The only situation in which D2 could suffer is if in an action by P, the plaintiff's loss was adjudged to be less than the amount previously paid by the contributor to the claimant. However, this situation should not arise because of the requirement that any compromise be reasonable before it can form the basis of a contribution claim. In assessing D2's liability for contribution the court will have considered the same factors that it would consider in assessing D2's liability to P, in an action by the plaintiff. What if the plaintiff was contributorily negligent with regard to D2, but not against D1? In that event the compromise might be reasonable as against D1 but not D2. However, contributory negligence is a factor which would be taken into account by the court when considering what is a "just and equitable" amount for D2 to pay.

The writer submits that any reform need not include a "bona fide" requirement. Sufficient protection is afforded to D2 by requiring that the settlement be reasonable. An unreasonable settlement figure need not be a bar to contribution. However, in that event the court should have to fix a reasonable settlement figure on which to base its assessment of the contribution rights.

## X. SOME OTHER MATTERS

What if D1 makes a low settlement with the plaintiff and P subsequently sues D2 and recovers a substantially higher amount? Should D2 be then able to bring contribution proceedings against D1? It is submitted that D1's settlement should not be a bar to contribution proceedings by D2, to prevent the situation of the plaintiff and one concurrent wrongdoer conspiring against another concurrent wrongdoer. Rather, if a defendant has already compromised the plaintiff's claim, the amount of that settlement should be a factor considered by the court when assessing D2's claim against D1.

It is accepted that this could mean two sets of contribution proceedings: first, D1 against D2 following D1's compromise with the plaintiff, and secondly, D2 against D1 following P's obtaining judgment against D2 for the balance of the claim. It is desirable that all claims be heard together, however the rules regarding award or refusal of cost should ensure that the problem will not normally arise. If the original compromise is of a reasonable amount, a subsequent claim by P against D2 is unlikely to arise.

Section 17(1)(b) of the Law Reform Act 1936 provides that any damages awarded in a second action, in respect of the same damage, cannot exceed those awarded in the first, and that unless there are reasonable grounds for bringing a second action the plaintiff is not entitled to costs in respect of it. There is no reason to not retain this costs sanction. The United Kingdom[114] legislation abolished the damages sanction on the ground that it resulted in injustice in situations where the plaintiff had good reason to sue one defendant first, but a limitation of liability clause meant damages were limited. The Committee[115] recommended such a change, which the writer agrees with.

114 Civil Liability (Contribution) Act 1978 (U.K.), s.5.
115 Working Paper on Contribution 1983, 22.

A consequence of extending contribution rights is that settlement may take a form other than payment.[116] In a contractual situation settlement may be repair of the damage or replacement of the goods. Any legislation would have to be appropriately drafted to cater for this consequence.

## XI. CONCLUSION

The writer submits that a far reaching reform of the law of contribution between defendants is necessary. An extension of contribution rights to all concurrent wrongdoers will break down the barriers of compartmentalisation and unify the law, thus removing the injustices which are created by unnecessary distinctions. Some of the problems in remedying the current law have been identified and solutions offered. Obviously it is not always possible to completely satisfy all interests. With the benefit of overseas precedents, however, a reform can be promptly undertaken. Nevertheless, it is important that overseas initiatives are not adopted without critical consideration, as was done in 1936, and some of the aspects which merit further consideration have been referred to in this article.

116 Dugdale, supra n.93, 185.

# Section 20 of the Evidence Act 1908 – the law of confessions in New Zealand?

Kerry W. Fulton*

*In this article, the writer looks at the way the law has developed concerning the admissibility of confessions in a criminal trial. By considering the history and development of section 20 of the Evidence Act 1908, the writer argues that the current understanding of the law is incorrect, and that a true analysis of the section reveals that it alone is the law governing the admissibility of a confession at a trial. In particular, the writer argues that a judicial discretion to exclude confessions cannot be part of New Zealand law.*

## I. INTRODUCTION

This article will examine the effect New Zealand courts have given to section 20 of the Evidence Act 1908. This section represents Parliament's intention regarding the exclusion of confessions tendered as evidence in a criminal trial. The courts have been faced with interpreting this parliamentary expression and its effect on the Common Law rules. The Common Law has an elaborate set of rules that have continued to expand. The writer believes the full implications of section 20 have yet to be explored by the courts and therefore the relationship with the Common Law has yet to be fully appreciated.

This article will provide the examination necessary to fully understand the effect of section 20 and give effect to the true construction of the section. As a consequence of this interpretation the Common Law rules will be seen as ineffective and anomalous. Indeed part of the Common Law cannot remain without defying the will of Parliament.

Before embarking on this interpretation, the writer will introduce the detail of the law in the area of confessions. This will involve consideration of Common Law and statute, and will reveal the aims and basis of the law. This is important background for the reader to appreciate the arguments put forward in this paper.

* This article was submitted as part of the LL.B. (Honours) programme at Victoria University.

## II. BACKGROUND

### A. Common Law

A confession is inadmissible as evidence in a criminal trial unless proven by the Crown to be voluntary beyond reasonable doubt.[1] There are various definitions of voluntary, the classic example being Lord Sumner's, when he said:[2]

> . . . in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority.

A wider formulation would have duress, intimidation, persistent importunity, or sustained or undue insistence or pressure, deprive the confession of its voluntary character,[3] but the widest formulation is that of Casey J. when he said, "Voluntary in this sense means that the accused's will was not overborne by some other person."[4]

Despite the variance in definitions it is commonly understood to be essential that any promise or threat be held out by a person in authority to rob the confession of its voluntary character. A magistrate, police officer or any person having custody of the alleged offender, and the prosecutor or his relations, have all been held to be persons in authority.[5]

The rationale for the voluntariness rule historically is reliability. The concern is not to admit statements that could be untrue, the doubt arising from the circumstance in which it is made. There are other rationales offered for the rule namely deterrence of police misconduct, protection of the accused's rights to due process and protection of the privilege against self-incrimination.[6] These latter rationales can all be supported, but the significance of reliability as a founding principle of the law cannot be emphasised strongly enough.[7]

The most recent development of the Common Law is a judicial discretion to exclude a confession admissible by application of the voluntary test. It is said to have emerged clearly in *R.* v. *Voisin*,[8] but now has a widely stated place in the law of confessions. A breach of the Judge's Rules, unfairness to the accused,[9] and improper police conduct,[10] are frequently stated to be guiding principles for the exercise of the discretion.

In New Zealand this Common Law exclusionary basis is to be read in conjunction with section 20 of the Evidence Act 1908. There is a parallel statute in

1 *R.* v. *McCuin* [1982] 1 N.Z.L.R. 13.
2 *Ibrahim* v. *R.* [1914] A.C. 599,609.
3 *McDermott* v. *R.* (1948) 76 C.L.R. 501.
4 *R.* v. *Hannah* (1984, unreported, Auckland Registry, T58/83).
5 *Halsbury's Laws of England* (4 ed. Butterworths, London, 1976) vol. 11, Criminal Law, para. 411, p. 233.
6 Evidence Law Reform Committee, Working Paper 3, May 1985.
7 For discussion see post Part IIIA.
8 *R.* v. *Voisin* [1918] 1 K.B. 531; Mathieson *Cross on Evidence* (3 ed. Butterworths, Wellington, 1979) 523.
9 *R.* v. *Voisin* [1918] 1 K.B. 531; *R.* v. *Convery* [1968] N.Z.L.R. 426.
10 *Cleland* v. *R.* (1983) 43 A.L.R. 619.

the Australian state of Victoria. Among the Common Law countries, this situation is unique, and brings us to consider the statutory setting.

*B. Statute*

1. *New Zealand*

As section 17 of the Evidence Further Amendment Act 1895, this country introduced a statutory rule in the area of confessions. It reads:

> No confession which is tendered in evidence on any trial shall be rejected on the ground that a promise or threat has been held out to the person confession, unless the Judge or other presiding officer shall be of opinion that the inducement was really calculated to cause and untrue admission of guilt to be made.

Stout C.J. in considering the effect of this provision said, "Before I can refuse to admit the evidence, it must appear clear that what was said prevented the truth being spoken."[11] On the facts of the case his Honour said that nothing said or done " . . . could tend to make the accused state what was untrue."[12] Therefore, "I have no course open but to obey the law, and must therefore admit the evidence."[13] His Honour saw that circumstances had to be proved that would prevent the truth being spoken, before he could refuse to admit the evidence.

In a later decision, Cooper J. said:[14]

> . . . as an abstract rule of law the answers are admissible, unless they have been obtained by some promise or threat which the presiding Judge is of the opinion was in fact likely to cause an untrue admission of guilt to be made . . .

This formulation of the rule, along with Stout C.J.'s views on the section, show the section to be the sole rule governing the determination of exclusion. In effect the section is the end of the matter, and this view continued to be held until the Court of Appeal, in *R.* v. *Gardner,*[15] criticised it. In that court, Myers C.J. said the statute asked the court to consider only whether the promise or threat was " . . . likely to cause . . . " an untrue admission to be made, so a " . . . statement made by the prisoner may, in fact, be perfectly true, but this is not the point to be considered."[16] This view limits the application of the section to an artificial reliability test rather than the direct approach of Stout C.J. in the earlier decision.[17] Even on this approach the Court of Appeal said the facts disclosed a threat that was likely to cause an untrue admission, therefore the confession was inadmissible.

In the Supreme Court the same case was decided differently by Smith J. His Honour said, "In my opinion, this is not the only rule to be applied in excluding a confession in New Zealand."[18] This observation was made of section 20 of the Evidence Act 1908, which, although worded a little differently from the 1895

11 *R.* v. *Hamilton Sinclair* (1905) 7 G.L.R. 441,442.
12 Idem.
13 Idem.
14 *R.* v. *Kerr* (1910) 13 G.L.R. 93,94.
15 [1932] N.Z.L.R. 1648.
16 Ibid. 1660.
17 Supra, n. 11.
18 Supra, n. 15, 1649.

provision, was not significantly different.

Smith J. was of the opinion that the violent procedure disclosed in the facts robbed the confession of its voluntary character and it was therefore inadmissible. There existed, then, things outside the scope of the section that could render a confession involuntary and inadmissible. It was therefore unnecessary to apply the "likelihood of truth test" to such confessions. As an alternative ground for excluding the confession Smith J. said the court had a discretion to exclude a voluntary confession if it " . . . would be unfair to admit against the prisoner."[19] In light of the violent procedure, his Honour would have exercised the discretion in the alternative.

It is significant to note the Court of Appeal excluded the confession on the application of section 20 and also declined to make any observation on the question of discretion. However the judgment of Smith J. was to find favour in later cases. The most significant is the Court of Appeal decision in *R.* v. *Phillips*.[20] The court said that section 20 was not definitive of the Common Law, that is, there are other things besides a promise or threat that render a confession involuntary.

The *Phillips*[21] decision introduced further limitations to the application of section 20. First, although the section was silent on the point, the court felt the person in authority requirement should attach to the section, because the section " . . . was to an extent stating the Common Law . . . "[22] Hence the section applies only to promises or threats held out by a person in authority. Secondly, the section applies only to complete admissions of the offence charged. Any statement less than a complete admission falls to be governed by the Common Law.

As a result of the court's interpretation of section 20, the court held implied promises or threats to be outside the scope of the section, and also held that such an implied threat or promise would render a confession involuntary and inadmissible. O'Leary C.J. went on to hold, although not required to, that a trial judge has a discretion to exclude a voluntary confession affected by some impropriety.

In direct response to the *Phillips*[23] decision, Parliament amended section 20 in 1950 to read:

> **Confession after promise, threat, or other inducement** — A confession tendered in evidence in any criminal proceeding shall not be rejected on the ground that a promise or threat or any other inducement (not being the exercise of violence or force or other form of compulsion) has been held out to or exercised upon the person confessing, if the Judge or other presiding officer is satisfied that the means by which the confession was obtained were not in fact likely to cause an untrue admission of guilt to be made.

19 Ibid. 1654.
20 [1949] N.Z.L.R. 316.
21 Idem.
22 Ibid. 345.
23 **Supra, n. 20.**

The reason for the amendment as stated in the House was " . . . to remove this anomaly."[24] The anomaly referred to is the Common Law exclusion of a confession on proof of an inducement, other than a promise or threat, even though the inducement may have had no influence on the accused at all. If that were the case with a proven promise or threat, section 20 would direct the confession's admission. There was then a direct conflict between statute and Common Law which is resolved in favour of statute by the extension of section 20 to include " . . . any other inducement . . . " The Court of Appeal has recognised the effect of this amendment when it said:[25]

> . . . the rule should not be extended further than as appears from the current text of S.20 of the Evidence Act, which appears to us to have been drawn so as to include every case of non-voluntary confession then contemplated by the Legislature.

In considering the application of section 20 to involuntary confessions, the court must decide whether the inducement is violence, force or other form of compulsion. If it is, the court need go no further as the confession is inadmissible. "Other form of compulsion" broadly corresponds to oppression,[26] but the Court of Appeal has qualified this by saying, "While not involving violence, the oppression had a physical character putting it in the category of 'other form of compulsion' in S.20."[27] Anything less than this would be an inducement requiring the court to go further.

On deciding there is an inducement that is not violence, force or other form of compulsion, the court is to decide whether the inducement was " . . . in fact likely the cause an untrue admission of guilt to be made." These are the words of section 20 and have been interpreted to require the court to consider:[28]

> . . . whether or not an innocent person in the position of the accused and in the circumstances in which he was placed would be likely to confess to a crime which he had not committed.

This test must be satisfied before the judge can admit the confession. This onus of proof is also an alteration implemented by the 1950 Amendment. Before this the onus was reversed, so that doubt the judge had on the effect of the inducement would go in favour of the Crown and therefore in favour of admission.[29]

We have seen through these statements of the law in New Zealand a trend of interpretation that began with the section as the governing rule. Then came a realisation that the section did not cover the Common Law. There was also a related restriction of the scope of section 20 to complete confessions only. There has also developed a judicial discretion to exclude a voluntary confession. Then came a legislative enlargement of section 20. It is this response and the

24 Evidence Amendment Bill, N.Z. Parliamentary debates Vol. 291, 1950: 2389. Recourse to Hansard was recently made by Richardson J. in the Court of Appeal in *Re Simpson* [1984] 1 N.Z.L.R. 738, so for present purposes there should be little objection.
25 *R.* v. *Nanisini* [1971] N.Z.L.R. 269,275.
26 *R.* v. *Rodgers* [1979] 1 N.Z.L.R. 307.
27 *R.* v. *Wilson* [1981] 1 N.Z.L.R. 316,324.
28 *R.* v. *Hammond* [1965] N.Z.L.R. 257,258.
29 *R.* v. *Douglas* [1962] N.Z.L.R. 1117.

development of this section that forms the nucleus of the writer's views which follow. Before expressing those views it is useful to briefly outline the interpretation of a parallel section by Victorian courts.

2. *Victoria*

Section 141 of the Evidence Act 1928 reads:

> No confession which is tendered in evidence shall be rejected on the ground that a promise or threat has been held out to the person confessing, unless the Judge or other presiding officer is of the opinion that the inducement was really calculated to cause an untrue admission of guilt to be made.

This provision originated in 1857 and was for a considerable time regarded as definitive of what confessions could be excluded as evidence. It was regarded as applying to all statements that could be involuntary, until the courts decided the section did not apply to all involuntary confessions.[30] It applied only to promises or threats and not to other involuntary confessions, for example those obtained by violence or force or oppression. It was also decided the section applied only to complete admissions of guilt of the offence charged.[31] The High Court of Australia on appeal from Victoria also held, in somewhat hesitant terms, that a discretion to exclude a voluntary confession could exist in Victorian law.[32]

The section remains in this form today and the judicial discretion has become solidly established in the state. There has been a parallel development in Victorian law, as there was in New Zealand up to 1950. The important point to note from these statutory discussions is the initial treatment of the section which saw it regarded as the law on confessions.

*C. Summary*

To summarise, the law of confessions in New Zealand is that a confession must be voluntary to be admissible. This is subject to the application of section 20 and exercise of judicial discretion. This simplistic statement belies the difficulty involved in applying the law. Indeed Lord Salmon has recently said of the Common Law:[33]

> A whole body of case law seems to have been conjured up out of what are essentially decisions of fact. This has, I fear, led to a great deal of unnecessary confusion and complication . . .

The complex relationship between statute and Common Law in the present statements of the law in New Zealand, and Victoria, serves only to further complicate. It is the writer's view that much of this difficulty is unnecessary and indeed would disappear on a proper construction of section 20. Furthermore, the development of judicial discretion has lead to an uncertainty in the law that accentuates the difficulties involved in practice. It is the writer's view that this

30 *Cornelius* v. *R.* (1936) 55 C.L.R. 235.
31 *R.* v. *Lee* (1950) 82 C.L.R. 133.
32 Cowan Z. and Carter P. *Essays on the Law of Evidence* (Clarendon Press, London, 1956) 55, and idem.
33 *D.P.P.* v. *Ping Lin* [1976] A.C. 574,606.

discretion cannot be part of New Zealand law and furthermore the uncertainty it introduced is undesirable.

## III. ISSUES

### *A. What Does Section 20 do to the Common Law Voluntariness Rule?*

In the words of Sir Francis Adams, "It is submitted that the new Section 20 sweeps this restriction aside, and, subject only to the expressed exceptions, establishes a universal rule."[34]

It is useful to return to the period in which this section had its beginnings. The Common Law voluntariness rule has its historical focus on the reliability of confessions admitted in evidence. *R.* v. *Baldry*[35] offers, as the "only intelligible"[36] reason, reliability as the basis for exclusion when the court says, " . . . it is supposed that it would be dangerous to leave such evidence to the jury."[37] In particular, Parke B. expressed deep concern with the objections that had prevailed to exclude confessions in the past. Further support is found in *R.* v. *Warickshall,*[38] where the court expressed its disapproval of the suggestion that confessions are excluded to maintain public faith, and replies that confessions are rejected " . . . under a consideration whether they are or are not entitled to credit."[39] It is true, as Schrager suggests,[40] that there have been confessions excluded which in the circumstances can be considered reliable. However, the criticism Parke B. directed to certain exclusions and the courts' emphatic upholding of the reliability principle received statutory recognition when the New Zealand legislature enacted section 17 of the Evidence Further Amendment Act 1895.

The legislation captured the Common Law exclusionary rule, as did *Ibrahim,*[41] and replaced it. The section was historically regarded as covering the whole Common Law exclusionary basis. That is, the courts said that the section covered what the Common Law would hold to be an involuntary confession. As voluntary confessions were admissible, and judicial discretion to exclude them not yet heard of, Parliament needed only to deal with involuntary confessions. Parliament clearly stated that it wanted the confession as evidence at trial, if it could be considered reliable on application of the "likelihood of truth test". It did not matter for the purpose Parliament acted that the confession was involuntary, and it clearly felt the Common Law was not achieving the result it desired, otherwise legislation would not have been required. Hence the Common Law was replaced.

As the Common Law developed, the situation arose that lead to other

34 Adams "Confessions" (1963) 1 N.Z.U.L.R. 5, 28.
35 (1852) 2 Den. C.C. 430, 169 E.R. 568.
36 *Commissioner of Customs and Excise* v. *Harz and Power* [1967] 1 A.C. 760,782.
37 Per Thesiger J., supra, n. 35, 573.
38 (1783) 1 Leach C.C. 263, 168 E.R. 234.
39 Idem.
40 M. Schrager "Recent Developments in the Law Relating to Confessions: England, Canada, and Australia" (1981) 26 McGill L.J. 435.
41 Supra, n. 2.

involuntary confessions that were outside the scope of the section, and governed only by the Common Law. We have seen the legislative response to that development in 1950, through the expansion of section 20. The intention of that expansion is clear and, when the historical interpretation is considered, clearly stamps the legislative dominance on the exclusion of confessions. The result is that the only legal basis to exclude a confession is stated in section 20. This is confessions obtained by violence, force or other form of compulsion and, confessions obtained by a promise, threat or any other inducement where the judge is satisfied it is likely to have caused an untrue admission to be made.

For the application of section 20, "any other inducement" should mean anything capable of inducing a confession to be made. This category of section 20 should not be limited by the ejusdem generis principle, but instead be interpreted to apply to all confessions where inducement is alleged. It will be necessary then to consider the extent of the inducement. That is, does it amount to "other form of compulsion"? As a confession is inadmissible if obtained by compulsion, there needs to be a clear line drawn between it and a mere inducement. The writer submits that *R.* v. *Wilson*[42] has done this correctly, when the Court of Appeal qualified oppression with "of a physical character". As the aim of the section is to preserve evidence such an interpretation is in accord with legislative intent. Expansion of the exclusionary ground would defeat the purpose of the section and would be the result of a broad interpretation of compulsion.

The statutory direction given to the law of confessions is based on reliability. The issue is approached directly, unlike the Common Law, which has developed artificial rules to achieve the same result. The statute is better than the Common Law in achieving its ends. Based on the clear statement of parliamentary intent, a broad interpretation of section 20 is required. This interpretation involves little more than considering directly the reliability of confessions alleged to be induced. If the way a confession was given was not within the grounds stated by section 20 then it would be admissible. At Common Law it would be voluntary in the truest sense of the word. Therefore to term an admissible confession voluntary is still legitimate. However the "notion of voluntariness" does not direct the court to the question Parliament has provided. Admissibility of a confession should therefore depend solely on the application of section 20, as the law was historically regarded to be.

### *B. How Does the Limitation of Section 20 to Admissions of Guilt Affect the Preceding Discussion?*

The courts have limited the section to full confessions only and therefore anything less than a full confession falls to be governed by the Common Law. However the fact the section applies only to a specific type of confession does not derogate from the intended scope of the section. If the scope covers all involuntary confessions but "operates" only on some, the voluntariness rule is still of no use to the resolution of section 20.

42 Supra, n. 27.

The distinction however is absurd and the writer submits unintended. Indeed the High Court of Australia had this say:[43]

> . . . it is quite likely that it was intended to cover all statements by accused persons which would have been rejected at Common Law on the ground they were not voluntary, and it is by no means surprising that it was for many years regarded as effectuating such an intention.

Why then should the court adopt a restrictive interpretation of the section? The wording of the section being "admission of guilt", allows the court to adopt the view, but historically the courts were much more flexible and simply applied the section to all statements, and indeed that approach is much more sensible. Perhaps the fact the section did not cover all confessions of an involuntary character swayed the court in adopting the limitation. Whatever the reason, the distinction made is undesirable in terms of consistency in the law and in achieving the ends of the section, unless of course Parliament wishes the rules to apply only to the clearly guilty. This is unlikely, given the section's historical content and interpretation. A broadening of present interpretation to include all involuntary confessions, in the Common Law sense, is necessary to implement the will of Parliament. However as the courts have created this limitation in recent years, it is unlikely they will return to the historical interpretation without parliamentary directive. The writer therefore urges this directive to be given.[44]

The writer has expressed doubt about the courts' willingness to accept the interpretation argued here. However the Court of Appeal recently[45] embarked upon an interpretation exercise that would be highly authoritative should the question be canvassed in court, and could well see adoption of section 20 for all statements which the Common Law voluntariness rule would apply to. The court was considering section 27 of the Misuse of Drugs Act 1978, which concerns intercepted communications. The Common Law rules of privilege were seen as the guiding principle and the section as " . . . an endorsement by Parliament of the basic principle", and " . . . an indication of legislative policy to which I would attach major importance . . . "[46]

In considering whether a communication between client and solicitor, which was overheard by a constable, was covered by the privilege rule to the extent the constable could not give evidence, the court drew on section 27. It said, "It would be out of harmony with the approach and sense of values revealed by the section if the Court were to hold . . . "[47] the rule did not so extend, for "Cases outside

43 Supra, n. 31, 146; and see Evidence Amendment Bill, N.Z. Parliamentary debate, Vol. 290, 1950: 1893.

44 Even though the 1950 Amendment did not attempt to clarify the point the writer is confident of the interpretation argued. It appears the point raised by *Phillips,* supra, n. 20, was not even considered in the House (see Hansard, supra, n. 24). Should the matter have been pointed out there may well have been a change, as the anomaly is the same as that the amendment was to remove. It may not have been considered as the holding was strictly obiter dictum.

45 *R.* v. *Uljee* [1982] 1 N.Z.L.R. 561.

46 Per Cooke J., ibid. 568-569.

47 Ibid. 569.

the scope of the legislation need to be considered in its light."[48] The result was that a third party who has overhead a privileged communication cannot give evidence unless the client waives the privilege. The input of the section to that result was considerable.

In the present context the argument that section 20 covers all confessions involuntary at Common Law is even stronger when the considerations above are taken into account. First, section 20 embodies the basic involuntariness principle but the section makes considerable change. Parliamentary policy is therefore made evident. Secondly, the section was historically regarded as covering all statements which the voluntariness rule applied to. But for the literal construction later adopted, this section would cover all those statements. Thirdly, it is out of harmony with the section not to apply the "likelihood of truth test" to a statement falling short of a full confession, yet induced by promise or threat. Such a statement would be excluded at Common Law, but may well be admissible on application of section 20. As the section does cover all inducements that could render a confession involuntary, it is absurd to draw the distinction between a full confession and something less. An interpretation removing that absurdity and thereby bringing the Common Law into harmony with legislative policy must be adopted.

Strictly speaking the argument put forward amounts to a judicial reform of the Common Law. The obvious strength of the argument would almost demand that the interpretation be adopted, yet the writer doubts that would take place. The better approach, which has exactly the same result, is to interpret section 20 according to the clear intent and policy it reflects. This was historically the case and the absurdity of the restrictive interpretation is so clear that the section must be construed liberally. No matter which approach you take, be it construe Common Law according to the statute, or construe the statute more widely, the net result is that section 20 covers all involuntary confessions. The arguments to that end are so strong they cannot be resisted.

The application of section 20 would become very simple should the interpretation argued be adopted. The defendant would simply allege a statement is unreliable because of the way it was obtained. The court asks whether there is any inducement to support this claim. If there is, is it an inducement requiring the court to exclude directly? That is, was the inducement violence, force, or other form of compulsion? If not, was the inducement likely to cause the accused to state what was untrue? If yes, the statement is inadmissible. If no, the statement is admitted.

As the writer has previously noted, the voluntariness rule is based on reliability itself, so when a challenge was made to the voluntariness of a confession, the reliability of it was really being questioned. There is no doubt that this is the approach reflected by section 20, because it does not want the confession admitted unless its unreliability can be denounced.[49] The important point is the section actually asks the issue to be considered, whereas the Common Law works on some

48 Idem.
Part IIIE.
49 See supra, Part IIIA; and for discussion of the true effect of the section, see infra.

"notion of voluntariness" as resolving the issue. Therefore the statute must be given its proper interpretation to best implement the evident policy of Parliament.

*C. Can Admissible Confessions be Excluded by Judicial Discretion?*

This question has two parts: firstly, the confessions that do not come within the scope of the section and are therefore admissible — these would be voluntary confessions at Common Law; secondly, those confessions which the section compels to admit because they are not likely to be untrue. The reader will recall the present law says a voluntary confession can be excluded by judicial discretion, and there are various grounds for that, in particular improper police conduct, and unfairness to the accused. This is clearly adopted by New Zealand courts as part of our law. However the second question has yet to be answered in this country. As a matter of law, neither questions have been before the court since 1950. The discussion to follow has not yet been presented to the court in this country but has received attention in Victoria.

To answer the second part of the question first, the writer submits the High Court of Australia, sitting on appeal from Victoria, has answered this question correctly:[50]

> But in all cases to which it applies S.141 is imperative and leaves no room for the exercise of discretion in any relevant sense.

and,

> It applies to compel the admission of some confessions which the Common Law would regard as non-voluntary . . .

Observations New Zealand courts have made on the question support the view expressed above. In *R.* v. *Wilson*[51] the Court of Appeal said that section 20 " . . . prohibits rejection on the ground of inducement if the Judge is satisfied that the means were not in fact likely to cause an untrue admission of guilt." Then in *R.* v. *Convery*[52] Turner J. said " . . . even if the statements tendered are ruled admissible in law, the trial judge (at least in cases in which no ruling has been given in favour of the Crown under S.20) still has a discretion to reject them . . . "

It has been suggested that "on the ground" within section 20 provides an opening that might allow discretionary exclusion on some other ground, e.g. unfairness.[53] However these words appear in the Victorian section also and the High Court emphatically held no discretion. Furthermore, with respect to the members of the working party who suggested it, such an interpretation of the section is so blatantly contrary to the section's intention to be unsupportable. Parliament did not intend there to be exclusion on any other basis than unreliability, or the section's stated exceptions. Otherwise the change in onus of proof for the likelihood of truth test, implemented in 1950, would have been unnecessary. The alteration was made because prior to 1950 any doubt the judge had about the

50 Supra, n. 31, 150.
51 Supra, n. 27, 322.
52 [1968] N.Z.L.R. 426,436.
53 Supra, n. 6.

confession's reliability went in favour of the Crown, i.e. in favour of admissibility.[54] If Parliament contemplated exclusion on any other basis, why change the words? The writer submits the change to be a safeguard[55] intended to operate exclusively. Exclusion on any other basis was not contemplated, nor is it allowed by the law of this country. Therefore, if a confession passes the section 20 test, it must be admitted as evidence.

We should also recall the historical origin of this section where the various grounds of Common Law exclusion were gathered together and qualified by a single exclusionary principle, i.e. reliability. Any other principle of exclusion is therefore incidental, and if given paramountcy, is defeating the purpose of codifying the exclusion of confessions. Any other Common Law principle of exclusion was expressly rejected by the statute when it was first enacted and the subsequent developments only tend to reinforce the dominance of the reliability principle.

In relation to the words "on the ground", the above arguments prevent the interpretation of the words to allow exclusion unrelated to reliability. The writer concedes that such an interpretation may be open, i.e. "on the ground" implies other grounds of exclusion are available. However given the history and purpose of the section, such an interpretation defeats the very reason for enacting the section and surely cannot be permitted. Furthermore the argument for the permissive interpretation arises only in retrospect. The cases which may need to be justified on this interpretation arose not by an interpretation of this section but rather on an undisciplined approach which gives section 20 only token acknowledgement. The writer does not suggest that such decisions are wrong in fact, although on the interpretation argued here they may be, merely that such developments, ignoring as they do the full effect of section 20, cannot be legitimated by retrospective interpretation. The simple fact is that if a decision is based on a misconception of the law, then it is wrong in law. The writer is arguing the law as it was and is, and if decisions turn out to be wrong in law, that does not mean that the same result would not have been achieved by application of section 20. The point made is important to remember.

What of the confession not obtained by an inducement? Can this be excluded by judicial discretion? This is the first part of the question outlined previously and this sort of confession would be voluntary in the truest Common Law sense. Again the writer submits that exclusion of this sort of confession is disobeying the law of New Zealand and the discretion cannot therefore be part of New Zealand's confession law.

This argument was put to the High Court of Australia in the decision of *R.* v. *Lee*,[56] where the Court said:[57]

> . . . there is, we think, a great deal to be said for the view that a discretion to exclude statements which are, in the strict Common Law sense, voluntary, cannot satisfactorily exist alongside S.141 . . .

54 Supra, n. 29.
55 Hansard, supra, n. 43.
56 Supra, n. 31.
57 Ibid. 148.

The court was speaking of the Victorian section, set out earlier in this paper, which is equivalent to New Zealand's 1908 section 20. It does not however have the extended scope given to New Zealand's section in 1950. In deciding the discretion could exist alongside section 141 the court said:[58]

> . . . wide as was the scope of S.141, there was a considerable field which lay outside it and within which a discretion could be exercised without actually disobeying S.141. This field does exist. If the field exists and if within it the Full Court of Victoria, sitting as a court of criminal appeal, holds that a discretion exists which has been held to exist in other British jurisdictions, we do not think that this Court ought to interfere by denying the existence of such a discretion.

With respect to the High Court Bench, their reasoning is not at all persuasive. First, the field " . . . within which . . . " the discretion would operate is that which contains voluntary confessions. Therefore even if the scope of the section was wider, those confessions which would be excluded are the same. So the fact the scope of the section is limited makes no difference. The exclusion of a voluntary confession is anomalous when an involuntary confession could be admitted. Secondly, the Full Court of Victoria may have been wrong, and indeed this is why the High Court of Australia exists as an appellate court. On this issue the writer submits the Full Court was wrong. Thirdly, other jurisdictions, except New Zealand, who had not at that stage definitely held a discretion to exist, do not have to consider the expression of parliamentary intent embodied in the section. Therefore precedent from other jurisdictions cannot be authoritative.

In the New Zealand context there is no doubt the scope of the section has been extended to include those confessions outside the section in Victoria. Therefore the confessions on which the discretion could be exercised are voluntary in the truest Common Law sense. By definition then, exclusion of such confessions is on some basis other than reliability. To do this is plainly contrary to the will of Parliament and is disobeying section 20. Furthermore the adoption of a judicial discretion is resurrecting the anomaly Parliament acted in 1950 to remove. That amendment was to remove the possibility that a confession could be excluded as involuntary by conduct that had little operative effect on the giving of the confession. This would be the result of a judicial discretion as the confession has already been found to be free of such possibility. The resurrection of the anomaly must not be allowed.

It could be argued that the limitation of the "likelihood of truth" test to promises, threats and inducements, excluding violence, force or other form of compulsion derogates from the writer's argument. However the whole section includes all involuntary confessions and therefore Parliament has in totality directed the course of events for confessions obtained by various means. It alone has drawn the line and it is not to be re-drawn by the courts. This is what judicial discretion would do. It must not be forgotten that the issues which a judicial discretion concerns can be canvassed before the court. Furthermore, as the usually cited basis for discretion concerns improper police conduct, it must be noted that Parliament

58 Ibid. 149.

has provided a set of rules to deal with such behaviour.[59] There are avenues in our present law which Parliament has chosen which must be pursued. The principle of admissibility should not be eroded due to a perceived inadequacy in another area.

There is however a degree of anomaly written into our law. This is the non-application of the "likelihood of truth" test to force, violence and other form of compulsion. It would be anomalous to exclude a reliable but beaten confession. However Parliament seems to accept such an anomaly. It has decided the limits that are to be adopted. It is highly unlikely the police would tender a beaten confession anyway, due to the potential crucifixion the news media and judge would give them.

To conclude this argument, the writer would make two more general observations on the discretionary exclusion of evidence. First, the discretion may have been adopted by the courts because of a failure to perceive how far the voluntariness rule went in excluding confessions.[60] The discretion was a useful means of excluding confessions that could be unreliable, yet admissible on a strict application of the *Ibrahim*[61] test. Following the interpretation argued of section 20 in this paper, such a need for the discretion is removed. Section 20 covers all the Common Law could cover to exclude a confession that may be unreliable by means of treatment. Unfortunately as the Common Law has developed its voluntariness rule, the discretion has remained and has been used for disciplinary purposes, i.e. as a means of sanction for improper police conduct. The writer has argued that this purpose cannot be part of New Zealand law.

Secondly, the practice of disciplinary exclusion has received strong criticism. The Chief Justice of the Supreme Court of the United States had this to say:[62]

> Some of the most recent cases in the Supreme Court reveal, almost plaintively, an unspoken hope that if judges say often and firmly that deterrence is the purpose, police will finally notice and be deterred.

and,

> I suggest that the notion . . . was never more than wishful thinking on the part of the courts.

and,

> We can well ponder whether any community is entitled to call itself an 'organised society' if it can find no way to solve this problem except by suppression of truth in search for truth.

The writer submits that New Zealand's Parliament has found a way to solve the problem. It has said that evidence law is not the place to solve it, and has provided an alternative means. If this alternative is not being operated to the satisfaction of the supporters of disciplinary exclusions, they should follow the lead of Parliament, and canvass improvement in the alternative means.

59 Police Act 1958; e.g. s.30 General Instructions — power to make, s.33 (1)(b)(iv) and (2)(b)(iv), which provide for a fine up to $500 for misconduct or neglect of duty, and s.35 Dismissal — as ultimate sanction.

60 Supra, n. 31.

61 [1914] A.C. 599; and *McDermott* v. *R.* (1948) 76 C.L.R. 501,512.

62 W. Burger "Who will watch the Watchman" (1964) 14 American U.L.R. 1, 11,12,23.

*D. Is It Necessary that a Promise or Threat be Held Out or Exercised by a Person in Authority?*

The reader will recall that the Court of Appeal in *Phillips*[63] ruled that section 20 applies only to promises or threats held out or exercised by a person in authority. The writer has also referred to the Common Law developing artificial rules to test the reliability of confessions. The whole voluntariness rule is, as discussed, based on reliability, but the person in authority requirement is the classic example of artificiality. It serves also to emphasise the concern for reliability in confessions.

It has been said that confessions, made as a result of a promise or threat by a person in authority, are excluded because:[64]

> . . . even a slight inducement by a person in authority is deemed to have such an over-whelming effect as to make it unsafe to allow any statement made as a result of the inducement to be given in evidence.

The rule is artificial because the question is never really asked of the confession, whether it is likely to be untrue by virtue of the circumstances surrounding it being given.

This rule cannot logically apply in New Zealand. As section 20 asks the court to consider directly the issue of reliability, there is little use in applying a rule that "notionally" asks the same question. Section 20 has superseded the requirement and therefore the person in authority limitation should be forsaken. Furthermore, the fact that section 20 has been extended to cover "any other inducement" means that a promise or threat not held out by a person in authority can still be an inducement within the meaning of the section. The requirement of person in authority is then an unnecessary complication in the law that serves no useful purpose.

The Privy Council has also considered the requirement and, while their Lordships held the Common Law applied only to exclude a confession induced by a promise or threat held out by a person in authority, they said:[65]

> If the ground on which confessions induced by promises held out by persons in authority are held to be inadmissible is that they may not be true, then it may be that there is a similar risk that in some circumstances the confession may not be true if induced by a promise held out by a person not in authority, for instance if such a person offers a bribe in return for a confession.

The writer has shown that at Common Law the possibility the confession may be untrue is the dominant basis for the rule. In New Zealand, section 20 firmly establishes this as the basis for exclusion of confessions obtained by any inducement, not being force, violence or other form of compulsion. The essential point is that New Zealand has actually to consider the "likelihood of truth" of the confession. New Zealand does not work on presumption, as the Common Law does. As the Privy Council has noted, there is the possibility of a similar risk of untruth in

63 Supra, n. 20.
64 *R.* v. *Wilson; Marshall Graham* [1967] 2 Q.B. 406,416.
65 *Deokinanan* v. *R.* [1969] 1 A.C. 20,33.

other circumstances. These other circumstances have been foreseen by section 20 through the words "any other inducement.". Therefore the person in authority requirement is an unnecessary complication.[66]

*E. Is the Test, of an Innocent Person in the Position of the Accused, the Correct Test to Apply in the Context of Section 20?*

The words "likely to cause an untrue admission of guilt to be made", as they appear in section 20, have been interpreted to mean:[67]

> . . . whether or not an innocent person in the position of the accused and in the circumstances in which he was placed would be likely to confess to a crime which he had not committed.

In applying this test, the judge is not entitled to have regard to his opinion as to the truth of the admission, but must restrict himself to the tendency to admit guilt assuming the defendant to be innocent.[68] This test has been paraphrased by the writer to "likelihood of truth" throughout this article.

The writer submits the test is incorrect. The section asks the judge to consider the "means by which the confession was obtained", and whether they were "not in fact" likely to cause an untrue admission to be made. These words direct us to the particular accused, and the actual facts of the case. The inference from these words is that the truth of the admission is being directly considered. The fact that the burden is only likely to cause, does not mean the actual truth of the statement is irrelevant. In fact it is for ". . . the judge to determine whether or not it is a true confession or recital of what happened . . ."[69] Therefore the truth of the statement is highly relevant.

The position in Canada, where the Common Law voluntariness rule applies, is that:[70]

> Where the discovery of the fact confirms the confession — that is, where the confession must be taken to be true by reason of the discovery of the fact — then that part of the confession that is confirmed by the discovery of the fact is admissible, but further than that no part is admissible.

The writer submits this to be the correct approach to applying section 20. If a portion of the confession or statement is proven to be true by discovery of facts revealed in the statement, this is evidence to the truth of the whole statement. The writer submits that such a situation should be sufficient to satisfy the judge

66 There is considerable confusion in the Common Law as to who is a person in authority and therefore there is much uncertainty. See Schrager, supra, n. 40, for a full discussion. This uncertainty is totally undesirable and is avoided by the section. See for an example of facts that could come within this construction *R.* v. *Nanisini* [1971] N.Z.L.R. 269.

67 Supra, n. 28.

68 Idem.

69 Evidence Amendment Bill, supra, n. 43.

70 *R.* v. *Wray* [1971] S.C.R. 272,273. Note that since the passing of the Constitution Act 1982, the courts have been able to use Art. 24 to exclude evidence. See for example *R.* v. *Turgeon* [1983] 1 S.C.R. 308, which tends to indicate a radical departure from the previous law.

that the means were not in fact likely to cause an untrue admission to be made. Therefore the whole statement should be admitted. It must not be forgotten the circumstances surrounding the making of the confession can be canvassed before the jury. The defence counsel can reduce the weight of the confession accordingly.

The section is trying to have evidence placed before the court so long as it does not unduly ". . . prejudice . . ."[71] the confessor by reason of the means used to obtain the confession. In the aforementioned situation the accused could not be said to be unduly prejudiced as the confession can be considered reliable.[72]

Unfortunately the large majority of cases falling to be considered by section 20 will probably not have been confirmed by discovery. In such cases the task for the judge may be much more difficult, but here the judge may have formed his opinion on the truth of the confession and he should be entitled to have regard to that opinion. After all, the burden the Crown has to discharge is to satisfy the judge or presiding officer.

The writer submits that the approach of Hillyer J. in the High Court recently[73] is the correct one. His Honour said ". . . the character of the person to whom it is made must be considered in determining . . ."[74] the "likelihood of truth". On the facts, his Honour felt that because ". . . the accused appeared to me to be a very intelligent, well educated and tough minded individual . . ."[75] the inducement was not likely to cause an untrue admission. This approach is sensible and in accord with the intention of the section. It puts the judge in the position that he can ensure the accused is not prejudiced by the reception of unreliable evidence, but also ensures that evidence that can, to the satisfaction of the judge, be relied upon will be received.

To conclude, the writer submits that the judge is not constrained by the test produced in *Hammond*[76] of an innocent person in the position of the accused. The judge can have regard to all material before him in order to ensure the task is resolved in a manner in accord with Parliament's intent. The court must be prepared to preserve evidence which the judge is satisfied can be considered reliable. The writer does not suggest it will be easy but the facts of each case will be of immense value. Indeed the approach argued here is more flexible than the innocent person test.

It will now appear to the reader that the person in authority requirement is of little use. Whether or not the person is in authority, as defined by the Common Law, is really irrelevant. If the person who made the inducement had so much

71 Supra, n. 69.
72 See the comments of Lord Hailsham in *D.P.P.* v. *Ping Lin* [1976] A.C. 574,600. His Lordship was strongly critical of the Common Law voluntariness rule because of the possible exclusion of an obviously truthful confession. The case also indicates a strong approval of the effect of s.20 as argued in this article.
73 *R.* v. *Postlewaight* (1985, unreported, Auckland Registry, T138/84) 7.
74 Idem.
75 Idem.
76 Supra, n. 28.

influence on the accused that the judge was satisfied the accused could state something untrue, that is sufficient. The important connection is the actual influence the circumstances had on the confessor. The fact that someone is a person in authority does not necessarily mean that he has actually influenced the accused, so much as that the confession cannot be relied upon. So why even bother trying to establish someone is a person in authority? We should instead go directly to the real question. Just how much influence did the inducement have on the accused?

It will also be apparent that the scope of section 20 should be as argued. It should include any conduct capable of influencing the mind of the accused. In this way we are in a position to ask just how big an influence there was. We can then also ensure that the will of Parliament is implemented to its logical conclusion.

### *F. What Will Happen to the Judges' Rules as a Consequence of This Interpretation?*

The judges' rules are a set of rules adopted by the courts as a guideline to the exercise of judicial discretion. As the writer has submitted there can be no discretion, then the judges' rules seem to be redundant. There are however some points that should be noted about the present use of the judges' rules.

First, the Royal Commission on Criminal Procedure said the presumption behind the judges' rules is to ". . . rigorously . . ." test the reliability of confessions.[77] With the interpretation of section 20 argued in this article, the section serves this purpose, so the judges' rules would no longer be required. The rules are guidelines for the police on how a person in custody should be treated. They are not statements of how much influence the failure to comply with a rule will have on the individual. They are then basically useless for the pursuit of their underlying presumption.

Secondly, the New Zealand Court of Appeal, in accordance with the criticism just delivered to the rules, has said it is the spirit and purpose of the rules that is important,[78] not the letter. The court seems then to be giving prominence to the underlying presumption.

Thirdly, it has been held that a statement should not be excluded because of a breach of the judges' rules, unless it is unreliable.[79]

The writer submits that the judges' rules are no longer of any use to the New Zealand courts. They should be abandoned because they serve only to complicate the real issue, and as an individual instrument are ineffectual. The proper construction of section 20 would subsume those confessions that would be excluded as being unreliable. The confession would be excluded not on the breach of a judges' rules, but because the conduct constituted an inducement that was

77 *Royal Commission on Criminal Procedure* (1981; Cmnd. 8092) 91.
78 *R.* v. *Convery* [1968] N.Z.L.R. 426.
79 *R.* v. *Elliot* [1977] Crim. L.R. 551.