SOCIAL MEDIA IDENTIFICATION AND *IMM*

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This paper's focus is a particular category of evidence that will likely become increasingly prevalent in criminal trials: identifications made from pictures on social media. Specifically, it will focus upon identifications made by witnesses of accused persons, either not known or barely known to them, from photos drawn from social media sites. The risk of misidentification in these circumstances is significant, and must inevitably inform both whether or not to admit the evidence at trial, and how it is dealt with within a trial if admitted.

The paper is in three parts. The first part is a breakdown of the well-known dangers of identification evidence generally, and how these are often made more acute in the context of social media. In particular, the psychological phenomenon of displacement — historically occurring infrequently — presents a growing risk to the fairness of trials, given the increasing prevalence of social media. It is central to the discussion of identification evidence. The second part forms an analysis of how we are to assess the probative value of this type of evidence, though particularly in light of the seminal judgment of the High Court in *IMM v The Queen*.[1] This part will analyse three recent appellate decisions that have considered challenges to the admission of identifications made from social media, two from South Australia and one from Victoria; the contrasting positions of the Courts of Appeal from the two states highlight the difficult questions raised by such evidence. The Victorian case, as well as a very recent High Court case support a conclusion that *IMM*[2] may not in fact restrict a consideration of the reliability of such evidence quite as much as may be first thought. The third part of the paper takes this conclusion further by proposing three 'types' of reliability; I suggest that this categorisation assists in determining which factors can inform an assessment of probative value post-*IMM*.[3]

Ultimately, there is no uniform guide as to how identifications made from social media should be dealt with in the context of criminal trials; even within the limited scope of the type of evidence under consideration, the myriad scenarios that might arise necessitate a case-by-case approach. Rather, this paper's goal is to suggest — with the dangers of identification evidence in mind — how courts should analyse the probative value of such evidence as both the technology and the case law develop.

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[1] (2016) 257 CLR 300 ('*IMM*').

[2] Ibid.

[3] Ibid.

I: IDENTIFICATION EVIDENCE

A *Facebook identification hypothetical*

Consider the following hypothetical: a woman, Jane, is sitting in the kitchen of her home eating breakfast. Without warning, a man bursts in the front door, holding a knife. He is unknown to her. He grabs Jane's handbag, which is sitting on the kitchen table, and flees. The interaction is over within a matter of seconds, but Jane had a brief opportunity to see the man's face and make some general observations about his build and his clothing. Jane didn't have her glasses on at the time, and she is marginally short-sighted, but to such a limited degree that she often won't bother wearing her glasses at all. Jane's friend Sue was in the other room at the time, with a window that faces out onto the street. After she has recovered, Jane describes the man to Sue — his facial features, his height, and so on. Sue says 'I saw that same man run past the window, and though I couldn't really see his face, it looked like a kid I know of called Andrew Jones — I sort of know his mother, they live in the next suburb.' Sue opens Facebook on her phone, and manages to find a photo of Andrew Jones. She shows the photo to Jane and says 'it was him, wasn't it?' Sue looks at the photo for a few seconds and says 'yes that's him, I'm sure of it.' They tell the police and provide the above version of events. Andrew Jones is later charged with robbery.

This hypothetical scenario is provided as an example of the type of identification made from social media that this paper considers, and is similar in many respects to the factual scenarios of the 'Facebook cases' discussed below. Ongoing reference will be made to it to highlight the evidentiary difficulties of such identifications.

B *General dangers of identification evidence*

Courts have long remarked upon and emphasised the inherent dangers of identification evidence ('dangers' in this context, of course, means the danger of misidentification).[4] Wrongful convictions have occurred due to honest witnesses confidently giving what has later transpired to be mistaken identification evidence.[5]

This experience has given rise to two warnings about identification evidence in the Uniform Evidence Legislation[6] ('Evidence Acts') governing the admission of evidence in most Australian States*:* per s 116, jurors must be reminded of the special need for caution before accepting identification evidence; and per s 165, a jury must be reminded of its status as unreliable evidence.

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[4] See, eg, *Domican v The Queen* (1992) 173 CLR 555, 561–562, 565; *Kelleher v The Queen* (1974) 131 CLR 534; *Reg v Turnbull* [1977] QB 224: *R v Burchielli* [1981] VR 611; *R v Smith* (2001) 206 CLR 650; *Carr* (2000) 117 A Crim R 272; *Davis and Cody v The King* (1937) 57 CLR 170.

[5] *Bayley v The Queen* [2016] VSCA 160 [57] ('*Bayley*').

[6] *Evidence Act 1995* (Cth); *Evidence Act 1995* (NSW); *Evidence Act 2008* (Vic); *Evidence Act 2011* (ACT); *Evidence (National Uniform Legislation) Act 2011* (NT); *Evidence Act 2011* (Tas); *Evidence Act 2004* (NI).

Mason J expressed some of the reasoning underpinning these warnings in *Alexander v The Queen*:[7]

> Identification is notoriously uncertain. It depends upon so many variables. They include the difficulty one has in recognizing on a subsequent occasion a person observed, perhaps fleetingly, on a former occasion; the extent of the opportunity for observation in a variety of circumstances; the vagaries of human perception and recollection; and the tendency of the mind to respond to suggestions, notably *the tendency to substitute a photographic image once seen for a hazy recollection of the person initially observed*.[8]

The above line is emphasised to draw attention to the well-known phenomenon of 'displacement', which plays a greater role in increasing the risk of misidentification in social media identification cases.

C *Displacement*

Displacement is the term used to describe the psychological effect of an image of a person in a photograph (in criminal trials, usually the accused) 'displacing' the memory of an original sighting (usually of the actual offender, who may of course not be the accused). In this context it has been shown to be possible that a person may remember the face of an accused person as being the face of an offender, without ever becoming aware that this 'displacement' has occurred. The Australian case in which displacement is extensively discussed is *Alexander*.[9] In it, the displacement effect — and the acute dangers it presents — is described as follows:

> Lastly, there is the 'displacement' effect. Having been shown a photograph, the memory of it may be more clearly retained than the memory of the original sighting of the offender and may, accordingly, displace that original memory.[10] … The general dangers in identification of a stranger are compounded when the first identification after the crime is from a photograph. The well-known 'displacement' effect tends to reduce the reliability of a later identification.[11]

Some of the historical case law concerns examples of displacement that involve witnesses seeing or being shown a single photo (sometimes by police) of an accused previously unknown to them, after an offence, then later undertaking a photo board in which they identify the accused as being the perpetrator.[12] This is a more conventional (that is, pre-social media) example of the circumstances of an identification diminishing its evidentiary value because of the risk of displacement.

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[7] (1981) 145 CLR 395 ('*Alexander*').
[8] Ibid, 426 (emphasis added).
[9] Ibid.
[10] Ibid, 409 (Stephen J).
[11] Ibid, 436 (Murphy J).
[12] See, eg, *R v Ormsby* [1985] 1 NZLR 311.

However there is little meaningful difference — for the purposes of considering the probative value of the evidence, or the risk of unfair prejudice — between the more conventional example (usually involving physical photographs), and an example from social media such as the hypothetical described above. A separate complication in each example is that there may be an independent suggestion (or suggestions) that the party depicted is guilty; this is discussed further below. That aside, the main difference between historical examples of displacement and more modern ones worth noting at this point is that social media is immediately accessible to most of the population, and consequently that photos can be accessed by witnesses, and their evidence tainted, before police have even been contacted.

D *Recognition identification and displacement*

It might be claimed that displacement simply isn't possible when the witness knows the person identified. Consider a hypothetical in which Mary, rather than Jane, is robbed and Mary knows the person accused (again Jones) or has some basis for 'knowing of' him: for example he may be, as she supposes, an acquaintance's son, or someone she claims to have 'seen around'. In that scenario, it might be said that displacement simply couldn't occur because Mary, when she looks at the phone, would only be 'confirming' her recognition. Then again: if a person were certain they had recognised someone, why would they need to confirm it? Opinions will differ but I suggest that the above claim (that displacement isn't possible in the case of a recognition identification) isn't entirely correct: the risk of displacement will depend on the *degree* to which a person knows the person they claim to recognise. On the 'unfamiliar' end of that spectrum the risk of displacement is significant, on the 'familiar' end it is almost non-existent.

Courts — such as the Tasmanian Court of Criminal Appeal, quoted below — have repeatedly emphasised the dangers inherent not just in ordinary identification cases, but in recognition identification cases as well. And they have made reference to degrees of familiarity:

> As *Boardman* and *Turnbull* illustrate, *'recognition' cases will often involve just as much danger of mistaken identification as cases involving persons first seen at the times of their alleged crimes*. It would therefore be illogical to hold that a warning as to the dangers of mistaken identification of the sorts discussed in *Domican* need never be given in a recognition case. … Whether such a warning is necessary in a recognition case must depend on all the relevant circumstances, including *the degree of familiarity of the witness with the accused*, the circumstances in which the accused was previously seen by the witness or known to the witness, and the circumstances in which the accused is alleged to have been seen by the witness at or about the time of the crime.[13]

The above passage constitutes judicial acceptance of the concept of degrees of recognition, which will depend upon how well a witness knows a person, when they last saw them, and the circumstances in which they were identified. For example, evidence of recognition of one sibling by another, in circumstances allowing little scope for a mistake, would

[13] *Carr v R* (2000) 117 A Crim R 272, 289 (emphasis added).

obviously be considered a strong recognition identification (and would effectively rule out any risk of displacement, as discussed above).[14]

In the circumstances of the second hypothetical, the recognition of Andrew Jones by Mary is clearly fairly weak. She only knows 'of' Andrew Jones and is better acquainted with his mother. Let's assume she hasn't met him but only thinks 'she saw him around'. As a result, it's entirely conceivable that when she produced a photo of Andrew Jones on her phone, she subconsciously displaced the face of the offender with Andrew Jones' face, becoming convinced in the process that the offender was the same person. So displacement is possible in the context of recognition evidence, but will depend on the strength of the identification (which in turns depends on the degree of the recognition and the circumstances in which the identification is made).

E *Difficulties in testing identification evidence*

Further amplifying the dangers of identification evidence generally is the conviction with which witnesses will often give evidence about identification. Their certainty does little to strengthen their evidence, but markedly increases the risk of unfair prejudice against an accused; in other words, a witness' certainty grants their evidence an unwarranted persuasiveness due to the risk, which may not be apparent due to a jury, of their identification being mistaken. The case law is clear about the danger of misidentification even when witnesses are adamant. Consider the remarks of Spigelman CJ in *R v Marshall*:

> The prejudice often associated with identification evidence is that, *although mistaken, it is frequently given with great force and assurance by the person who made the identification*. These are matters about which witnesses frequently refuse to admit the possibility that they might have erred and, accordingly, give evidence in a particularly definitive form.[15]

Intensifying this issue is the judicially acknowledged problem that cross-examination is a limited tool in testing a witness' ability to recognise faces.[16] In cases of possible displacement, a witness who is honestly mistaken would not be conscious of displacement having occurred, and any cross-examination would more likely result in simple affirmation of the evidence of identification.[17] The risk of prejudice is clear: a jury may place undue weight upon the evidence of a mistaken witness due to the apparent certainty, even under cross-examination, of their claim.

F *Single suspect identification and displacement*

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[14] However, courts have noted the possibility of mistake even between close family members — see *R v Smith* (2001) 206 CLR 650, 667–8 [55].
[15] (2000) 113 A Crim R 190, 192 [15] (emphasis added). See also *Longmair v Bott* [2010] NTSC 30 [18].
[16] *Longmair v Bott* [2010] NTSC 30 [18].
[17] See *R v Smith (No 3)* [2014] NSWSC 771 [32]–[34].

Often linked to instances of displacement are cases in which a witness has made an identification from a single photograph, or has simply identified a suspect when seeing them on their own (that is, without the 'foils' that are included in a photo board procedure or a police line-up). These are known as 'single suspect' identifications. Their link to the risk of displacement is obvious: most often it is the later viewing of a single suspect that carries the risk of displacing the memory of the original offender.[18]

In single suspect identifications, this risk is further exacerbated when accompanied by another factor (or factors) which suggest the guilt of the person identified. Some examples where this has been found to have occurred include:

a) The identification of a single suspect at a police Station;[19]
b) The viewing of a single suspect in the back of a police car;[20]
c) The presentation of a single photo of a suspect by police for identification;[21]
d) Identification from a Facebook photo in circumstances linking the person identified to serious crimes;[22]
e) Dock identifications without prior identification by a witness.[23]

Conventionally, single suspect identifications have occurred because of a suspect's apparent link to a crime or criminality, either through suggestion or because they have been charged (a dock identification being an example of the latter). However, recent cases have demonstrated that prejudicial single suspect identifications can occur in other ways. The Facebook identification hypothetical demonstrates how the viewing of a person from a single photo — in circumstances where it is being *suggested* to the witness (Jane) that the person in the photo is the offender — would amplify the risk of misidentification, and particularly so when combined with the risk of displacement. Further, courts have recognised that witnesses may be desirous of assisting police when shown photographs by police, creating a subconscious pressure.[24] Similar subconscious pressures may well bear upon those keen to identify a person through social media investigations prior to police involvement.

II PROBATIVE VALUE OF IDENTIFICATION EVIDENCE

A *Relevant definitions*

[18] This is not to say that displacement cannot also occur when viewing a photo containing more than one person, or even a group, as noted by Peek J in the course of excluding an identification made in such circumstances — see *Strauss v Police* (2013) 115 SASR 90, 103–4 [36] ('*Strauss*').
[19] *R v Marshall* (2000) 113 A Crim R 190.
[20] *R v Burchielli* [1981] VR 611.
[21] *R v Ormsby* [1985] 1 NZLR 311.
[22] *Bayley* [2016] VSCA 160.
[23] *Grbic v Pitkethly* (1992) A Crim R 12. There are numerous other historical instances of dock identification which have since been found to have had little if any probative value, whilst remaining high in prejudicial effect — see, eg, *Bayley* [2016] VSCA 160 [92].
[24] See, eg, *Pitkin v The Queen* (1995) 69 ALJR 612.

1 *Section 137*

Section 137 is the provision most often used to exclude identification evidence of the type that is the subject of this paper. Under s 137 of the Evidence Acts, a 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. So it is a mandatory, rather than discretionary provision, and reads: '[i]n 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.[25]

In the context of s 137 objections, courts have qualified 'prejudice':

> Prejudice argues for exclusion only if there is a *real risk* of danger of it being unfair: *R v Lisoff* [1999] NSWCCA 364. This may arise in a variety of ways, a typical example being where it may lead a jury to adopt an illegitimate form of reasoning, or to give the evidence undue weight.[26]

A more detailed paper would assess exactly how the risks related to misidentification might give rise to a risk of prejudice — there being little doubt that this can, and does occur[27] — as well as how the courts might deal with such evidence if it is ultimately admitted after consideration of s 137 (whether through appropriate jury directions, editing of the evidence, or the limitation of its use in a trial). However, that type of analysis is beyond this paper's scope. Rather, this part will focus on a more narrow, though no less crucial consideration: how to assess the probative value of this type of evidence, and how identification evidence might in fact help us to correctly assess and define probative value itself.

2 *Probative value*

Probative value is defined in the Dictionary to the Evidence Acts as follows: '[p]robative value', of evidence, means the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue.[28] This definition is evidently supplementary to the definition of relevance of evidence, drawn from s 55 of those same Acts: '[t]he 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.'[29]

The concept of probative value has been the source of significant and contemporary judicial discussion, having recently been comprehensively analysed by the High Court in

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[25] Evidence Acts s 137.
[26] *R v Yates* [2002] NSWCCA 520 [252].
[27] See *R v Marshall* (2000) 113 A Crim R 190, 192 [15], cited in *Bayley* [2016] VSCA 160 [81]–[82].
[28] Evidence Acts Dictionary pt 1 (definition of 'probative value') (excluding *Evidence Act 2011* (Tas)); *Evidence Act 2011* (Tas) s 3 (definition of 'probative value').
[29] Evidence Acts s 55.

IMM.[30] In *IMM,*[31] the High Court was considering the admissibility of tendency evidence that had been admitted in the context of a sexual assault trial in the Supreme Court of the Northern Territory, that decision having been subsequently appealed to the Northern Territory Court of Criminal Appeal.[32] Beyond the specifics of that case, the High Court's judgment was viewed as one of enormous jurisprudential importance, in the sense that it would resolve a long-standing dispute between the New South Wales Court of Criminal Appeal and the Victorian Court of Appeal as to whether, in assessing probative value, a judge should take into account the credibility of a witness or the reliability of the evidence.[33]

The majority of the High Court ultimately sided with the NSWCCA in ruling that neither credibility nor reliability could be taken into account; Gageler J dissented, as did Nettle and Gordon JJ jointly, all three ruling that both credibility and reliability must be taken into account in an assessment of probative value (though for somewhat different reasons). The majority, in reaching their converse position, essentially reasoned as follows:

a) The statutory definition of relevance presupposes that the jury will accept the evidence in question because it explicitly includes the words 'if it were accepted'.
b) An assumption that the jury will accept the evidence necessarily precludes a consideration of credibility or reliability as part of the assessment of that evidence.
c) The inclusion of the definition of relevance within the definition of probative value means that we should understand probative value as 'degree of relevance'.
d) Because of this relationship, as a matter of practical necessity any assessment of probative value requires the same presumption that relevance requires: that the jury will accept the evidence.[34]
e) This is so despite the omission of the words 'if it were accepted' from the definition of probative value.

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[30] (2016) 257 CLR 300.
[31] Ibid.
[32] *IMM v The Queen* [2013] NTSC 9; *IMM v The Queen* [2014] NTCCA 20.
[33] The position of the Victorian Court of Appeal had been made clear in *Dupas v The Queen* (2012) 40 VR 182; the contrary position of the New South Wales Court of Criminal Appeal was initially established in the case of *R v Shamouil* (2006) 66 NSWLR 228, then re-affirmed in *R v XY* (2013) 84 NSWLR 363. It should be noted that the Court in *Dupas v The Queen* (2012) 40 VR 182 had determined that credibility could not be considered but that reliability could; however, the appellant in *IMM* (2016) 257 CLR 300 argued that both must be taken into account when assessing probative value.
[34] On this point the majority rely heavily on an observation made by Gaudron J in *Adam v The Queen* (2001) 207 CLR 96, 115 [60], which was to the effect that the definition of 'probative value' in pt 1 of the Dictionary to the *Evidence Act 1995* (NSW) must have read into to it an assumption that a jury will accept the evidence as a matter of practicality. The minority judgments rely upon the conflicting view of another High Court Justice, McHugh J, who two years earlier had observed that an assessment of probative value 'necessarily involve[s] considerations of reliability' — *Papakosmas v The Queen* (1999) 196 CLR 297, 323. The majority in *IMM* (2016) 257 CLR 300 dismissed McHugh J's remarks as 'having been made in passing': see *IMM* (2016) 257 CLR 300, 316 [56]. Both minority judgments preferred McHugh J's position over that of Gaudron J's: see *IMM* (2016) 257 CLR, 324 [94] (Gageler J); *IMM* (2016 257 CLR, 337 [140] (Nettle, Gordon JJ).

f) Hence, in assessing probative value, neither credibility nor reliability can be considered.

The crucial point upon which the majority and both minority decisions disagree is whether an assessment of probative value requires an assumption that the jury will accept it ('d)' above) — the dissenting judgments did not take issue that such a preclusion must exist for relevance, given that it is statutorily required. This point of contention turns even more narrowly upon the import of the absence of the words 'if it were accepted' from the statutory definition of probative value, and forms the heart of the interpretative dispute between the two camps: the majority regard that absence to have little significance, whilst the minority decisions accord it great significance. This 'conundrum of statutory construction' is summarised in Gageler J's dissenting judgment:

> The statutory assumption required by the words 'if it were accepted' therefore has the result that, where the tribunal of fact is a jury, a judge determining whether evidence is relevant is 'neither required nor permitted … to make some assessment of whether the jury would or might accept it'. The judge is required instead to assume that the jury would find the evidence to be credible and otherwise reliable and to ask, on that assumption, whether the jury could rationally infer from the evidence that the existence of a fact in issue is more or less probable.
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> The particular conundrum of statutory construction at the heart of this appeal is whether the same assumption must be made for the purpose of determining probative value. Where the tribunal of fact is a jury, is a judge determining probative value required to assume that the jury would find the evidence to be credible and otherwise reliable and to assess, on that assumption, the extent to which the jury could rationally infer from the evidence that a fact in issue is more or less probable? Alternatively, is the judge required to examine whether the jury could rationally find evidence to be credible and otherwise reliable as a step in determining the extent to which the jury could rationally infer from the evidence that the fact in issue is more or less probable?[35]

Gageler J takes the latter of these two positions, though of course the ultimate result of *IMM*[36] is that when considering probative value a trial judge must now proceed on the assumption that a jury will accept the evidence. As such, neither the credibility of a witness nor reliability of the evidence in question is relevant to its assessment.[37] Nevertheless, as I suggest later, the reasoning process employed by the majority has the effect that this proscription is not as strict as it first seems.

3 *Credibility and reliability*

It will be useful to consider the definitions of credibility and reliability at this point: though used habitually by lawyers, judges, and jurists, they are not as easy to define as might be first thought. In *IMM,* Nettle and Gordon JJ (in dissent) implicitly acknowledge this difficulty in the process of defining the terms as understood traditionally by the common law:

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[35] *IMM* (2016) 257 CLR 300, 321-2 [83]–[84] (citations omitted).
[36] (2016) 257 CLR 300.
[37] Ibid, 315 [52].

> Before proceeding further, it is important to be clear about what is meant by 'credibility' and 'reliability' in this context. At common law, a distinction was ordinarily drawn between the two concepts. The credibility of a witness was commonly understood as meaning the 'truthfulness' of the witness — whether the witness genuinely believed that he or she was telling the truth. Reliability, on the other hand, referred to the ability of the witness accurately to discern and relay the truth as to an event, including the witness' ability to observe and remember facts. For example, if an event occurred a long time ago, that might affect the reliability of the witness because it is generally accepted that memory is prone to fade over time.[38]

However, the Evidence Acts define 'credibility' of a witness as: 'the credibility of any part or all of the evidence of the witness, and includes the witness' ability to observe or remember facts and events about which the witness has given, is giving, or is to give evidence.'[39] This statutory definition subsumes both common law reliability and credibility of a witness under the one term, and must be preferred to the common law as the 'primary source' when interpreting rules of evidence.[40] What that leaves open is the definition of *reliability*, undefined under the Evidence Acts.

So what does this all mean for identification evidence, and more specifically the type of evidence that is the subject of this paper? The crucial questions for present purposes post-*IMM*[41] concern reliability. Does the exclusion of the consideration of reliability in an assessment of probative value require the exclusion of a consideration of *all* of the factors that historically underpin the dangers of identification evidence? And does it exclude a consideration of the circumstances in which an identification is made?

In the remainder of the third part, the paper looks at some recent cases that have considered the admissibility of identifications made from social media,[42] and then explores how best to measure the probative value of identification after *IMM*.[43] It argues that *IMM*[44] may not found as strict an approach to an assessment of probative value as may first appear to be the case, using a conceptual categorisation of types of reliability to illustrate this claim.

B *Cases that have considered exclusion of social media identifications*

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38 Ibid, 330 [114].
39 Evidence Acts Dictionary pt 1 (definition of 'credibility of a witness') (excluding *Evidence Act 2011* (Tas)); *Evidence Act 2011* (Tas) s 3 (definition of 'credibility of a witness').
40 See *IMM* (2016) 257 CLR 300, 311 [34], citing *Papakosmas* (1999) 196 CLR 297, 302 [10] and *R v Ellis* (2003) 58 NSWLR 700, 716–7 [78].
41 (2016) 257 CLR 300.
42 For a further analysis of such cases other than those considered in this paper, see Paul McGorrery, 'The Limited Impact of Facebook and the Displacement Effect on the Admissibility of Identification Evidence' (2015) 39(4) *Criminal Law Journal* 207; Paul McGorrery, '"But I Was So Sure It Was Him": How Facebook Could Be Making Eyewitness Identifications Unreliable' (2016) 19(1) *Internet Law Bulletin* 255.
43 (2016) 257 CLR 300.
44 Ibid.

1 *South Australian cases*

Two recent South Australian decisions, both preceding *IMM*,[45] have considered arguments to exclude identifications made from social media recently (both Facebook). One is a decision of Peek J of the South Australian Supreme Court in which the appeal was upheld, the other a decision of the Court of Criminal Appeal, in fairly similar circumstances, which dismissed an appeal against conviction (Peek J dissenting).

It is worth noting — because South Australia does not employ any equivalent of the Evidence Acts — that these cases considered in part the application of the *Christie*[46] discretion, which was the common law predecessor to s 137 (also discussed extensively in *IMM*).[47] Differences between the *Christie*[48] discretion and s 137 aside, the cases are useful insofar as they involve an assessment of the probative value of social media identification evidence and the concomitant risk of prejudice to an accused.

The first is the matter of *Strauss*.[49] Prior to the appeal, the accused had been convicted — in the summary jurisdiction — of being one of a group that had assaulted someone. There were several independent witnesses to the assault, and two persons, including the victim, identified the accused on Facebook after the incident. But this identification occurred only after another witness or witnesses had suggested the accused's name as a person they thought was present, and after the two persons mentioned had accessed the accused's profile on Facebook (on separate occasions). These witnesses also later identified the accused in court.

Peek J upheld the appeal on insufficiency of evidence rather than by finding that the evidence should have been excluded, though he noted that the '*Christie*[50] discretion' to exclude the evidence was clearly available.[51] He remarked upon the low probative value of the in-court identifications[52] and the unreliability of the Facebook identifications.[53] In the process of his reasoning, Peek J referred to much of the psychological research in relation to displacement and the risks of misidentification and applied those findings to the circumstances of identifications made from social media. He remarked:

> Long before the advent of Facebook, it was well-recognised in both the courts and the scientific literature that identification evidence, particularly in relation to strangers, has 'special problems'. It is a suspect type of evidence: 'notoriously uncertain', 'often proved to be unreliable' and

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45 (2016) 257 CLR 300.
46 *R v Christie* [1914] AC 545 ('*Christie*').
47 (2016) 257 CLR 300.
48 [1914] AC 545.
49 (2013) 115 SASR 90. Peek J also provides a detailed and thorough analysis of all of the dangers of identification evidence in the modern age, referring to extensive academic research in support of his findings.
50 [1914] AC 545.
51 *Strauss* (2013) 115 SASR 90, 146 [206].
52 Ibid, 141 [183].
53 Ibid, 103–4 [36]–[37].

> 'proverbially untrustworthy'. But despite its unreliability, eyewitness testimony remains very persuasive. Identification is a matter about which many witnesses are over-confident, even dogmatic. Such evidence is rightly described as 'seductive'.[54]

However, in the later case of *R v Crawford*,[55] a majority of the South Australian Court of Criminal Appeal upheld a trial judge's decision to admit evidence of an identification from Facebook. In that matter, the defendant had been charged with a 'home invasion' robbery. The Crown case was that, with two co-offenders, he had entered the house of the victim (who was known to him) and threatened him with a shovel, asking for money. There was a brief struggle before the victim managed to escape over the fence. The victim told police that he did not know the co-offenders, but was told the name of the defendant by them. He later searched Facebook using that name, and told police that he recognised the defendant from photos relating to one of the profiles he had found. Subsequently, police put together a photo board parade from which the victim again picked out the defendant.

Gray J dismissed the appeal against admission of the evidence despite remarking that '[i]t is plain that the value of the identification evidence was relatively low.'[56] Nicholson J also dismissed the appeal, though similarly and separately remarking that the probative value of both the photo board identification and the Facebook identification, taken either separately or together, was 'slight'.[57] Both found that the risk of prejudice arising (largely as a result of displacement) could be cured by judicial direction.

However, it is worth reiterating that the admissibility test applied was markedly different from that required by s 137, the test applied being a 'general unfairness' test (the Court being of the view that this test subsumed the *Christie*[58] test).[59] This called for a consideration of whether the admission of the evidence would 'create a perceptible risk of miscarriage of justice or a perceptible risk that could not adequately be avoided by directions'.[60] It is possible, I suggest, that an application of s 137 to the same evidence might have produced a different result.

Peek J separately wrote a comprehensive dissent in this case, carefully considering the evidence in the matter before reiterating the factors that can easily skew reliability of an identification made from social media, such as displacement, lack of 'foils' (as in photo board arrays), and factors suggestive of guilt. He considered that the probative value of the identification evidence, 'taken as a whole', was 'slight',[61] and ultimately ruled that the evidence should have been excluded pursuant to the 'general unfairness' test, though

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[54] Ibid, 97–98 [17] (citations omitted). With regards the quoted expressions, each is extensively footnoted in the full judgment, with reference to detailed academic research.
[55] (2015) 123 SASR 353 ('*Crawford*').
[56] Ibid, 364 [35].
[57] Ibid, 385–6 [125].
[58] [1914] AC 545.
[59] *Crawford* (2015) 123 SASR 353, 362 [25] (Gray J), quoting *R v Lobban* (2000) 77 SASR 24, 49–50.
[60] Ibid, 363 [30] (Gray J), quoting *R v Lobban* (2000) 77 SASR 24, 48.
[61] Ibid, 371 [68].

noting that he would have excluded the evidence alternatively under either the *Christie*[62] or public policy discretion.[63] In relation to the broader context of this paper, the main point to be taken from the decisions of both *Strauss*[64] and *Crawford*[65] is that, notwithstanding the differences in the judgments, there was recognition on all sides that, due to the problems associated with the identifications made from social media, the probative value of such evidence is often low.

2 *Victorian case*

Both *Strauss*[66] and *Crawford*[67] were determined prior to the High Court's decision in *IMM*.[68] However, in *Bayley*,[69] the Victorian Supreme Court of Appeal also considered the admissibility of an identification made from Facebook, but *after* the decision in *IMM*.[70] The appeal was one of several heard in *Bayley*[71] following three separate trials of the accused, but only the first (as it is referred to in the case) is relevant to this paper. That appeal ground was that the verdict was unsafe and unsatisfactory, but the decision largely turned on the trial judge's decision to admit identification evidence.

The facts in that matter were such that, plausibly, the probative value of the identification evidence was negligible at best. The complainant in the matter made an identification of Adrian Bayley twelve years after the alleged offending (rape) from a picture of him she saw on Facebook. Mr Bayley had notoriously already been convicted and sentenced for murdering a woman named Jill Meagher, and the picture was accompanied by information linking him to this murder. Having informed police of her identification, the police conducted a photo board identification procedure during which the complainant selected Mr Bayley.

In finding that the evidence should have been excluded pursuant to s 137, the Court referred to, and re-asserted, a line of authority that was said to ground a policy of exclusion of unreliable identification evidence:

> Garling J's ruling in *Smith* represents a recent application of well-established doctrine. In general terms, identification evidence of a questionable nature should not be admitted because there is a real risk that, irrespective of the strength of any warning that might be given to the jury as to its possible infirmity, it will be accorded more weight than it actually merits. There are many examples, at trial level, of weak identification evidence having been excluded rather than left to

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62 [1914] AC 545.
63 Ibid, 385 [121].
64 (2013) 115 SASR 90.
65 (2015) 123 SASR 353.
66 (2013) 115 SASR 90.
67 (2015) 123 SASR 353.
68 (2016) 257 CLR 300.
69 [2016] VSCA 160
70 (2016) 257 CLR 300.
71 [2016] VSCA 160.

the jury with strong warnings, for their consideration. There are also examples at appellate level of such evidence having been said to be inadmissible.[72]

Further, in some contrast to the characterisation of such evidence by the Court of Criminal Appeal in South Australia in *Crawford*,[73] the Victorian Supreme Court of Appeal found that the Facebook identification in *Bayley* 'was in some respects no better than a dock identification. Indeed, it could reasonably be viewed as worse.'[74] However, the most interesting aspect of *Bayley*[75] was the Court's reference to a hypothetical scenario first postulated by the Hon Dyson Heydon in a paper published[76] just prior to the decision in *IMM*.[77] This hypothetical was subsequently used by the High Court in *IMM*[78] to illustrate how identification evidence, in particular, might be lessened in probative value — due to the circumstances in which it was made — *without* taking reliability into account (as prohibited by the decision).[79] The Court of Appeal in *Bayley* remarked:

> Importantly, their Honours said [referring to the majority in *IMM*]:
>
> > 'It must also be understood that the basis upon which a trial judge proceeds, that the jury will accept the evidence taken at its highest, does not distort a finding as to the real probative value of the evidence. *The circumstances surrounding the evidence may indicate that its highest level is not very high at all.* The example given by J D Heydon QC was of an identification made very briefly in foggy conditions and in bad light by a witness who did not know the person identified. As he points out, on one approach it is possible to say that taken at its highest it is as high as any other identification, and then look for particular weaknesses in the evidence (which would include reliability). *On another approach, it is an identification, but a weak one because it is simply unconvincing.* The former is the approach undertaken by the Victorian Court of Appeal; the latter by the New South Wales Court of Criminal Appeal. *The point presently to be made is that it is the latter approach which the statute requires. This is the assessment undertaken by the trial judge of the probative value of the evidence.*'
>
> As may be gleaned from these passages, French CJ, Kiefel, Bell and Keane JJ were attracted to the example given by former Justice Heydon. He had observed that the 'disputation between and within the intermediate appellate courts of New South Wales and Victoria is detailed', but the 'detail may obscure the possible fact that the gap is narrow'.

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[72] Ibid [75]–[76] (citations omitted).
[73] (2015) 123 SASR 353.
[74] Ibid [94].
[75] [2016] VSCA 160.
[76] Dyson Heydon, 'Is the Weight of Evidence Material to Its Admissibility?', (2014) 26 *Current Issues in Criminal Justice* 234.
[77] (2016) 257 CLR 300.
[78] Ibid.
[79] Ibid, 392 [50].

> Adopting the approach described by Heydon, and seemingly endorsed by the majority in *IMM*, GH's purported identification from Facebook was, in our view, not merely weak, but 'simply unconvincing'. [80]

The Victorian Court of Appeal's adoption of the Hon Dyson Heydon's hypothetical indicates judicial acceptance of the principle that the circumstances 'surrounding the evidence' could render it 'simply unconvincing', consequently lowering its probative value. What the decision does not answer is whether 'simply unconvincing' is a standard that forms a static bar, or whether it is a point on a spectrum; it also leaves open the possibility that 'unconvincing' is merely another word for 'unreliable'. Both of these questions are discussed further below with reference to *IMM*.[81]

C *Assessing the probative value of identification evidence*

Due to the risk of mistakes in identification evidence, procedures have developed over time to govern police line-ups and photo board identifications. Peek J highlighted the dangers presented by social media identifications by pointing to the obvious lack of these safeguards in *Strauss*:

> So called '*Facebook* identifications' have none of the safeguards which accompany a properly executed formal identification procedure conducted by the police. Purported *Facebook* identifications from group photographs are particularly dangerous in that they present a seductive and deceptive air of being a plausible identification but in fact rarely involve a group of people each having similar features to the accused; they suffer from 'foil bias' as discussed above. Consequently, if a suspect with similar features to the real offender is depicted in a photograph of a group whose other members lack those features, the suspect will likely be identified by a witness as the offender in the fervour of the superimposed '*Facebook* chat' and the pressure of the moment. The displacement effect will then later proceed to erase from the memory the subtle differences between the real offender and the person identified.[82]

Few would dispute that identifications such as the ones referred to in *Strauss*[83] would constitute weaker or less reliable evidence than would the evidence produced from a properly conducted identification from a photo board. But given that we are now barred from assessing the reliability of evidence, why wouldn't this exclusion also apply to the

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[80] *Bayley* [2016] VSCA 160 [52]-[55] (emphasis in original) (citations omitted). A side-issue here is what is meant by the term 'at its highest' as it is used by the High Court in its analysis of probative value in *IMM* (2016) 257 CLR 300, 313 [44]. The majority state at that point that '[t]he assessment of "the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue" requires that the possible use to which the evidence might be put, which is to say how it might be used, be taken at its highest.' This suggests that, in an analysis of probative value, it must be assumed that the jury would both use the evidence for the purpose for which it is sought to be adduced, and accord it as much weight as it rationally could be for that purpose.

[81] (2016) 257 CLR 300.

[82] *Strauss* (2013) 115 SASR 90, 103–4 [36]. See also *Bayley* [2016] VSCA 160 [64]–[65].

[83] (2013) 115 SASR 90.

inherent unreliability — due to the lack of safeguards referred to above — presented by social media identifications? An answer to this question is suggested below.

1 *Problem for identification evidence post-*IMM

On a plain reading of the majority in *IMM*,[84] an identification from a line up or a photo board would *necessarily* carry the same probative value as one from Facebook. Both are positive identifications, and if we are to assume that a) the jury will accept the evidence and b) we are barred from considering the evidence's reliability, then the two identifications must carry the same probative value. So, on this strict interpretation, we seem to be left in the undesirable position of attributing an equal and inordinately high level of probative value to *any* identification evidence.

But are there other ways of assessing probative value after *IMM*?[85] I suggest that there are, and in this context there are two important takeaways from that case: the first concerns the use of Hon Dyson Heydon's hypothetical, and whether this founds a separate means through which to assess probative value;[86] the second relates to the different types of reliability referred to in the different judgments in *IMM*,[87] and how these might help us think about how courts should approach the assessment of probative value of identification evidence in the future.

2 *The Hon Dyson Heydon's hypothetical*

The Hon Dyson Heydon's hypothetical is quoted in the excerpt from *Bayley*[88] above, and involves an identification 'made very briefly in foggy conditions and in bad light by a witness who did not know the person identified.'[89] The majority's apparent endorsement of the use of 'circumstances in which an identification is made' as a factor that may render evidence 'simply unconvincing' seemingly operates as a separate means through which the probative value of that evidence might be reduced. This was also clearly the view of the Victorian Court of Appeal in *Bayley*.[90]

The first question, however — assuming that this does indeed form a means of measuring probative value — is whether the status of evidence as 'simply unconvincing' forms a static bar, or whether it implicitly suggests a spectrum of 'unconvincingness', such that circumstances of an identification may render it slightly, somewhat, or 'simply' unconvincing.

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[84] (2016) 257 CLR 300).
[85] Ibid.
[86] *IMM* (2016) 257 CLR 300, 315 [50].
[87] (2016) 257 CLR 300.
[88] [2016[VSCA 160.
[89] As paraphrased by the majority in *IMM* (2016) 257 CLR 300, 392 [50].
[90] [2016[VSCA 160 [52]–[55].

I suggest that the characterisation of 'simply unconvincing' as a static bar is illogical: if that were the case, identification evidence would be highly probative right up to the point that it crossed a conceptual line that suddenly dropped its probative value to a negligible, borderline irrelevant level. On the other hand, the alternative reading is that the circumstances in which an identification was made render that identification more or less 'convincing', suggesting that the level of 'simply unconvincing' is a point on a spectrum of 'convincingness' relevant to determining probative value.

It is not clear that this is what the Victorian Court of Appeal had in mind in *Bayley*,[91] but that Court clearly did consider that the circumstances of an identification being made from Facebook (combined with other facts, like age and suggestibility) were circumstances that — given the message of the Hon Dyson Heydon's hypothetical — could also reduce the probative value of the evidence. The problem is that there would seem to be little conceptual difference between a scale of 'unconvincingness' and a scale of unreliability. Nevertheless, and whatever the interpretation, after *Bayley*[92] there exists support for the proposition that identifications made from social media can be made in circumstances that reduce that identification's probative value.

III TYPES OF RELIABILITY

The assessment of probative value post-*IMM*[93] is assisted by a suggested categorisation of different types of reliability. For reasons stated below, there are three distinguishable categories, at least with regards to identification evidence: 'personal' reliability; 'circumstance' reliability; and 'categorical' reliability. As mentioned above, credibility but not reliability is defined under the Evidence Acts.

A *Personal Reliability*

It will be recalled that the common law definitions of credibility and reliability — as spelt out by Nettle and Gordon JJ in *IMM* — essentially distinguish the terms by describing them as 'truthfulness' on the one hand (credibility), and on the other 'the ability of [a] witness accurately to discern and relay the truth as to an event' (reliability).[94] By contrast, the majority in *IMM*[95] rely upon the Evidence Act dictionary's definition of credibility, which, as mentioned earlier, subsumes the common law definitions of credibility and reliability under the one term: 'credibility'.[96]

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91 [2016[VSCA 160.
92 Ibid.
93 (2016) 257 CLR 300.
94 *IMM* (2016) 257 CLR 300, 330 [114].
95 (2016) 257 CLR 300.
96 Evidence Acts Dictionary pt 1 (definition of 'credibility of a witness') (excluding *Evidence Act 2011* (Tas)); *Evidence Act 2011* (Tas) s 3 (definition of 'credibility of a witness'). As much is also observed by Gageler J in *IMM* (2016) 257 CLR 300, 321 [82].

However, for the purposes of unpacking the decision in *IMM*,[97] it is useful to define the above type of common law reliability — the 'ability of [a] witness accurately to discern and relay the truth as to an event'[98] — as 'personal reliability'. The definition of credibility in the Dictionary to the Evidence Acts also explicitly acknowledges and defines this type of reliability, stipulating that the credibility of a witness 'includes the witness's ability to observe or remember facts and events about which the witness has given, is giving or is to give evidence'.[99]

Given that the majority in *IMM*[100] relies upon the Evidence Act definition of credibility — which subsumes 'personal reliability', as just defined — it follows that when the majority makes reference to reliability of evidence, it is necessarily being made to reliability *other* than 'personal reliability'. This much seems to be made even clearer by the definition of credibility in the Evidence Acts, which speaks only of the credibility of a 'witness' or 'person', again much like the common law definitions of credibility and reliability.[101] In other words, neither credibility (as it is defined in the Evidence Acts) nor credibility and reliability (as those terms are defined by the common law) contemplate any type of reliability of evidence other than that which might arise from factors personal to the witness giving the evidence.

This may be why the majority in *IMM* consistently refers to the 'credibility of a witness and the reliability of *evidence*'.[102] This again implies that 'personal reliability' is subsumed within the statutory definition of credibility of a witness, suggesting that 'reliability of evidence', as the majority in *IMM*[103] uses that term, refers to types of reliability of evidence that do not relate to a witness' ability to relay their memory of events. At the very least, it contemplates types of reliability outside personal reliability as defined.

Given the ruling of the majority, personal reliability cannot be taken into account when assessing the probative value of evidence post-*IMM*.[104] This is the case even outside the context of identification evidence. However, the definition is useful as it allows us to distinguish it from the other types of reliability of identification evidence.

B *Circumstance reliability*

The second type of reliability of identification evidence is the degree of reliability (or unreliability) derived from the *circumstances* in which an identification was made. In other words, even if a witness was highly reliable in terms of their personal capacity to observe

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97 (2016) 257 CLR 300.
98 *IMM* (2016) 257 CLR 300, 330 [114].
99 Evidence Acts Dictionary pt 1 (definition of 'credibility of a witness') (excluding *Evidence Act 2011* (Tas)); *Evidence Act 2011* (Tas) s 3 (definition of 'credibility of a witness').
100 (2016) 257 CLR 300.
101 Evidence Acts Dictionary pt 1 (definition of 'credibility') (excluding *Evidence Act 2011* (Tas)); *Evidence Act 2011* (Tas) s 3 (definition of 'credibility').
102 See *IMM* (2016) 257 CLR 300, 304 [4], 307 [20].
103 (2016) 257 CLR 300.
104 Ibid.

and relay what they had seen or heard (personal reliability), there may be factors external to them that would hamper their ability to see or hear and thus affect the reliability of their observations. An example of factors that would affect the circumstance reliability of identification evidence are the 'dark and foggy' conditions of the Hon Dyson Heydon's hypothetical.

I suggest that circumstance reliability can, consistently with *IMM*,[105] be taken into account when assessing the probative value of identification evidence. This would initially seem problematic, given the majority's proscription of reliability as a factor that can legitimately be taken into account as part of such an assessment. Yet despite that proscription, the majority considered the Hon Dyson Heydon's hypothetical as a set of circumstances that would reduce probative value, as the circumstances would render an identification made in such conditions 'simply unconvincing'.[106] If one were to accept that this reasoning contemplates a scale of 'unconvincingness', as suggested earlier, then it is not a leap to consider 'unconvincingness' as merely unreliability by another name.

As such, circumstance reliability — that is, a set of factors external to a person that might affect the reliability of an identification made by them — would appear to be a definable type of reliability that *can* be taken into account when assessing the probative value of identification evidence despite the ruling in *IMM*.[107]

C *Categorical reliability*

Finally, certain categories of evidence have long been accepted as inherently unreliable; some of these categories are explicitly recognised in the Evidence Acts as such (identification evidence being one such category).[108] Nettle and Gordon JJ also make this observation in their dissenting judgment in *IMM*, importantly tying this unreliability back to questions of the traditional inadmissibility of such evidence:

> Similarly under the Act, the rules of admissibility and exclusion are based on the understanding that some evidence may be so unreliable as to have minimal capacity to bear on the facts. Just as at common law, so too under the Act it is recognised that *particular categories of evidence* – including hearsay evidence, identification evidence and evidence of bad character (of an accused or witness) can be and sometimes are so unreliable as to make the evidence unsuitable for the jury's consideration. … It is the discharge of the long recognised duty of a trial judge to exclude evidence that, *because of its nature or inherent frailties*, could cause a jury to act irrationally either in the sense of attributing greater weight to the evidence than it is rationally capable of bearing or because its admission would otherwise be productive of unfair prejudice which exceeds its probative value.[109]

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[105] Ibid.
[106] Ibid, 314–5 [50].
[107] (2016) 257 CLR 300.
[108] Evidence Acts ss 116, 165.
[109] *IMM* (2016) 257 CLR 300, 345–6 [159]–[161].

Despite these dissenting observations, a plain reading of *IMM*[110] suggests that this third type of unreliability cannot be taken into account when assessing probative value. However, in the recent judgment of *The Queen v Dickman*,[111]it is apparent that the High Court determined that inherent, categorical problems with identification evidence (and particularly, photographic identification evidence) *should* lessen its probative value. In that case, the admissibility of an identification made from a photo board array by a man called Mr Aakbari in August 2011 was being considered under s 137 of the *Evidence Act 2008* (Vic); the Crown case was that the accused was the 'old man' to whom reference is made below:

> In written submissions, the appellant complains that the Court of Appeal majority wrongly took into account their Honours' assessment that Aakbari was an unreliable witness of identification. As the appellant acknowledged on the hearing of the appeal, the complaint is not to the point in circumstances where *there is no dispute that the probative value of the evidence was rightly assessed by the trial judge as low*. This was an estimate that *did not depend upon his Honour's assessment of Aakbari's truthfulness or reliability as a witness*. Assuming that the jury would accept the August 2011 identification at its highest, it was identification with limited capacity to rationally affect the assessment of the probability that the respondent was the 'old man'. *This is to recognise not only the limitations of photographic identification*, but also that the August 2011 identification was evidence of Aakbari's opinion that of the 11 men whose photographs were included in the array, the respondent's photograph bore the closest resemblance to his recollection of the appearance of the man who had assaulted him two years earlier.[112]

The crucial takeaway from the above is the High Court's clear acknowledgement of the 'limitations of photographic identification' as a factor that renders that category of evidence less probative than other types of identification evidence. True it is that the evidence, taken at its highest in *Dickman*,[113] was not as high as a more definitive identification (due to the fact that the witness' evidence was simply that it bore the closest resemblance to the accused) — but that does not detract from this first point. What is unambiguous is that firstly, photographic identification is a type of evidence that carries with it a general, categorical unreliability; and secondly — and despite *IMM*[114] — it is a characteristic that will lessen the probative value of that type of evidence.

By extension, it would seem now a requirement that categorical reliability issues with identification evidence be taken into account when determining probative value, even post-*IMM*.[115] One such category would be identification evidence giving rise to a risk of displacement; as suggested, this risk would be far more commonplace in identifications made from social media.

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[110] (2016) 257 CLR 300.
[111] (2017) 91 ALJR 686. Nettle J joined this *per curiam* decision notwithstanding his dissent in *IMM* (2016) 257 CLR 300.
[112] Ibid, 693 [43].
[113] (2017) 91 ALJR 686.
[114] (2016) 257 CLR 300.
[115] Ibid.

IV CONCLUSION

So returning to a consideration of how to assess probative value of social media identification in the context of the three categories discussed: clearly, post-*IMM*,[116] personal reliability cannot be a relevant factor. However, there is a strong argument that, for the second two types of reliability, there are means to take them into account *consistently* with the majority in *IMM*[117] (if in a semantically fraught way, in that we likely need to avoid any iterations of the term 'reliable'). These second two types are: firstly, the external circumstances in which an identification is made in terms of the degree to which it makes an identification 'unconvincing'; and secondly, consistently with *Dickman*,[118] the *inherent* unreliability (or 'limitations') of identification evidence, due to factors like displacement.

The lessons for the Facebook identification hypothetical described at the start of the paper are straightforward. First, that the witness Jane was 'slightly short-sighted' is a form of personal reliability that would be barred from consideration. Second, the circumstances of the identification — that is, that the encounter lasted seconds, and in stressful circumstances — would be factors affecting the 'circumstance reliability' of the evidence such that it may be rendered less convincing, and thus less probative as a result. Third the general dangers related to identification (particularly, photographic identification, suggestibility, and the risk of displacement) would be factors affecting the 'categorical reliability' of the evidence, and its probative value — per *Dickman*[119] — as a result.

These categories are not perfectly defined, being provisional suggestions only, and there may be some overlap between them: *Bayley*,[120] for example, uses risks arising from displacement as giving rise to 'circumstance unreliability' in contrast to the High Court in in *Dickman*[121], with its reference to the general 'limitations' of photographic identification. But the somewhat illogical position that the Facebook identification suggested would bear the same probative value as properly conducted photo board identification can be discounted.

After *IMM*,[122] how courts assess the probative value of this type of evidence (and perhaps other types) — as well as how they are to assess the risk of prejudice and appropriate measures after admission — are difficult questions. What this paper suggests is that, with the traditional dangers of identification evidence in mind, the above categorisation of types of reliability will help us to understand how circumstance and categorical reliability should continue legitimately to affect the probative value of identification evidence. These questions will become increasingly important, complicated, and frequent as the prevalence of social media produces a growing number of identifications that are challenged in criminal trials.

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116 Ibid.
117 Ibid.
118 (2017) 91 ALJR 686.
119 Ibid.
120 [2016] VSCA 160.
121 (2017) 91 ALJR 686.
122 (2016) 257 CLR 300.