in the skills exercises completed by some of the same students in the Trial Process course, a subsequent practical skills course focused on advocacy in both criminal and civil litigation contexts undertaken by those students in their final year of study.

## II. THE NATURE OF IDENTIFICATION EVIDENCE AND THE LEGAL CONTEXT

When identification evidence is given by an independent eyewitness, it has the feature of apparent reliability. However, this feature must be evaluated in light of the inherent dangers related to the subjective experience of human perceptions. It has been remarked that ‘human perception is not always accurate or complete, and this is so even when there

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1 Stephen Nathanson, ‘Designing Problems to Teach Legal Problem Solving’ (2001) 34 *California Western Law Review* 101, 116.

2 Paul Rothstein, ‘Teaching Evidence’ (2006) 50 *Saint Louis University Law Journal* 999, 999-1000.

3 *Ibid* 1000.

is no question but that the witnesses are seeking to tell the truth as they perceived it to be.’<sup>4</sup> When recalling an event or image, human beings trigger a memory of their subjective experience of the event or image, which impacts upon the reliability of that memory. The experience may have been ‘impure’ to some extent ‘because of personal and environmental factors present at the time of the event and which, in the interval that has elapsed between the event and the recollection of it, will probably have undergone further distortion and recreation ... an act of memory is an act of reconstruction.’<sup>5</sup> Such evidence may then be ‘as dangerous as it appears reliable’,<sup>6</sup> although jurors as fact-finders tend to place great weight on eyewitness accounts relating to the identification of people, particularly the defendant in criminal proceedings. As mistaken identification has been largely recognised as the one of the most significant causes of miscarriages of justice,<sup>7</sup> it must lead a lawyer to carefully analyse and synthesise all the factors surrounding and impacting upon the identification made by the eyewitness in order to develop a strategy directed to either enhancing reliability or raising a doubt about reliability, depending on which party to the proceedings is calling the eyewitness.

In undertaking this analysis of the various factors affecting the cogency of an eyewitness’s identification evidence, attention must be directed to the environmental and personal factors operating on the occasion of the initial observation, such as natural or other obstructions to the view of the witness and the health and emotional state of the witness. Other factors impacting on the force and reliability of such evidence are the time gap between the event perceived and any formal identification of a person associated with this event, plus the circumstances of the formal identification at an identification parade or by another method. Such factors become highly relevant in proving, or raising doubts about, the identity of the perpetrator of a criminal offence and, thus, will generally become the focus of the questions to be asked in cross-examination of an ‘identification witness’ in the adversarial trial process.<sup>8</sup>

The complexity of, and dangers associated with, the process of identification has resulted in a number of rules governing the admissibility of, and warnings to be given about, identification evidence when used in proof of a key fact in issue in criminal proceedings. This issue will invariably be whether the accused was the person who perpetrated the acts constituting a crime. These rules and judicial warnings have been developed at common law and further refined in statutory form. In the Commonwealth and NSW jurisdictions, where the ‘uniform’ *Evidence Act 1995* operates,<sup>9</sup> students must learn and apply the provisions in Part 3.9 of the Act. In other jurisdictions, an important body of common law from which the legislative provisions in NSW and the Commonwealth are derived must equally be learned and applied by law students in those jurisdictions. These rules restrict the logical scope of information that can be admitted as evidence in criminal proceedings. At the same time, however, scope for analysing and synthesising the various potentially admissible facts leading to proof of, or doubt about, a witness’s identification evidence is accommodated through the oral testimony emphasis in the trial process where the evidence is fully tested in cross-examination.

In the abstract, the *Evidence Act 1995* Part 3.9 provisions relating to identification evidence in criminal proceedings are complicated and prolix. Even the most enthusiastic and intelligent law students will encounter difficulties in comprehension of these provisions upon simply reading the legislation. The questions of admissibility and the contents of any warning in application of the rules and doctrinal principles of identification

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4 Frank Bates, ‘Evidence of Identification: The Implications of Some Recent Australian Cases’ (1983) 12 *Anglo-American Law Review* 248, 248.

5 Graham Roberts, *Evidence: Proof and Practice* (1998) 569.

6 *Ibid* 568.

7 John Dyson Heydon, *Cross on Evidence*, (6th Australian ed, 2000) 66-69.

8 Graham Roberts refers to these factors as ‘pressure points in identification evidence’: see Roberts, above n 5, 571-576.

9 Any reference hereafter to the Evidence Act 1995 includes both the NSW and Commonwealth Acts. The Evidence Act 2001 (Tas) omits some of the provisions that are contained in Part 3.9 of the NSW and Commonwealth Acts relating to identification evidence, but it does include s 116.

evidence, together with assessing the weight and reliability of such evidence, are, it is strongly contended, best understood by an experience in the process, albeit simulated and circumscribed, of an oral witness examination involving ‘identification’ as a significant and disputed issue; ‘a limited “how to do it” exposure.’<sup>10</sup>

### III. EXPERIENTIAL LEARNING, PROBLEM-SOLVING AND SIMULATIONS

In his illuminating essay, ‘Teaching Evidence Scholarship: Evidence and the Practical Process of Proof’, Australian evidence scholar Andrew Ligertwood contends that ‘within the discipline of law, evidential issues are most effectively analysed and understood in the context of the practical legal process within which they arise ... Ultimately, it is the instrumental ends of that legal process which determine when evidential issues arise, and the content of any applicable evidentiary rules.’<sup>11</sup> Ligertwood goes on to say that

abstract exposition [of evidentiary rules] does not really capture the complexity of the situations in which evidential decisions are made. Nor does abstract exposition ever really convey why the proof of facts within the common law adversarial oral trial is so elusive. These complexities are best and most profoundly appreciated by first-hand exposure to the practical processes of adjudication, or to the next-best-thing in the classroom: student role-play in mock trials.<sup>12</sup>

Abstract exposition must, therefore, largely give way to a simulation of process in what effectively amounts to a hands-on experience of evidence in action incrementally calibrated to the specific stage of student learning. An excellent topic area to use this simulated process to give students the opportunity of experiencing and appreciating these complexities is that of identification evidence in a criminal proceeding. Significant potential for transferring the learning gained from the experience to other and different contexts also clearly exists.

The theoretical underpinning of experiential learning techniques is found in constructivism, and theorists such as Philip C Candy emphasise that the focus of constructivism in education is on the learner and their construction of knowledge into ‘systems, structures or schemata, using both cognitive and affective processes’.<sup>13</sup> Such techniques are student-centred and require the teacher ‘to take a “back seat” to the learning activities so that the students are fully engaged in the process.’<sup>14</sup> Thomas J Shuell’s simple formulation of the constructivist framework for teaching and learning is pertinent and instructive.

[I]f students are to learn desired outcomes in a reasonably effective manner, then the teacher’s fundamental task is to get students to *engage* in learning activities that are likely to result in their achieving those outcomes ... it is helpful to remember that what the student does is actually more important in determining what is learned than what the teacher does.<sup>15</sup> (emphasis added)

Importantly, the experiential learning process involves the learner moving through a learning cycle of four stages: forming principles through information gathering about a skill; planning in the context of certain materials which will be used to demonstrate development of the skill; performing the skill as an experiential exercise by work placement, role-play or other simulation; and reflecting by keeping a journal, watching a video of the exercise and/or discussion with the teacher or peers about what happened in

<sup>10</sup> Rothstein, above n 2, 1000.

<sup>11</sup> Andrew Ligertwood, ‘Teaching Evidence Scholarship: Evidence and the Practical Process of Proof’ in Paul Roberts and Mike Redmayne (eds), *Innovations in Evidence and Proof: Integrating Theory, Research and Teaching* (2007) 239-240.

<sup>12</sup> *Ibid* 251.

<sup>13</sup> Philip C Candy, *Self-Direction for Lifelong Learning: A Comprehensive Guide to Theory and Practice* (1991) 272, cited in Sally Kift, ‘Lawyering Skills: Finding their Place in Legal Education’ (1997) 8 *Legal Education Review* 43, 59-60.

<sup>14</sup> Marlene Le Brun and Richard Johnstone, *The Quiet Revolution: Improving Student Learning in Law* (1994) 96.

<sup>15</sup> Thomas J Shuell, ‘Cognitive Conceptions of Learning’ (1986) 56 *Review of Educational Research* 411, 429.

the experience of demonstrating development of the skill.<sup>16</sup> Ultimately, student learning is achieved ‘by actively reflecting on experience, translating that reflective observation into a ‘theory from which new implications for action can be deducted’, and then testing those theories as a guide to creating new experiences.’<sup>17</sup> This can be a debriefing session where the students involved in the simulation and those observing discuss the experience and particular aspects of the conduct demonstrated in the simulation. As Marlene Le Brun and Richard Johnstone emphasise:

Reflective discussion helps students learn to generalise from, and think beyond, their particular experiences. If the role play or simulation is video-recorded, we can lead the class through a discussion of the different types of interaction displayed in the role play.<sup>18</sup>

Therefore, analysing and synthesising facts in a specific legal context, using that as a basis for formulating questions to ask a witness in a simulated cross-examination, and conducting that cross-examination in front of an audience of observers who will assist with reflection when the simulation exercise is completed, is the cycle learners are able to use to construe meaning from their knowledge of that legal context. It is ‘learning by doing’ in a holistic sense, as espoused by David A Kolb,<sup>19</sup> and it is clear that ‘learning from experience must involve links between the doing and the thinking.’<sup>20</sup> ‘Reflecting-in-action’ is a most significant part of the experiential learning process and, in training professionals such as lawyers, this reflection on an experience ‘is central to the art through which practitioners sometimes cope with the troublesome “divergent” situations of practice.’<sup>21</sup>

In employing the experiential learning technique to engage students, encourage effective reflection and achieve the desired learning outcomes in the specific context of the identification evidence topic, it is essential to use a well-designed problem. This requirement is clearly emphasised in the work of leading international clinical legal scholar Stephen Nathanson, where he draws out the following principles of problem design for legal-skills teaching and especially in legal-skills simulations: ‘(1) user-friendly; (2) realistic; (3) relevant; (4) consistent with objectives; (5) similar, but different; and (6) challenging’.<sup>22</sup> Accordingly, a problem using a criminal case where identification is the central issue must be developed so that it is easy to read and use, keeping factual and documentary detail to a minimum, and resembles real life to provide motivation for students to want to solve the problem. Further, the problem scenario must be relevant to what could be expected in practice in the real world, and meet the objectives of encouraging deep analysis and synthesis of factual and evidential issues as well as incrementally developing basic advocacy skills. Finally, the problem must be designed to enable learning that is transferable to different legal contexts, and so that it presents ‘an interesting puzzle that the student knows something about but cannot solve right away’, thus balancing both ‘linearity and flexibility.’<sup>23</sup>

The solving of such a problem, designed in accordance with these principles, through both deep analytical thinking and effective advocacy skills, supports the specific student learning outcomes stated for the author’s Evidence course. The course objectives, which translate into student learning outcomes, are to develop knowledge and understanding of specific rules and principles relating to evidence law, to further develop core skills of

16 Kift, above n 13, 62-63. Also see, David A Kolb, *Experiential Learning: Experience as The Source of Learning and Development* (1984) 20-38.

17 Ibid 63.

18 Le Brun and Johnstone, above n 14, 305.

19 Kolb, above n 16, 20-21

20 G Gibbs, *Learning By Doing* (1988) 9, cited in Kift, above n 13, 62.

21 Donald A Schon, *The Reflective Practitioner: How Professionals Think in Action* (1983), 62.

22 Nathanson, above n 1, 104-106. See particularly the table, ‘Six features of Good Problems’ on page 106 for a precis of the enumerated features.

23 Nathanson, above n 1, 117. Nathanson describes these features of problem-solving; ‘[I]nlinearity is the step-by-step aspect of problem solving that requires familiarity with routines and precedents applicable to the legal context. Flexibility is the higher-level skill needed to modify the routines and precedents or to create something novel to solve the problem.’ He emphasises that to make a problem appropriately challenging for students, ‘[p]roblems should be designed somewhere in the middle of these extremes, balancing the two’ (118).

problem-solving and oral communication in the context of the rules of evidence, and to develop a critical appreciation of the operation of the rules of evidence in the process of fact-finding in an everyday practical context.<sup>24</sup>

The use of role-plays or simulations as a useful experience for student learning have been promoted by leading American scholar in clinical legal education Professor David Chavkin, who highlights ‘simulation’ as one of the pivotal features of a ‘meaningful clinical legal education’ for students, in that

[s]tudents need to have an opportunity to ‘try on’ skills and values in a context in which no one will be harmed by mistakes and in which they can take some risks that they would not take if real-life client interests were at stake. Simulation exercises provide a tool for giving students these opportunities.<sup>25</sup>

A simulation provides students with a unique opportunity to experience the different processes existing within the complex and dynamic legal system.<sup>26</sup> Le Brun and Johnstone emphasise that role-plays and simulations can be used effectively in different ways in the classroom. There must be sufficient time given to students to prepare for their roles and they must be given ‘clear and detailed, but sufficiently flexible, instructions so that they know what they are required to do and yet are able to be creative.’<sup>27</sup> This echoes the ‘linearity and flexibility’ of Nathanson’s well-designed problems in creating the conditions for effective simulation.

One form of the simulation method is the ‘fishbowl’ approach, where a small group of students conduct a simulation exercise in front of the rest of the class and teacher, who then provide feedback ‘using the simulation as a springboard for discussion.’<sup>28</sup> Another form is where all students perform the simulation in small groups at different locations inside or outside the classroom and ‘report their experiences to the class.’<sup>29</sup> The form chosen will depend on a variety of factors including time constraints, numbers of students, nature of skill and mode of assessment.

An overriding consideration in using the simulation method is that ‘we must be sensitive to signals of discomfort from students who are reluctant to be involved in such activities’ and it may be that ‘some students cannot or will not participate.’<sup>30</sup> In this way, it must also be acknowledged that ‘an aspect of good teaching is the adoption of teaching and learning processes that accommodate a variety of learning strategies’,<sup>31</sup> ‘particularly if we are interested in educating lawyers who can assume diverse roles in a complex, post-industrial world.’<sup>32</sup> As far as participation in the actual simulation is concerned, this may be offered to students as an option and the student group undertaking the simulation will make a deliberate choice for this form of learning and assessment. The rest of the class will then have the opportunity for observation, a number of whom may keenly participate in this way, and then provide feedback to the group presenting the simulation, encouraging ‘reflection-in-action’ proximate to the experience.<sup>33</sup>

A number of other methods of learning used in the course will not require the students to simulate a witness examination but to accommodate other learning styles within student groups whilst also challenging students to ‘broaden the range of their learning preferences’.<sup>34</sup> For example, a group may be required to engage in analysis and synthesis

24 See University of Newcastle, School of Law, *Course Outline — LAWS4004 Evidence* (Semester 2, 2008) 4-5.

25 David Chavkin, ‘Experience is the Only Teacher: Meeting the Challenge of the Carnegie Foundation Report’, (Paper presented at the School of Law Teaching and Learning Seminar, University of Newcastle, 9 August 2007) 48-49.

26 Paul Ramsden, *Learning to Teach in Higher Education* (2nd ed, 2003) 172.

27 Le Brun and Johnstone, above n 14, 306.

28 Ibid.

29 Ibid.

30 Ibid.

31 Kift, above n 13, 63.

32 Le Brun and Johnstone, above n 14, 82.

33 Schon, above n 21, 128-136.

34 See Kift, above n 13, 63-64, and Figure 5 for a description of the four learning styles from Kolb’s inventory and the association of these learning styles with different stages of the learning cycle. See also Le Brun and Johnstone, above n 14, 82.

of a problem question by an oral presentation of their analysis of the issues, alternative arguments and conclusions, at the same time as attempting to promote a full class discussion of the issues raised by the problem. This also involves a reflective component in ensuring that the learning transferred in this process is accessible to other students in the same way that it must be in the professional-client relationship in practice.<sup>35</sup>

The author has used an experiential learning framework together with applying the principles of well-designed legal problems in developing a strategy based on a simulated witness cross-examination to promote effective student learning of the identification evidence topic and incremental development in the practical legal skill of advocacy. The strategy adopted is also clearly influenced by evidence scholars, notably William Twining and Andrew Ligertwood, in the use of 'role-plays and advocacy exercises [to] bring Evidence doctrine to life'<sup>36</sup> in order to promote deep learning and scholarly understanding of evidential issues through a unique insight gained by participating in the process (albeit a simulation). The 'deep' approach to learning is a most valuable attribute in teaching as it promotes learning in a holistic sense of encouraging students to examine facts in the specific context of qualitative legal concepts. John Biggs exemplifies the educational value of the 'deep' approach to learning generally in stating:

When using the deep approach in handling a task, students have positive feelings: interest, a sense of importance, challenge, even of exhilaration. Learning is a pleasure.<sup>37</sup>

Below is an outline of the specific strategy being used in teaching the identification evidence topic.

#### *A. The Experiential Teaching and Learning Strategy*

The identification evidence topic area is the penultimate topic in the semester-long (13 week) Evidence course taught by the author in the School of Law at the University of Newcastle. This compulsory course is offered to students in the second semester of the fourth year of study for undergraduates completing a combined law degree program and the second semester of the second year of study for graduate students in the LLB degree program. By the time the identification evidence topic is reached in the course, students have completed set readings, received instruction and participated in seminar classes covering the law and process relating to the proof of facts in issue, examination and cross-examination of witnesses, and all other evidentiary exclusionary rules found in the *Evidence Act 1995*. This reading, instruction and participation takes place as a result of private study, a series of weekly lectures, oral group presentations by students of case analyses and problem-solving exercises in weekly 2-hour seminar classes. There are two seminar classes with approximately 40 students in each class.

Students form their own groups of four members at the beginning of the semester and each group is allocated a name related to evidence law, such as 'identification', 'hearsay', 'tendency' and 'circumstantial'. Depending on overall numbers in the seminar classes, there are a minimum of 10 and a maximum of 12 student groups formed in each of the two seminar classes. In the first three weeks of classes, the groups are given the opportunity to choose the topic areas for their presentations to the class from the full range of topics covered in the course. This includes the identification evidence topic, which involves the simulated advocacy skills exercise of cross-examining an eyewitness who has identified a defendant in a criminal proceeding. Accordingly, there is ample preparation time available to the student groups. The groups then take it in turns to present a case analysis or a review problem in each of the nine seminar classes, following modelling of presentation techniques by the teacher in the first three seminar classes. Each group is assessed in relation to their presentation by reference to published criteria in three principal areas:

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<sup>35</sup> Schon, above n 21, 290-295.

<sup>36</sup> Ligertwood, above n 11, 259.

<sup>37</sup> John Biggs, *Teaching for Quality Learning at University* (1999), 16-17. Also, see Ramsden, above n 26, 40-61.

research of relevant primary and secondary sources; understanding, depth of analysis and synthesis of facts and evidential issues; and effective presentation skills including stimulation of class discussion.

The seminar class for the identification evidence topic includes a problem question where the student group has to identify the issues, engage in analysis and synthesis of the facts, apply the relevant law, and then present a cross-examination of the eyewitness who identifies the defendant, linking him to a particular crime. The rules relating to identification evidence and the associated analysis and synthesis of the factual issues are put into action by the students. This incorporates the planning and forming stages of the learning cycle before the ‘doing’ stage of a simulated witness cross-examination. The assessment criteria in relation to effective presentation skills is modified to reflect the objective of incremental development of advocacy skills in cross-examination, particularly taking into account that it is likely to be the student group’s first experience with this practical skill. In assessing this incremental skill development, observance by the group of specific rules relating to the conduct of cross-examination, such as s 41 of the *Evidence Act 1995* dealing with improper questions, is considered. A ‘fishbowl’ approach is implemented for this simulation exercise as the rest of the class and the lecturer watch the performance by the student group. At the conclusion of the simulation, there is time allocated for reflection and discussion of the performance, with the whole class encouraged to participate in feedback and critical appraisal. This incorporates the final and important reflection stage of the experiential learning cycle.

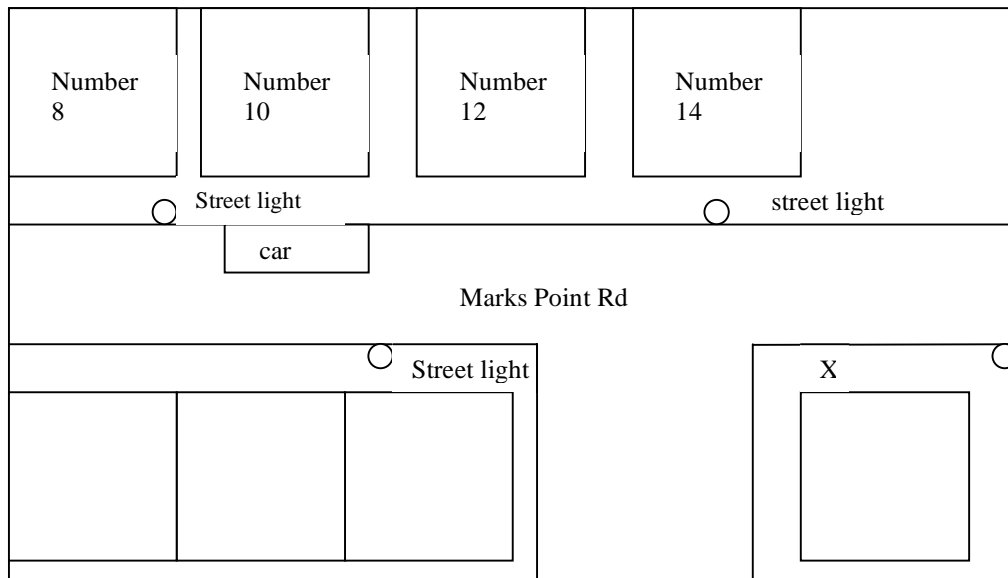
The case of *R v Ben Lewis*, set out below, was specifically created as a legal problem to provide students undertaking the author’s Evidence course with an experience which places the law relating to identification evidence squarely into a practical context. A primary aim of this student experience is to enhance their understanding of the legal rules of admissibility and the content of an appropriate judicial warning about identification evidence in a criminal proceeding. At the advanced stage of student learning within the overall law degree program, and the late stage of the Evidence course when this problem is confronted by students, they are expected to have developed some understanding of a range of evidentiary principles and rules, skills in problem-solving techniques, and to have had exposure to the procedural components of the trial process. There has also been some modelling and experimentation with examining and cross-examining witnesses by other student groups in earlier seminar classes related to the ‘examination of witnesses’ topic.

Allied to the aim of enhancing legal understanding of identification evidence through problem-solving, the experience also aims to give students the opportunity to develop advocacy skills through cross-examining a witness in a role-play and simulation of the witness examination process. This particular skill was chosen because of the broader scope available to the students to experiment with techniques in questioning and to ask questions deeply probing the issues raised. Specifically, this involves one student taking the role of the defence advocate, one student taking the role of the prosecution eyewitness, and the other two group members involved in the preparation and presentation of a commentary to the rest of the class and teacher. Ultimately, students are encouraged to engage in a deeper analysis and synthesis of the facts and applicable legal rules to formulate and present an effective cross-examination. There are several parts to the legal problem designed for this specific student experience in seminar classes, which students must ultimately synthesise in their simulated witness cross-examination. The identification-evidence problem-solving and experiential task utilising the case of *R v Ben Lewis* is as follows:

Ben Lewis is charged with ‘break, enter and steal’ as well as ‘steal motor vehicle’. You represent him at trial in the District Court. The prosecution case is that the residence at 10 Marks Point Road was broken into at approximately 9.00pm on 8 March (Yr-0) and various valuable personal items were taken. In addition, a car was earlier stolen for use in the break and enter at 10 Marks Point Road. The prosecution alleges that Ben Lewis is responsible for these crimes. Ben Lewis denies that he committed these crimes.

The prosecution intends to call Kim Thurlow, whose statement says s/he saw a man getting into a red Holden Commodore with an ‘M’ registration number plate at about 9.20 pm on 8 March (Yr-0) just outside the house at 10 Marks Point Road. This man was about 25-30 metres from Thurlow when s/he saw him getting into the car. Thurlow was standing across the street, which s/he says was well lit by both the street lights and the full moon apparent in the clear skies that night. S/he initially saw the man emerge from a water access lane between 10 and 12 Marks Point Road and then quickly walk about 20 metres, get into a red Holden Commodore and drive off away from where s/he was standing. The man s/he saw was wearing a blue jacket, dark trousers and ‘some sort of woolly hat’, which s/he said s/he thought was odd because it was warm on that particular night. Thurlow noticed that the man was carrying a bag in his left hand. From this sighting of the man, Thurlow estimated that he was about 20 years of age, approximately 180cm tall, average build, and he had a pockmarked face with no facial hair. The ‘woolly hat’ covered the man’s head so Thurlow could not say whether he had hair. Thurlow asserts that s/he had never before seen this man.

Thurlow produced a plan of the street (not to scale - see below). The point marked with an ‘X’ indicates where s/he was standing at the time s/he observed the man emerge from the water access.



Subsequently on 11 March (Yr-0), Thurlow was contacted by Sgt Boots and attended the local Police Station to view a parade of eight men from which s/he was asked if s/he could identify the man s/he had seen getting into the car outside 10 Marks Point Road on 8 March (Yr-0). The parade had been arranged by Sgt Boots following a request from the detectives investigating the case. The men in the parade were all aged between 19 and 23 years, of average build, had no facial hair, ranged in height from 175cm to 182cm, and four of the eight men had pockmarked faces. Each man held a number from 1 to 8 on a large piece of cardboard in front of him. Thurlow selected number 3 as the man s/he had seen on 8 March. This was the number which Ben Lewis was holding in the parade. Thurlow made another statement to the detectives following this identification procedure.

Thurlow’s friend, Sam Sanderson, also witnessed the incident but was not invited to participate in an identification procedure. S/he was, however, able to identify the man as s/he recognised him from having seen him around the local neighbourhood. Sanderson and Thurlow are also friends with Chris Massey, who is currently serving a prison sentence for a ‘break and enter’ offence that he says he didn’t commit but that he was ‘set up’ by Ben



Lewis. The prosecution intends to call Sanderson to give evidence and identify Ben Lewis at the trial.

A police witness, Detective Reg, says in his statement that he found the red Commodore vehicle, registered number ZMM-581, stored in a garage belonging to a man named Alan Grayson. He searched the car and found a balaclava in the passenger side floor of the front seat. There is also a statement from Alan Grayson which states he received a telephone call from Ben Lewis at 10.30pm on 8 March (Yr-0), and was asked to look after a car for him. Lewis then arrived at approximately 11 pm and left the Commodore in Grayson's garage. Before doing so, he took a heavy bag out of the front passenger seat. Grayson noticed that Lewis was wearing a black leather jacket and dark jeans at the time. Grayson was not asked to identify Lewis at an identification parade.

The car had been stolen on 7 March (Yr-0). The unused material that the prosecution has revealed to the defence shows that Alan Grayson has numerous prior convictions including three 'break, enter and steal' offences that all took place in the last eight years. It also reveals that the police attended Alan Grayson's property as the result of an anonymous phone call from a phone box, the message being: 'If you're looking for the car what done a house in Marks Point Road you should go to Grayson's place.'

Ben's instructions to you are that he was nowhere near 10 Marks Point Road that night. He does know the road. It is generally well lit and there are lots of cars parked on it even late at night. Also, there are lots of trees along the road of various heights but they are largely bushy and over 2 metres tall. Your instructing solicitor instructs you that s/he has visited the street and thinks that the laneway down to the water would have been in darkness and that there are two trees between the street lights on either side of number 10, one just outside number 10 and slightly to the right. Ben knows Alan Grayson. Alan does occasionally store cars for Ben (who buys and sells cars). He also says that Alan occasionally breaks in and steals from houses. Ben knows Chris Massey and is aware of rumours circulating that Ben had 'framed' Massey for another 'break and enter' offence in Marks Point for which Massey is currently serving a prison sentence. Ben denies that he 'framed' Massey. Ben knows that Massey has a lot of friends in the Marks Point area and had seen him with Thurlow on a few occasions (although Ben only knew Thurlow by sight not by name). As to the identification parade, Ben says that the other men in the parade didn't really look like him. Although a couple of the others had pockmarked faces their markings were not as clearly pronounced as those on Ben's face. He believes it wasn't a fair procedure.

(i) Prepare and present the cross-examination of Kim Thurlow concerning the identification of Ben Lewis. What parts of the *Evidence Act* would you need to consider?

Initially, students need to determine that the fact in issue is whether it was Ben Lewis who committed the break, enter and steal offence at 10 Marks Point Road and that he was the person that Kim Thurlow saw getting into the red Holden Commodore vehicle at about the time the offence was committed. Having done that, students must consider the following provisions of the *Evidence Act 1995* set out in Table 1 below:

**Table 1 – Parts of the *Evidence Act* to be considered in the experiential learning exercise**

<b>SECTION / PROVISION OF <i>EVIDENCE ACT 1995</i></b>	<b>REASON FOR CONSIDERATION IN PREPARING CROSS- EXAMINATION</b>
'Identification Evidence' definition in Dictionary, Part 1	To determine whether the witness has observed the person at or near a crime scene at approximately the time a crime was committed and the witness has subsequently made an identification of the defendant as that person or resembling the person who was observed on the earlier occasion.
Part 3.9 – s 114	Visual identification evidence of a witness is not admissible unless an identification parade that included the defendant was held or an exception applies, such as it was not reasonable to hold a parade in the particular circumstances or the defendant refused to take part in a parade.
Part 3.9 – s 116	'If identification evidence has been admitted, the judge is to inform the jury (a) that there is a special need for caution before accepting identification evidence; and (b) of the reasons for that need for caution, both generally and in the circumstances of the case.'

The problem is designed to engage students in deep thought about the identification evidence of Thurlow by examining the circumstances of the formal identification of the defendant at an identification parade, so that the focus is on the operation of s 114. As a result of this thought process, students then proceed to formulate lines of cross-examination linked to the admissibility provisions in the Act. In addition to prescribing the necessity for an identification parade, s 114 provides that the identification must be made 'without the person who made it having been intentionally influenced to identify the defendant', which requires the students to analyse the circumstances of the conduct of the parade and the persons involved in this event. The mode of conducting an identification parade is not regulated by the *Evidence Act 1995*. In the NSW context, however, Sheller JA in *R v Fisher* referred to the reliability of an identification parade depending 'in part, on ensuring that as far as possible those who parade are of the same age, height and general appearance as the suspect'.<sup>38</sup> This common law statement is supplemented by guidance to NSW police officers in the *Code of Practice for CRIME* where it is provided that: there should be a minimum of seven other persons of similar age, height, and appearance as the suspect; the parade must be arranged and conducted by an officer independent of the investigation; the witness should be given the option of viewing the parade through a one-way mirror if s/he has declined to view the parade 'face to face'; and the entire procedure is to be video and audio recorded.<sup>39</sup> Accordingly, students must analyse and synthesise the

<sup>38</sup> *R v Fisher* [2001] NSWCCA 380, [17]. Also it should be noted that for Commonwealth matters, a regulatory framework for the conduct of identification parades by police officers is provided for in the *Crimes Act 1914* (Cth) ss 3ZM, 3ZN, 3ZP.

<sup>39</sup> NSW Police, *Code of Practice for Custody, Rights, Investigation, Management and Evidence (CRIME)* (Version 3, February 2008) 76-81.

facts available as to who conducted the parade, the manner in which it was conducted, the number and appearance of the foils to the defendant in the parade, and all the circumstances under which the witness made the identification, including what was said to them by the police or others involved in the conduct of the parade.

Secondly, if the identification evidence is admissible under s 114, students must progress to analyse the matters that might affect the weight to be given to this evidence in light of the fairness of the conduct of the parade and the overall reliability of this identification process. Insights into determining the weight of evidence are provided through the tangible experience of putting the problem into action rather than considering the concept of ‘weight’ in the abstract. Also, students should come to realise ‘that arguments first addressed to admissibility may be recycled later in slightly altered form to bolster or undermine the weight a jury might assign to the piece of evidence if it is admitted’,<sup>40</sup> utilising their overall synthesis of the facts.

Thirdly, students must carefully analyse and synthesise the factors surrounding the event when the eyewitness first observed the person later identified as the defendant and what effect those factors have on the reliability of the evidence of the eyewitness. Matters relating to distance, duration of observation, visibility, lighting, location of obstructions, and any other distractions present at the time, will be important to consider for cross-examination of the eyewitness.

Fourthly, some personal characteristics of the eyewitness are specified to engage students in devising lines of cross-examination related to the credibility and truthfulness of the witness as a person, as distinct from the reliability of the observations made at the time of the event. This draws on some earlier learning in relation to credibility of witnesses and is linked to the weight of the evidence once admitted and the specific content of a judicial warning under s 116 *Evidence Act 1995* allowing students to synthesise the various aspects of the eyewitness’s evidence. As to the content of the warning relevant to an assessment of the probative value of the identification evidence in the circumstances of the particular case, it should range across a synthesis of the particular conditions under which the identification was made, including the time available to accurately perceive the characteristics of the person identified and the time between the initial observation and the subsequent formal identification at a parade.<sup>41</sup>

The skills part of the task is that of cross-examining the eyewitness, Thurlow. Firstly, in preparing for the execution of the cross-examination at trial, the students need to formulate an objective. Essentially, the defence are aiming to raise a reasonable doubt about the prosecution case that it was Ben Lewis who committed the ‘break and enter’ offence at 10 Marks Point Road. Therefore, in cross-examining Thurlow, the defence objective is for evidence to be adduced to assist in raising that doubt in the mind of the tribunal of fact to support the eventual submission that the prosecution have not proved its case beyond reasonable doubt. In order to achieve this objective there are several strategies that could be employed by the defence, starting with the possibility of demonstrating that Thurlow made a mistake in the identification and, even if s/he is being honest, the evidence of identification is not reliable. This will be likely to involve incidental attacks on Thurlow’s credibility in relation to the reliability of the observations made as a consequence of the lighting, any obstructions to Thurlow’s line of vision such as the tall bushy trees and other cars which she did not mark on his/her plan of the street, the distance s/he was from the person s/he has identified as Ben Lewis, and the time s/he had to notice the distinguishing aspects of his appearance to support the subsequent identification s/he made at the parade. There might be particular focus on the clothing worn, having regard to what the police found in the car and the clothing that the defendant was seen to be wearing by Alan Grayson.

<sup>40</sup> Rothstein, above n 2, 1001.

<sup>41</sup> *Domican v The Queen* (1992) 173 CLR 555; *R v Clarke* (1997) 97 A Crim R 414; and *Dhanhoa v The Queen* (2003) 199 ALR 547 are important for students to consider in relation to the specific content of any warning given under s 116 *Evidence Act 1995*.

Another strategy could be to attack Thurlow's honesty and credibility as a witness — perhaps s/he is not being truthful because of prior local knowledge and sightings of Ben Lewis, through Sam Sanderson, Chris Massey or otherwise. Is there a potential for bias as a result of a particular relationship, such as the friendship with Massey, who alleges Ben Lewis 'framed' him? This may be apparent through the eagerness s/he demonstrates to identify Lewis as the man s/he saw on that particular evening and the detailed description given despite the objective evidence of visual impediments. There is clear scope to explore the potential for bias through a synthesis of all the relevant facts.

As to the identification of Lewis by Thurlow at the police station, assuming this evidence has been admitted, the strategy must be directed to diminishing the weight of the evidence by raising a doubt as to the accuracy of the identification through this method. Cross-examination might be directed to the lack of similarity of appearance of each of the participants in the parade — few pockmarked faces and no others with comparable markings to that apparent on Ben Lewis' face, plus the fact that the men in the parade were not wearing hats or similar clothing. There may also be questions directed to any differences in the clarity of the lighting at the parade compared to when Thurlow made the observation of the man getting into the car in Marks Point Road.

As a group, the students usually divide the presentation so that an introduction and commentary is provided by one or two students as to how they prepared for the cross-examination, by reference to the parts of the *Evidence Act 1995* that had to be considered, and then the facts in issue and strategies utilised to raise a doubt about Thurlow's identification evidence. Depending on the number of other students in the group, one student then takes the role of the defence advocate who cross-examines another student from the group acting as the witness, Thurlow. Although the students in the group know each other well and there is potential for a softening in the cross-examination, it is an incremental step in student learning and this familiarity is not a barrier to achieving the modest aims of the exercise. The students then present a conclusion as to why they asked certain questions and the success or otherwise of their strategy. The whole class then discusses the effectiveness of the group's analysis of the available information in light of the applicable rules of evidence and of the effectiveness of the questioning in cross-examination to achieve the stated objective. This immediate reflection and class discussion is a significant part of the experiential learning cycle and encourages the students to think deeply about the transfer of thought into action in the context of this particular task.<sup>42</sup>

The *R v Ben Lewis* problem has been designed to be realistic and challenging in providing the opportunity for students, relative to the advanced stage of their learning, to develop analytical problem-solving skills in dealing with the complexities and vagaries of identification evidence. In addition, an important opportunity is provided to the students to transfer the analytical process into a circumscribed practical experience by developing oral advocacy skills in formulating effective questions and conducting a simulated cross-examination of an eyewitness. The author's Evidence course is not designed to be a course in advocacy. Its primary focus is on the law relating to the rules of evidence. However, as a form of procedural law it also must necessarily involve an exposure to the process that brings '[e]vidence doctrine to life ... [and provides] a fundamental insight not only for the student of Evidence who aspires to practice but also for anyone seeking scholarly understanding of evidential issues within common law process.'<sup>43</sup>

A significant number of the students in the author's Evidence course will go on to study the Trial Process course in the following semester. Trial Process is an introductory advocacy course in the Diploma of Legal Practice program at the University of Newcastle and initially focuses on preparation for, and techniques used in, a trial in the criminal jurisdiction, particularly examination-in-chief and cross-examination of witnesses. The course then moves on to other litigation contexts, principally civil and family law. One of

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42 Kift, above n 13, 67-69.

43 Ligertwood, above n 11, 259.

the skills exercises in this course involves the students conducting a simulated witness examination and cross-examination in a mock courtroom before a visiting criminal law practitioner acting as the magistrate. These criminal matters contain various substantive law and evidential issues, including one case where the primary issue is 'identification'. In these witness examination skills exercises, an incremental increase in difficulty is provided as the witnesses for these exercises are volunteers from the first-year student cohort and are all strangers to the fifth-year student advocates. This incremental increase in difficulty is a shift towards practical reality in the simulated court exercises, which the students have been prepared for from their experiential learning in the Evidence course.

Also, whilst studying for the Diploma of Legal Practice and undertaking the Trial Process course, students are involved in live-client experiences in the clinic at the University of Newcastle Legal Centre, under the supervision of legal practitioners. These placement experiences, concurrently with the study of substantive law courses and skills-based courses, incrementally enhance the development of a number of practical legal skills in the students. In particular, there is clear scope for transfer of learning from the simulated experiences to the interviewing of real clients in the clinic. Oral communication, analytical skills and critical evaluation of information are all used by students in these learning processes.

Overall, this teaching and learning strategy combines legal problem-solving with an experience in developing some advocacy skills through role-play and simulation. The pivotal role that such an experience plays in the learning process has been highlighted by educational theorists, including Kolb.<sup>44</sup> The author's own teaching experience has confirmed the utility of this strategy.

### *B. Evaluation of the Teaching and Learning Strategy*

The evaluation of this experiential teaching and learning strategy, conducted in the author's Evidence course in 2006 and 2007, has been limited by the short time frame over which it has been conducted. There is little comparative data available. On the basis of the data and other indicators readily available, a preliminary evaluation of the teaching and learning strategy has been made, the results of which may be confirmed with more extensive and specifically targeted data to be gathered in the future.

At this stage, the evaluation has been carried out on the basis of the author's observation and professional assessment of the student group performances of the task in the classroom, the assessment of subsequent examination question responses, anecdotal evidence of student appraisal, general written feedback from the students at the completion of the course, and by observation of the same students undertaking more difficult practical skills exercises before experienced barristers and solicitors in the Trial Process course.

Firstly, assessment of the student group performances was based on published criteria provided to all students at an early stage of the course. The criteria were divided into three principal areas: research of relevant sources, analysis of issues raised by the problem, and presentation skills (including advocacy skills in exercises where this particular task is included). Within these principal areas more specific statements were made in a rubric as to what was assessed, including the depth of thinking in analysis through a logically developed answer and the clarity of the presentation, together with stimulation of class discussion and meaningful reflection on the presentation.

Students undertaking this experiential problem-based exercise in the identification evidence topic have performed at very high standards, as judged against the set criteria. In 2006, the task was prepared and presented by student groups in each of the two seminar classes with marks of 85% and 87% awarded respectively. The average mark in all student group presentations of review problems in the nine seminars, including one other simulated advocacy exercise in another topic area, was 78% in both seminar classes. Accordingly, a mark well above average was achieved for the identification-evidence experiential task

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<sup>44</sup> See Kolb, above n 16.

presentation in both seminar classes. This assessment indicates a very high level of sophistication in analysis and synthesis of the problem and a very high skill standard achieved in the simulated witness examination relative to the limited experience students have with this particular skill. With a new cohort of students in 2007, the task was prepared and presented by student groups, again in each of the two seminar classes, with marks of 82% and 75% awarded respectively. The average mark in all student group presentations of review problems in the nine seminars, again including one other simulated advocacy exercise in another topic area, was 75% in both seminar classes. A mark well above average was achieved by the student group in the first seminar class and the average mark was achieved by the group in the second seminar class. This assessment again indicates a high to very high level of sophistication in analysis and synthesis of the problem, particularly by the group in the first seminar class. It also indicates a very high or sound achievement in the incremental development of advocacy skills in the simulated witness examination.

Secondly, students provide valuable information about the effectiveness of teaching and the achievement of learning objectives. The findings of research into student evaluations 'indicates that, generally, students are sound judges of different aspects of good teaching ... [t]heir judgments are robust, consistent, and are the best validated of all the practical sources of relevant data about the effectiveness of teaching.'<sup>45</sup> Both anecdotal appraisals by students and written feedback over the two years this problem-based strategy was used in seminars has been very positive in relation to the group presentations generally, and to this particular experience in using an aspect of the trial process to demonstrate the operation of evidentiary rules and fact-finding. The different demands of this exercise, in terms of a difficult analysis and synthesis of the evidence, plus the formulation of appropriate questions for actually presenting the cross-examination as an advocate, was welcomed as a challenging learning experience by the students.

In 2007, the author administered a formal Student Evaluation of Teaching instrument to students in the final seminar class. This was the first time the author had used this formal survey instrument and 79 of the 93 students enrolled in the course responded to the survey. In relation to specific questions about seminars and the teaching in this course, the following table is a summary of the 2007 individual student responses:

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<sup>45</sup> Le Brun and Johnston, above n 14, 336-337, referring to the research of Richard L Abel (1990) and Peter A Cohen (1990).

**Table 2: Student Evaluation of Seminars and Teaching in LAWS4004 Evidence 2007**

Question	5. Strongly Agree	4. Agree	3. Neutral	2. Disagree/ 1. Strongly Disagree	Mean Result
I am encouraged to participate in seminars	35.4%	45.6%	13.9%	5.1%	4.1
Seminar discussion has been interesting	24.4%	57.7%	11.5%	6.4%	4.0
The seminars helped me learn the course material	34.2%	36.7%	16.5%	12.7%	3.9
I have been well prepared for each seminar session	7.8%	51.9%	33.8%	6.5%	3.6
I have developed an ability to solve problems in this field	17.9%	71.8%	10.3%	0	4.1
This teacher motivates me to extend my learning	50%	44.6%	4.1%	1.4%	4.4
This teacher clearly explained what I was required to do in assessment items	55.4%	40.5%	4.1%	0	4.5
This teacher helped me to understand the importance of the content to my program	41.9%	50%	5.4%	2.7%	4.3

This data shows a strong positive response to the seminar teaching and the motivation it provides to student learning of the course materials, with mean results approximating the ‘agree’ response of 4.0 or above. Although there was no specific question as to the identification-evidence experiential learning exercise, it is possible to extrapolate from this data that there are clear benefits to the students in terms of learning outcomes, motivation to extend learning, and understanding of the practical application of the course content, as a result of the teaching and learning methods utilised in seminars, including the experiential learning through simulation and role-play of a witness cross-examination. This extrapolation is fortified by specific comments in feedback from students to the open-ended question about the utility of the seminar classes, which was another part of this formal evaluation instrument. Comments were generally very positive. Illustrative of the general feeling of the students in this regard are the following comments: ‘The seminars are very informative and support my learning a lot’; ‘I thought that the presentations provided an interesting and interactive way to enhance our learning’; ‘The seminars were very useful and fun to participate in. The group exercises were interesting and useful’; ‘The seminars have been a great way of learning all the relevant cases and ensures that the class participates. The course content has been challenging!'; and ‘Seminars link very well

to the material discussed in lectures. Dr John has really inspired me to take part and want to learn more.<sup>46</sup>

Thirdly, student understanding was clearly demonstrated and transferred to the subsequent and final assessment task in the course, a formal open-book examination. As part of this examination, students were required to answer a problem question raising, among other issues, issues of admissibility and use of identification evidence. Since implementing the experiential exercise in 2006, the results for this examination problem question have significantly improved, with an average mark of 71% in the 2006 examination and 70% in the 2007 examination. This compares favourably with the 2005 examination, when this teaching strategy was not used and the average mark for the problem question was 66%. Arguably, this increase of 4-5% represents enhanced understanding of the identification evidence topic area by those students who had the opportunity to participate in, or observe and give feedback in reflection on, the experiential learning task.

Fourthly, incremental skill development has been clearly evident when these students have come to undertake the Trial Process course in the following semester, where a simulated court hearing using a criminal case is an assessable skills exercise. This exercise involves both examination-in-chief and cross-examination of a witness, played by a volunteer from the first year Criminal Law and Procedure class. These exercises are conducted as full hearings in a mock courtroom with a visiting barrister or solicitor acting as the magistrate. These visitors are very experienced Crown Prosecutors, criminal defence barristers and solicitor advocates. The feedback given by these visiting practitioners following the completion of these exercises has been very positive, with all students assessed by reference to published marking criteria as performing with satisfactory development in advocacy skills and some students performing at a very high level of skill development. The author is in a unique position to observe student performances in these exercises and this has confirmed that the limited exposure to practical advocacy skills in the Evidence course has been a beneficial incremental learning experience for these students.

Further and more sophisticated evaluation is currently planned or being undertaken following completion of the author's teaching of the Evidence course in the second semester of 2008. In addition to the data that will be collated through assessment and feedback mechanisms, a peer review of the identification-evidence experiential task presented by students in the seminar class has been conducted by an academic colleague of the author. Further, a focus group discussion will be arranged in 2009 involving approximately five students who have completed both the Evidence and Trial Process courses with specific discussion about the benefits or otherwise of the identification-evidence experiential task and simulated witness cross-examination.

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46 A selection of student comments about the seminars from the 2007 *Student Evaluation of Teaching* for the LAWS4004 Evidence course.



#### IV. CONCLUSION

Ligertwood highlights the valuable ‘fundamental insight’<sup>47</sup> gained by introducing students of Evidence to the trial process through role-plays and advocacy exercises integrated with their substantive learning of the rules of evidence. It is clear that tasks such as the one described above relating to identification evidence are integral to both engaging students of Evidence in their learning as well as promoting the depth of understanding needed to effectively apply their learning in practice. Rules of evidence are seen and effectively experienced in ‘their wider context’.<sup>48</sup> Although this teaching and learning strategy is at a relatively early stage of implementation and further evaluation is required, the experience has been most encouraging for both the students and the teacher.

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<sup>47</sup> Ligertwood, above n 11, 259.

<sup>48</sup> Ligertwood, above n 11, 258.

