"DNA Evidence: The CSI Effect"
Symposium at University of Canberra, 28 July 2006
Opening Remarks of Chief Justice Terence Higgins[1]

Ladies and gentlemen, thankyou for inviting me to take part in today's symposium on "DNA Evidence: The CSI Effect". It's great to see so many people interested in the reality of DNA and judicial proceedings beyond the small screen. The excellent panel guest speakers presenting today will, I am sure, shed much light on the relative differences between what you see on TV and what happens in reality.

You don't need to be in the Middle East, investigating an apparent suicide or establishing the identity of civilian casualties, to appreciate the significance that DNA and other forensic evidence can have on an inquiry. Shows like CSI help provoke public interest in DNA evidence and forensic procedure. However, there are significant differences between what you see on TV and what you would encounter in real life:

- In life, expert witnesses generally don't have a million dollars to spend on special effects;
- On TV, you don't see trials falling over or being adjourned for months because the police laboratory hasn't tested DNA samples; and
- In court; a police interview conducted by Grisson would not be admissible as evidence

Notwithstanding these differences, I would still say that truth can be stranger than fiction.

[1] Chief Justice of the ACT Supreme Court and Federal Court judge. My thanks to John Plumidis for his research on this topic.

In 1983, in the US county of St Louis, Johnny Briscoe was sentenced to 45 years of imprisonment for a rape. He was released last week. By sheer miracle, the cigarette butt left by the rapist at the scene was still in an evidence freezer. DNA evidence established that the spittle on it belonged to someone other than Mr Briscoe. This raised sufficient doubt as to his conviction to warrant his release, after 23 years in prison.

The stories of "CSI: Canberra" also provide for some bizarre reading. Let me describe a scene from last year's Court of Appeal decision *Hillier v The Queen* [2005] ACTCA 48 – by that I mean a scene from the facts of the case, not the hearing itself:

A 35 year-old woman lies on her bed, dead, in the burnt remains of her Winnie-the-Pooh pyjamas. Her bedroom is damaged by fire. There's a lighter and a cigarette butt on an ashtray beside her bed. But the woman never smokes inside the house.

In fact, she was dead before the fire was lit.

There are compression marks across the woman's neck and wrists, but no other evidence of a struggle, not even internal bruising. Nor is there evidence that the perpetrator broke into her home, even though there are deadbolt locks on all the doors and windows. Maybe the murderer had a key. Maybe he was let in.

You later find a set of handcuffs in the cupboard. There's scratch marks on the bedhead. This is probably a red herring.

DNA samples taken from the woman and her clothes match her ex-husband. He had been involved in a bitter custody battle for their children. On the other hand, fingerprints on the cigarette lighter and a footprint in the soot beside the bed belong to someone else.

That is just a teaser of the facts and evidence involved in the *Hillier* case. Mr Hillier was convicted his ex-wife's murder. The Court of Appeal quashed the jury's verdict. That decision was controversial.

An important aspect of *Hillier* was the use of DNA evidence. Swabs and samples were taken from the woman's body and her pyjamas. Some were mixed profiles, but each was consistent with the deceased having had contact with the accused. This assisted the prosecution case. On the other hand, Mr Hillier and the deceased had shared custody of their children. It would be expected that such traces of Mr Hillier's DNA would be present throughout her home.

Curiously, a swab taken from the deceased's neck was never tested. This is baffling, especially given the mixed DNA profiles. Had the swab contained the defendant's DNA, this would have strengthened the prosecution case. It is equally possible that the swab would have identified a different person who was the murderer, or a possible co-offender. We will never know. But, as a matter of law, if a sample is untested, we are required to presume that the result would not have assisted the prosecution case.

This is a recurring problem in criminal trials. There is more to a criminal prosecution than proving a particular case theory consistent with guilt. Proof beyond reasonable

doubt requires disproof of all reasonable hypotheses consistent with innocence. It is simply not acceptable to ignore evidence that is unnecessary to prove a particular case theory. Had Mr Hillier's conviction stood, and sometime in the future the neck swab had been tested and found not to be from him then Mr Hillier, like Mr Briscoe, would have been entitled to be released. And have suffered unjustly.

Let me provide further examples of this principle in practice.

In two different sexual assault trials I have presided over this year, DNA evidence established that semen samples taken from within both complainants' vaginas matched the respective defendants. Although other forensic samples were collected, they weren't tested. In both trials there was other evidence raising the possibility that such samples may have been deposited in another incident, not criminal. The other samples, not tested, could have implicated another person. Neither trial resulted in a conviction.

One trial was discontinued after the complainant testified that the perpetrator had used a condom. It was the defence case that the defendant had consensual intercourse with the complainant prior to the assault. This became a reasonable explanation for his semen in the complainant's upper vaginal area.

The other trial resulted in an acquittal. The defence case was that he was too drunk to realise that the complainant lacked the mental capacity to consent to intercourse. The evidence was that the defendant had sex with the complainant at least once. Had particular forensic samples been tested, they may have given more weight to the

proposition that the defendant engaged in intercourse with the accused once he was more sober.

In all these cases, including *Hillier*, the testing of further available evidence could have strengthened the case for conviction. In that respect, they might be labelled tainted acquittals. A recent press release from the federal Minister for Justice has endorsed recommendations from the Model Criminal Code Officers Committee that the defence of double jeopardy be removed for serious offences where 'fresh and compelling new evidence' emerges. In part these reforms have been driven by advances in forensic technology, and DNA evidence in particular.

I would make the point that:

1. A positive DNA match of semen from the inner vagina of a rape victim can be compelling evidence of a defendant's guilt. But it does not of itself establish guilt, each case turns on its facts. Neither of the two sexual assault cases I described resulted in a conviction;
2. If an acquittal is tainted in any way then there lies a right of appeal to a superior court; and
3. Just because the spittle from the cigarette butts proved that there was reasonable doubt as to Johnny Briscoe's conviction, the same evidence would not prove beyond reasonable doubt the guilt of someone else. Indeed, so many years later, it is likely that insufficient evidence would be available for any other accused to have a fair trial or be convicted beyond reasonable doubt.

Let me finish with this story of why, sometimes, evidence is not available after a trial. A man is acquitted of stabbing someone. No evidence had linked the man with the weapon. The day after the man turns up to the police station and asks for his knife back. The victim's blood was still on it. The man got his knife back. That acquittal, most probably, was tainted.

My thanks in allowing me to open for what I am sure will be very interesting presentations and discussion.