CONFESSIONS

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EVIDENCE LAW REFORM COMMITTEE WORKING PAPER 3 : CONFESSIONS

1. PREFACE

The views expressed in this Working Paper are only tentative. Comment and criticism are invited on matters raised in the Working Paper and on any other related matters which the Committee may not have considered and which are relevant to the topic.

The topics of the Judges Rules and Video/taping of confessions have been left for future consideration.

2. INTRODUCTION

This Working Paper will attempt to set out briefly the current law relating to confessions, highlight problem areas which are in need of clarification or reform and also to set out the options available. Where appropriate we also express a tentative preference for a particular option.

3. THE RULE

A confession is not admissible in evidence in a criminal trial if it has not been proved by the Crown that it was 'voluntary'.

The classic formulation of the rule is that of Lord Sumner in Ibrahim v R[1]:

> "It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, 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."

In McDermott[2] Dixon J stated a broader principle. The decision of the accused to make a statement must have been made in the exercise of a free choice.

> "If he speaks because he is overborne, his confessional statement cannot be received in evidence and it does not matter by what means he has been overborne. If his statement is the result of duress, intimidation, persistent importunity, or sustained or undue insistence or pressure, it cannot be voluntary."

If the confession is found to be voluntary it may, on one view, still be excluded in the exercise of the Judge's discretion on the grounds of unfairness.[3]

Conversely, a confession obtained by a promise, threat, or other inducement may still be admissible under section 20 of the Evidence Act 1908 which provides that:

> "A confession tendered in evidence in any criminal proceedings 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."

Section 20 will be discussed in detail later in this paper.

The above requirements concerning the admissibility of confessions are confined to cases in which the statement is tendered on behalf of the prosecution. In all other cases, the method by which the statement was obtained affects its weight rather than its admissibility.

4. THE BASIS OF THE RULE

A number of theories have been advanced as the basis of the voluntariness rule.

(a) Reliability

Voluntariness is seen as a guarantee of the probable truthfulness of the confession. It is on this basis that confessions are admitted in evidence as an exception to the hearsay rule i.e. people are not (for fear of probable consequences) likely to confess voluntarily to crimes that they have not committed.

The "likelihood of truth" test set out in s.20 of the Evidence Act 1908 is a statutory expression of this principle.

The question arises as to whether this is the only principle which should be applied in New Zealand, or are all, or only some, of the other principles to be applied? If the other principles are applicable what is the relative weight to be assigned to them?

(b) Deterrence

It has been suggested that the courts should discourage improper police methods by refusing to admit confessions obtained in such a manner. The Judges have increasingly recognised this principle.[4]

(c) Protection

This principle recognises the responsibility of the courts to hold a just balance between the rights of the State in bringing offenders to justice and the rights of the individual to be treated fairly and according to due process of law. If a citizen's rights are infringed then he should not be disadvantaged by the infringement.

This seems to be a general principle of which (b) above is a sub-category.

(d) Privilege against self-incrimination

It is sometimes said that an involuntary confession involves an infringement of the privilege against self-incrimination and the right to silence.

The New Zealand Position

The rationales of the confession rule were recently considered by the Court of Appeal in R v McCuin[5]. Cooke, Richardson and Holland JJ, in a combined judgment, referred to recent Privy Council (Wong Kam-Ming v R [1980] AC 247) and House of Lords (R v Brophy [1981] 2 ALL ER 705) decisions and stated (page 15, lines 25-31):

> "... confessions obtained by improper methods are excluded, not only because of their potential unreliability, but also, and perhaps mainly, because in a civilised society it is vital that persons in custody or charged with offences should not be subjected to ill treatment or improper pressure in order to extract confessions. In New Zealand in s.20 of the Evidence Act 1908 Parliament has left this principle in full force as regards violence, force or other form of compulsion".

And continued (p.15 lines 39-41):

> "In short, Parliament and the Courts have regarded third degree as so obnoxious that confessions obtained thereby are to be ruled out, no matter whether or not they may be true;..."

McMullin, J in his judgment did not refer to the rationales, but Somers J at page 23 concurred with the above statement and in addition, made the following observations. (Page 23, lines 19-25).

> "The commonly expressed justification is the trustworthiness of an induced confession - the risk that it is false ... Historically the rules about voluntary confessions have a different origin from those relating to privilege against self incrimination ... But as the principles about voluntary confessions have developed the two matters have tended to become linked."

In light of the McCuin decision, it appears that all four rationales have been accepted as guiding principles of the confessions rule.

Mathieson[6] states that although the basic idea behind s.20 is plain enough, the rationale of the section is unclear.

The reliability of confessions appears to be the governing rationale when the judge is considering whether a "promise or threat or any other inducement" exercised on a person was one which was "not in fact likely to cause an untrue admission of guilt to be made."

When violence or force or other form of compulsion are found to have been present the statement is not saved from exclusion even where the statement may be reliable. The other rationales of deterrence, protection and the privilege against self incrimination may all be applicable.

The Position Overseas

Mark Schrager, in his article "Recent Developments in the Law Relating to Confessions : England, Canada, and Australia"[7] conducted a careful analysis of the above principles and their application in the three named countries. The following conclusions were drawn by him.

ENGLAND

Judicial authority recognises a broad basis in policy underlying the confession rule which is not limited to the reliability principle (Reference was made to Lord Diplock's speech in R v Sang [1980] AC 407 where he expressed the view at p.436 that though the rationale of the confession rule may originally have been reliability it is now the right to silence). Schrager also comments that Lord Diplock evidently recognised the interrelationship of the various rationales as he referred to the confessional rule as an exceptional instance where a judge, for historical reasons, imposes sanctions for improper police conduct. Schrager referred to some decisions where confessions were excluded upon the application of the voluntariness rule even though in the circumstances they could be considered reliable.

In DPP v Ping Lin [1976] AC 574 the House of Lords directed the lower courts to apply the voluntariness rule in a simple, common-sense manner. Schrager commented (at page 441):

> "their lordships did not debate the rationales of the confession rule, preferring loyalty to precedent by holding that the rule is clearly established and should thus be applied by the courts without concern for its policy".

Schrager has rightly commented that the problem with the Ping Lin direction is what happens in the hard cases where rationales are commonly relied upon to guide the court.

CANADA

Schrager concluded that in recent years, the Supreme Court of Canada has limited the voluntariness rule by the doctrine of reliability or trustworthiness. In R v Wray [1971] SCR 272, the majority held that a part of an otherwise inadmissible confession, which is confirmed by real evidence discovered as a result of the same confession, is admissible; the reason being that the unreliability of that part has been removed. Also, the majority in Alward and Mooney v The Queen [1978] 1 SCR 559 approved the voluntariness rule in the following terms (page 502):

> "The true test, therefore, is did the evidence adduced by the Crown establish that nothing said or done by any person in authority, could have induced the accused to make a statement which was or might be untrue because thereof"

Schrager's research has found other Canadian Supreme Court decisions, which, together with the cases quoted above, have apparently replaced the voluntariness rule with the reliability rationale. He submitted that the exclusive acceptance of that rationale is wrong, preferring the attitude shown by the Australian courts.

AUSTRALIA (excluding Victoria)

Schrager submitted that the following quotation of Neasey J in R v Toomey [1969] Tas S.R. 99 (S.C.) at 104 summarises the general position in Australia:

> "Unreliability of enforced or induced confessions cannot in my opinion now be said to be the only policy reason behind the voluntary confession rule. A perusal of the history of the development of the Judges' Rules as an adjunct to the voluntary confession rule, and the broad interpretation of that rule in Cornelius v R., McDermott v R and R v Lee, will show, I think, that the privilege against self incrimination and control by the courts of improper police practices are at least as much involved in reasons behind the rule as the questions of unreliability."

Schrager concludes that controlling police behaviour and protection of individual rights and liberties are not alien to the common law tradition and that they are in accord with the policy basis underlying the voluntariness rule.

VICTORIA

The voluntary confession rule is modified in the state of Victoria by section 149 of the Evidence Act 1958. This section prevents exclusion of a confession made in response to a threat or promise where the inducement was not "calculated to cause an untrue admission of guilt to be made". This section explicitly adopts the reliability principle but judicial decisions have narrowly construed its effect. The common law rule still applies to statements other than those confessions induced by a threat or promise. Also, the common law discretion to exclude an otherwise admissible confession exists; this discretion being based on considerations of fairness to the accused.[8]

Schrager concluded that despite the existence of section 149, the Victorian Courts were not limited to the application of the reliability principle but that other considerations, namely fairness to the suspect, could be considered by the courts when exercising their common law discretion.

It appears then that the position in New Zealand is similar to that in England and Australia where a broad-based policy approach has been adopted.

Is it important to identify the principles which underlie the voluntariness rule?

Adrian Zuckerman has succinctly stated[9] in the course of a discussion of the English Court of Appeal's decision in R v Rennie[10]:

> "It is doubtful whether it was ever possible to ascertain the 'spirit' of the voluntariness rule, but the task is certainly rendered much more onerous, for appellate and trial judges alike, by D.P.P. v Ping Lin [1975] 3 All ER 175. For there the House of Lords stated that the voluntariness rule was so clear that there was no need to dwell upon its rationale. Lord Morris saw 'no necessity to re-examine or to consider the reasons which have been assigned as its justification or its basis...' (p.178). Lord Salmon dismissed such investigation as being 'an important philosophical question

but for the present purposes... only of academic interest' (p.188). And Lord Hailsham regarded voluntariness as an artificial rule which had been designed to protect the accused against dangers which no longer obtained. No rule of law, except the most technical one, can be found workable without an understanding of its rationale, or 'spirit', as the Court of Appeal [in Rennie] prefers to call it. When the purpose of a rule is unclear then its scope is going to be unclear too. Should impropriety on the part of the person in authority matter? Should it matter that the inducement formed only part of the suspect's reason for confessing? Who should be regarded as a person in authority? Does it matter that the admission was in fact true? Questions such as these could receive a satisfactory answer only if we have a principle as well as a rule, and only if we know the purpose of the rule, its policy and its place in our system of criminal justice. None of these last matters has ever been clarified and it is this uncertainty which has produced the highly technical and artificial body of decisions prior to Ping Lin. For the only alternative to principle is strict technicality.

"The indeterminacy of the voluntariness rule has deep roots for which the courts cannot be blamed. There is a profound tension between, on the one hand, the right of silence and on the other hand, the need to convict the guilty and protect the community. If the right of silence is to be fully respected, then nothing should be allowed which undermines the accused's freedom to exercise it. Suspects should be effectively informed of their right, and not merely formally; they should be given easy access to solicitors; and the Judges' Rules should be enforced as a matter of law and not merely as a matter of discretion which is almost never exercised in favour of accused. But of course such measures would make it very difficult to obtain confessions from and convictions of, the guilty. Instead police interrogation practices are designed to ensure, as the Royal Commission on Criminal Procedure has recently found that suspects do not exercise their right of silence, with the result that the vast majority of suspects make statements when it is in their interest to keep silent. As long as we are not prepared to face this conflict, and revise our attitudes to the right of silence, as long as we refrain from open consideration of what are and what are not acceptable interrogation practices, the voluntariness rule will remain indeterminate and difficult in practice..."

We believe that it is important to clarify the operative principles and their interrelationship both in relation to the initial decision about whether a confession is voluntary (i.e. before the application of s.20 falls to be considered) and also in relation to the exercise of any judicial discretion to exclude. A discretion to exclude would arise in relation to a confession held to have been voluntarily made and also probably in relation to a confession held to be involuntary but which would otherwise be saved by the 'likelihood' of truth' test contained in s.20.

The latter point is uncertain. It could be argued that s.20 manifests a clear legislative intention to admit all involuntary confessions if the method used to obtain the confession was not likely to cause an untrue admission of guilt and if the method falls short of violence, force or other form of compulsion i.e. there is no residual discretion to exclude once the test in s.20 is satisfied.

Contrary to this view, it can be argued that the specific wording of the section does not by its terms exclude the discretion. The section provides that a confession shall not be rejected on the ground that a promise or threat or other inducement has been held out. This view would leave open an exercise of the exclusionary discretion based on one of the other grounds set out above, regardless of the fact that the method used to obtain the confession was unlikely to produce an untrue admission of guilt.

The resolution of the conflict may in part turn on the interpretation of the word 'inducement' in s.20. Is it limited to some advantage or detriment to the accused or does it also embrace a mere deception or trick, such as a false statement that a co-offender has already made a full statement?

If the latter is the correct view there may still be room for a discretion where the confession has been obtained without any inducement but in a manner which involves some breach of the law.

The Canadian Federal/Provincial Task Force on Uniform Rules of Evidence also considered that identification of the principle(s) behind the rule was crucial to provide a consistent basis for later decisions[11].

We would be interested in receiving comments on which principle or principles should be regarded as the basis of the voluntariness rule and, if there is more than one principle, the relative weight to be attached to them.

5. SPECIFIC PROBLEM AREAS

(a) Statements subject to the rule

(i) At common law

No distinction is drawn, for the purposes of admissibility of voluntary statements, between a confession and an admission falling short of a full confession.[12]

Where a statement contains some inculpatory and some exculpatory material, the prosecution must put in the whole statement, or none at all. Where such a statement is admitted the inclusion of the self serving parts is regarded as being necessary for the proper understanding of the inculpatory part.

A wholly exculpatory statement is not a confession and would not be adduced by the prosecution as proof of its contents. The accused cannot adduce such a statement for to do so is contrary to the rule against self serving statements.

However, the situation may arise where the prosecution wishes to produce an exculpatory statement i.e. where the accused makes signficant departures from the statement when giving testimony in court and the Crown wish to lead the evidence to show that a previous inconsistent statement has been made. The accused may wish to object to the admissibility of the statement on the grounds that it was not voluntary. The question is whether the confession rule applies to exculpatory statements? On this point, there is seemingly no English or New Zealand authority. The matter was raised in Piche v. The Queen[13] where the majority of the Canadian Supreme Court ruled inadmissible a previous inconsistent but exculpatory statement which was found to be involuntary.

As stated earlier, inculpatory statements are admitted in evidence as an exception to the hearsay rule because of the belief that a statement against interest is, upon proof of its voluntariness, likely to be reliable.

A previous exculpatory statement on the other hand, is not led to prove the truth of its contents but rather to show inconsistency and thus attack the credit of the witness. The truth of the statement led is not relied upon, merely the fact that it was made.

If the applicability of the suggested bases of control of police procedure, protection, and the rights of the citizen not to be forced to give evidence against himself are accepted then the requirement of voluntariness may still be seen as an appropriate safeguard requirement.

Our tentative view is that all statements, whether inculpatory or exculpatory, made by the accused should be voluntary in order to be admissible.

(ii) Section 20 of the Evidence Act 1908

This section has been set out at page 2.

Mathieson[14] submits that section 20 applies only to full confessions and not to mere incriminating admissions, although there is an absence of New Zealand authority on the subject. If this is the case, then full confessions are subject to the section 20 "likelihood of truth" saving proviso, yet incriminating admissions falling short of full confessions are not.

We tentatively agree with Mathieson's view that such an interpretation has the effect of "driving an artificial wedge between full confessions of the crime charged and mere admissions of incriminating facts ... The most satisfactory solution would be a rewording of s.20 which subjected all statements made by an accused which had an incriminating tendency ... to the same criterion of admissibility".

Though a wholly exculpatory statement is not a confession, if such statements are made subject to the voluntariness rule then logically s.20 should also apply to them, at least in those circumstances where the truth of the matters contained in the exculpatory statement is relevant to the purpose for which it is led in evidence.

Other aspects of s.20 are dealt with later in this working paper.

(b) Conduct and silence of the accused

The silence of the accused when charged is not evidence of guilt and neither is his election to say nothing when cautioned.

However under existing law when a suspect chooses to say nothing in answer to police questions his silence may in some circumstances be incriminating.

A distinction is drawn between the possible effect of silence before and after a caution has been given. Silence before caution cannot of itself constitute proof of guilt but it may form part of the circumstances which can be taken into account when assessing the evidence.

After caution no inferences can be drawn from silence. To hold otherwise would render the caution a nonsense because, on the one hand, the caution advises the accused of his right to remain silent but if adverse or incriminating inferences could be drawn from that silence the caution would be more a trap than a protection.

The effect of silence before caution is not so clear-cut. The caution does no more than remind the accused of his common law right. Consequently, only in exceptional circumstances will the failure of someone to give the police an explanation when he is informed that an allegation has been made against him support the inference that he accepts the truth of that allegation.

For the purposes of the confessions rule the question of the inferences to be drawn from conduct or silence will only apply where the police are present since this is the only way in which questions about the voluntariness of the conduct of the accused are likely to arise.

The English Criminal Law Revision Committee in its 11th Report on Evidence (General) (1972 Cmnd 4991) recommended that in circumstances where the suspect failed to mention any fact which he later relied upon for his defence the Court should be able to draw an adverse inference in appropriate cases. The effect of this recommendation, if implemented, would be to abolish the right to silence.[15]

The recommendation received a hostile reception and was criticised and rejected by the English Royal Commission on Criminal Procedure (Report January 1981, Cmnd 8092), which strongly favoured the retention of the right to silence.

In relation to the silence of the accused our tentative view is that there should be no distinction made between silence before and after caution. In both cases no inference adverse to the accused should be able to be drawn.

These comments apply only to silence in the presence of police officers.

(c) The voir dire

(i) The decision to hold a voir dire

The admissibility of a confession is determined on a voir dire in the absence of the jury. In a Judge alone trial the Judge must decide on the voluntariness of the confession and then, if this is proven, assess the weight to be attributed to it.

Generally a voir dire will only be required when an objection to admissibility is raised by the defence. It now appears that the Judge may be under a duty to hold a voir dire when any question of voluntariness arises, whether or not the defence wish to take the point.

In Matheson v R[16] the High Court of Australia decided that a trial judge has the power and, where necessary, the duty to hold a voir dire of his own volition to determine a question of admissibility.

However, there remains some doubt about the course a trial Judge should take when counsel for the accused (if represented) does not ask for a voir dire. In Ajodha v The State[17] the Privy Council has stated that, irrespective of any challenge to the evidence by the defence, a trial Judge should rule on the admissibility of a confession if its voluntariness is in doubt.

If an accused is unrepresented the trial Judge has a duty to inform him of his rights with respect to the admission of evidence, including the 'right' to a voir dire to determine the admissibility of an alleged confession.

In R v Erven[18] the Supreme Court of Canada held that a voir dire should always be held to determine the admissibility of a statement made to a person in authority, even if the statement is ex facie voluntary. The possibility of an accused being able to waive his right to a voir dire was left open.

If, after a determination has been made at the voir dire, further evidence relating to voluntariness surfaces during the trial the Judge may reconsider his voir dire determination.[19]

In New Zealand the courts adopt the approach of testing the admissibility of a statement (usually) when the objection is taken, although the Judge may call for a voir dire on his own initiative when the circumstances require it.

Our tentative view is that this is a better approach than that set out in Erven. The Canadian approach does not provide for the flexibility inherent in the English, Australian and New Zealand jurisdictions.

A further issue which arises is whether a Judge should be able to order a voir dire on his own initiative in the face of an objection by the defence.

If an accused is unrepresented then it may well be appropriate for a Judge to hold a voir dire to protect the rights of the accused. However where counsel is retained we can see no justification for a rule which would allow a trial judge to apply his view of what is best for the accused in preference to the contrary view of counsel.

(ii) Evidence adduced at the voir dire

There has been some controversy about whether, on a voir dire, the prosecution in cross-examination, are entitled to ask the accused whether the challenged statement is in fact true. In R v Hammond[20] the Court of Criminal Appeal held that such a question was not improper as it was relevant to the accused's credibility. The truth of the statement was relevant to the issue of how he came to make it.

The Privy Council, on appeal from Hong Kong, however overruled Hammond in Wong Kam-ming v The Queen[21] The Privy Council by a majority made the following rulings.

(i) On a voir dire, the prosecution was not entitled to cross-examine the accused as to the truth of the statement, for the sole issue of the voir dire was whether the statement had been made voluntarily, and whether it was true was not relevant to that issue.

(ii) Whether the accused statement was excluded or admitted on the voir dire, the Crown was not entitled as part of its case on the general issue to adduce evidence of testimony given by the accused on the voir dire.

(iii) Per curiam, that where a statement is admitted as voluntary on the voir dire and the accused testifying on the general issue gives evidence about the reliability of the admissions in the statement, and in so doing departs materially from his testimony on the voir dire, cross-examination on the discrepancies between his testimony on the voir dire and his evidence on the general issue is permissible.

Where the accused does not give evidence at the substantive trial the House of Lords in R v Brophy[22] has unequivocally held that evidence given by the accused in the course of the voir dire is inadmissible in the substantive trial:

> "The right of the accused to give evidence at the voir dire without affecting his right to remain silent at the substantive trial is in my opinion absolute and is not to be made conditional on an exercise of judicial discretion". (per Lord Fraser at 710)

In Canada, the Supreme Court in De Clerq v The Queen[23] by a majority, followed the Hammond decision, holding that the truth or falsity of the statement may be relevant to that inquiry as going to the credibility of the accused's voir dire testimony. The question has not been reconsidered by the Supreme Court of Canada since Hammond was overruled in Wong Kam-Ming.

The situation in Australia differs between states.

New Zealand Courts have adopted the restrictions on the prosecution set out in Wong Kam-ming v R. Casey J in Grootjans v Patuawa[24] stated, obiter, that Wong Kam-ming establishes for New Zealand that the prosecution cannot cross-examine the defendant about the truth of the confession, nor can it call as part of its case evidence given by the defendant during that procedure. Also, if the statement is excluded, then he cannot be cross-examined on either its contents or his evidence given during the voir dire.

In our tentative view the Wong Kam-ming principles should continue to be applied by the courts in New Zealand.

We advance three main reasons in support of this view:

(1) It is hard to see the relevance of truth to the issue of voluntariness. Their Lordships in Wong Kam-ming pointed out that if the accused denies the truth of the confession, the truth or falsity of his denial cannot be determined until the jury has given its verdict on his guilt. They considered that asking such a question would undermine the purpose of the voir dire because confirmation of the truth of the confession by the accused would inevitably lead to its admission, regardless of credible evidence of police violence.

(2) If the truth of the confession can be raised, many accused will be discouraged from testifying on the voir dire.

(3) The prejudicial effect of an admission on a voir dire is increased where the trial is before a judge alone. Even where a statement has been ruled inadmissible, an admission of truth may influence the finding on the ultimate issue of guilt.

(d) The person in 'authority' requirement

The confessions rule requires that a promise, threat or any other inducement must be held out by a person in authority before the confession can be found to be involuntary[25] 'Person in authority' has been widely defined as someone who has authority or control over the accused or over the proceedings or prosecution against him.[26]

It seems quite clear to us that an inducement from any source is equally capable of causing an untrue confession.

The only commonwealth jurisdiction in which the 'person in authority' requirement has been abandoned is New South Wales. In R v Attard[27] the Court of Criminal Appeal reasoned that the exclusion of involuntary statements induced by persons in authority is only a particular (and typical) instance of a general rule.

The English Criminal Law Revision Committee in its 11th Report[28] recommended the abolition of the requirement.

Our tentative view is that the requirement should be abolished. This would remove an area of unnecessary technicality from the law and would recognise that an inducement from any source can cause an untrue confession.

A confession obtained by an inducement held out to the accused is still subject to the 'likelihood of truth' test contained in s.20. The 'reliability principle' would thus be applied uniformly to all inducements. We see this as a far more logical approach.

(e) The relevance of the accused's state of mind

In R v Naniseni[29] the Court of Appeal held that if some factor is relied on as having overborne, or as apt to overbear, the accused's will, it must be found in the will of someone else, though not necessarily of a person in authority.

> "The will of some other person is essential; the involuntariness cannot be produced from within. Such considerations as fatigue, lack of sleep, emotional strain, or the consumption of alcohol, cannot be efficacious to deprive a confession of its quality of voluntariness, except so far as any of these may have been brought about or aggravated by some act or omission of other persons to the end that a confession should be made."

It is arguable that the rule in Naniseni should be reversed by statute. The physical and/or mental state of the accused at the time that the confession was made would then be able to be taken into account when assessing voluntariness.

Many factors can render a confession involuntary. It may be an unjustifiable limitation to provide that factors such as fatigue, lack of sleep, emotional strain or the consumption of drugs or alcohol must be disregarded in assessing voluntariness unless they have been produced or aggravated by the police to facilitate a confession.

(f) The 'oppression' concept

In England the test of voluntariness seems to be:

"have the prosecution proved that the (confession) was voluntary in the sense that it was not obtained by fear of prejudice or hope of advantage excited or held out by a person in authority, or by oppression?'[30] (Emphasis added).

In R v Prager[31] the English Court of Appeal adopted the test of oppression stated by Sachs J in R v Priestly[32]:

> "Whether or not there is oppression in an individual case depends upon many elements. I am not going into all of them. They include such things as the length of time of any individual period of questioning, the length of time interviewing between periods of questioning, whether the accused person had been given proper refreshment or not, and the characteristics of the person who makes the statement. What may be oppressive as regards a child, an invalid or an old man or somebody inexperienced in the ways of this world may not be oppressive when one finds that the accused person is of a tough character and an experienced man of the world."

The concept of "oppression" appears to be directed to curbing the abuse of police power, promoting due process and reinforcing the right of silence. Although the House of Lords in D.P.P. v Ping Lin rejected the notion that impropriety on the part of a person in authority is essential before oppression can be said to exist, there seems to be a tendency for emphasis to be placed upon the impropriety of police behaviour.[33]

The New Zealand Courts have excluded statements obtained by oppressive conduct and circumstances, although the courts do not appear to treat this ground as being distinct from the voluntariness rules or the Judges Rules.

In R v Gardiner[34] a Maori youth aged 16, and described as feeble-minded, was woken in the middle of the night and tken, handcuffed on the way, to the police station where a written statement was obtained from him. The trial Judge rejected the statement because it was obtained by what he called 'a violent procedure' and was outside s.20 of the Evidence Act, as it stood then. The Court of Appeal in R v Phillips[35] approved of the lower court ruling in Gardiner, which lead to the redrafting of s.20 making violence, force and other compulsion specifically outside the scope of the section. It has been suggested that "other form of compulsion" probably covers the Gardiner type case.[36]

In R v Rodgers[37] the Court of Appeal stated that any "other form of compulsion", referred to in s.20, broadly corresponds to "oppression".

In R v Wilson a 17 year old Maori boy, under suspicion of murder, was subjected to a prolonged interrogation (spanning some nine hours), in a small, stuffy, dark painted room, and with the continuous attendance of one or more police officers. Although there was the occasional refreshment offered and no aspect of violence existed, the defendant was cross-examined at length from a previous statement even after the defendant had made it clear early on that he did not wish to answer their questions. The defendant's parents were not allowed access to him until after the confession was obtained. The Court of Appeal held that:

> "The irregularities went beyond mere breaches of the Judges Rules. In our opinion the prolonged interrogation in the confinement of a small room has to be treated, in all the circumstances, as unfair and oppressive. While not involving violence, the oppression had a physical character putting it in the category of "other form of compulsion" in Section 20. Accordingly the oral and written statements were not admissible, no matter whether or not the means employed to induce them were likely to cause an untrue admission of guilt."[38]

In New Zealand then oppression is treated as coming within the 'other form of compulsion' limb in s.20.

Oppression is something more than a threat or promise or a breach of the Judges Rules. It must be a whole course of conduct which amounts to serious misconduct on the part of the police which is sufficient to have overborne the will of the person subjected to it. Oppression seems to roll these concepts together to provide an overall assessment of the situation in which the accused was placed.

The result of characterising oppression as being akin to 'violence or force or other form of compulsion' is that a confession obtained as a result is automatically excluded by law.

In our view there is little to be gained by giving legislative recognition to it by adding to the categories of automatic exclusion in s.20. Since the Courts in New Zealand have already equated 'oppression' with 'other forms of compulsion' there seems to be no point in adding a further synonym.

(g) The scope and structure of section 20

To repeat, s.20 provides:

> A confession tendered in evidence in any criminal proceedings 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 admissionof guild to be made."

The test of 'likelihood of truth' is whether an innocent person, in the position of the accused and in the circumstances in which he is placed, would be likely to confess to a crime which he had not committed. The Court must restrict itself to the consideration of the tendency of the accused, assuming him to be innocent, to admit guilt.[39]

The only overseas jurisdiction having a similar provision to s.20 is Victoria. The issue is whether that section should be retained and if so, in what form?

In our tentative view s.20 has achieved a reasonable compromise between the automatic exclusion of involuntary confessions in some circumstances and the necessity to admit confessions into evidence where the circumstances in which the confession was obtained were not likely to cause an untrue admission of guilt to be made.

Or, as Mathieson puts it:[40]

> "The basic idea underlying s.20 is plain enough: there comes a point at which the dislike of self-incrimination and the desirability of discouraging improper police methods prevail over the objective of arriving at the truth, and that point is reached when violence or force are used on a suspected person. Whether this rationale also serves when an "other form of compulsion" has been used must remain doubtful so long as it is uncertain what amounts to an "other form of compulsion.""

We believe that violence or force should continue, on the grounds of public policy, to result in the automatic exclusion of any confession obtained. The phrase "other form of compulsion" is extremely vague but has been clarified to some extent by the Courts treating this ground as synonymous with the concept of oppression. Though oppression itself is an uncertain concept it is at least clear that what is to be looked at is the entirety of the situation in which the accused finds himself.

In our view s.20 is necessary to mitigate the rigorous exclusion of relevant evidence which would result from a strict application of the common law rules relating to voluntariness. We believe that the line has been correctly drawn. We doubt whether a more precise distinction can be drawn between those categories of conduct to which a likelihood of truth test should apply and those where the confession should be automatically excluded.

The Court of Appeal decision in R v McCuin,[41] held that the standard of proof to which the Crown must prove voluntariness is beyond reasonable doubt. We believe that consistency demands that the same standard should be applied to the likelihood of truth test under s.20. Confessional evidence is often of decisive importance. To label the question of admissibility of confession evidence as an incidental matter of fact, and apply the civil standard of balance of probabilities, is in our view inappropriate.

While we would appreciate comment on any aspect of either the practical operation or the content of s.20 we would draw particular attention to the following issues:

(1) If s.20 is to be retained should it be redrafted into paragraphs to improve clarity?

(2) Should the standard of proof to which the Judge must be satisfied be specifically stated?

(3) Should 'confession' be widely defined to include any statement made by the accused which the prosecution seeks to put into evidence and the truth of which is to be relied on at the trial?

This working paper has identified and briefly discussed the main issues which the Committee has isolated at this stage of its consideration of the topic.

We would welcome comment on the issues raised and the tentative views expressed and also on any issues which we may not have considered which are also relevant.

FOOTNOTES

1. [1914] AC 599, at 609.

2. (1948) 76 CLR 501, at 511. See also R v Lee (1950) 82 CLR 133, at 149.

3. Cleland v R (1983) 43 ALR 619. See also C. Corns, The admissibility of confession evidence, Victoria Law Institute Journal, Nov. 1984, at 1316-19.

4. See R v Hartley [1978] 2 NZLR 199, 218. R v McCuin [1982] 1 NZLR 13.

5. Ibid.

6. Cross on Evidence 3rd N.Z. Edition, 1979, Ed. D.L. Mathieson, at p.523.

7. 26 McGill Law Journal 1981, 435. See also for Canadian position Law Reform Commission of Canada, Working Paper 32 Criminal Law-questoning suspects, 1984.

8. See supra n.3.

9. A.A.S. Zuckerman, All England Law Reports - Annual Review 1982; Evidence; 126 at 136.

10. [1982] 1 All ER 385.

11. Report on Evidence 1982, Carswell, at 173-175.

12. Customs and Excise Commissioners v Harz [1967] 1 All ER 177.

13. [1971] S.C.R. 23.

14. Opt. cit. n.6, at p.510.

15. See Meng Heong Yeo, Diminishing the Right to Silence: 'The Singapore Experience' (1983) Crim LR 89.

16. (1981) 55 ALJR 594 at 598, 607.

17. [1981] 2 All ER 193 at 201-203 (PC).

18. [1979] 1 SCR 926.

19. R v Watson C.A. 246/80, Unreported judgment 30 July 1981.

20. R v Hammond [1941] 3 All ER 318 (C.C.A)

21. [1979] 1 All ER 939.

22. [1981] 2 All ER 705.

23. [1968] S.C.R. 902.

24. (Unreported judgment), M 98/80 (H.C.) Dunedin registry 1981.

25. D.P.P. v Ping Lin [1976] AC 574.

26. Deokinanan v R [1969] 1 A.C. 20 at 33. (P.C.)

27. [1970] NSWR 750.

28. Evidence (General) 1972 Amnd 4991, p.38 para. 58.

29. [1971] NZLR 269.

30. See Callis v Gunn [1964] 1 QB 445, D.P.P. v Ping Lin [1976] AC 574. Also, paragraph (e) of the preamble to the Judge's Rules 1964.

31. [1972] 1 All ER 1114.

32. (1976) 51 Cr App. R 1.

33. See Australian Law Reform Commission, Common Law of Evidence : Areas of Disagreement and Uncertainty Research Paper 2, December 1981 at p.90.

34. [1932] NZLR 1648.

35. [1949] NZLR 316.

36. R v Wilson [1981] 1 NZLR 316 at 323.

37. [1979] 1 NZLR 307.

38. Supra n.36 at 324.

39. R v Hammond [1965] NZLR 257, at 258.

40. Op. cit. n.6 at p.523.

41. See supra n.4.