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Recent Developments in the Law Relating to Confessions: England, Canada and Australia

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I. The nature and scope of the confession rule

Any suspicion that Lord Sumner's *locus classicus* in *Ibrahim*[1] no longer applied in its original form was dispelled by the House of Lords in *D.P.P.* v. *Ping Lin*,[2] where the Law Lords stated unequivocally that the test of admissibility applying to statements made by the accused to a person in authority is that laid down in *Ibrahim*, as elaborated in paragraph (e) of the Judges' Rules.[3] The House felt that the rule was too firmly established to be modified without legislation. Their Lordships affirmed their *dictum* in *Commissioners of Customs and Excise* v. *Harz and Power*[4] where they also approved paragraph (e) of the Judges' Rules, which reads as follows:

> that it is a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that person to a question put by a police officer and of any statement made by that person that it shall have been voluntary, in the sense that it has not been obtained from him by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression.[5]

Thus the test is that of Lord Sumner, coupled with the doctrine of oppression. In *R.* v. *Prager*[6] Edmund Davies L.J. (as he then was) examined the role of oppression in English law, noting that the

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1 *Ibrahim* v. *The King* [1914] A.C. 599 (P.C.).
2 [1976] A.C. 574.
3 [1964] 1 All E.R. 237.
4 [1967] 1 A.C. 760 (H.L.).
5 *Supra*, note 3.
6 [1976] 1 All E.R. 1114 (C.C.A.).

term first appeared in the Judges' Rules, 1964 and closely followed a *dictum* of Lord Parker C.J. in *Callis* v. *Gunn*[7] which condemned confessions "obtained in an oppressive manner". His Lordship cited Sachs J. in *R.* v. *Priestley*,[8] the only judicial consideration of oppression of which the Court was aware:

> this word in the context of the principles under consideration [Judges' Rules, 1964] imports something which tends to sap, and has sapped, that free will which must exist before a confession is voluntary.[9]

Sachs J. went on to illustrate what might constitute oppressive circumstances, outlining examples which lead to the conclusion that the test is essentially subjective, an approach not inconsistent with the decision of the House of Lords in *Ping Lin.*

It is interesting to note that the recommendations contained in the Eleventh Report of the Criminal Law Revision Committee,[10] while approving *R.* v. *Prager* and substituting "oppressive treatment of the accused" for "oppression",[11] advocated a change in the rule. A majority of the Committee's members suggested a limitation of the rule so as to exclude only statements made in response to threats or inducements that were likely to produce an unreliable confession.[12] The test applies not to the confession actually made but to any confession which the accused might have made as a consequence of the threat or inducement. Both the recommended rule and its suggested application appear contrary to *Ping Lin* in that the House adhered strictly to Lord Sumner's test and in that their Lordships' view of the rule's application called for an approach that is partly objective and partly subjective.

Since adopting the *Ibrahim* rule,[13] the Supreme Court of Canada has often affirmed its applicability to the admissibility of confessions.[14] Despite *dicta* underlining the usefulness of the Judges' Rules as guidelines in adjudication,[15] they are not regularly applied in Canada. Furthermore, in view of the narrow exclusionary discretion of the trial judge, it is difficult to imagine that a contravention

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[7] [1964] 1 Q.B. 445 (D.C.).

[8] (1965) 51 Cr. App. R. 1 (Kent Assizes), *aff'd* (1966) 50 Cr. App. R. 183 (C.C.A.).

[9] *Ibid.*, 1.

[10] *Evidence* (General), Cmnd 4991 (1972).

[11] *Ibid.*, § 60.

[12] *Ibid.*

[13] *Prosko* v. *The King* (1922) 63 S.C.R. 226.

[14] *E.g., Boudreau* v. *The King* [1949] S.C.R. 262; *Piché* v. *The Queen* [1971] S.C.R. 23; *R.* v. *Erven* [1979] 1 S.C.R. 926.

[15] See *R.* v. *Fitton* [1956] S.C.R. 958, 964; *R.* v. *Vaupotic* (1969) 70 W.W.R. 128, 131 (B.C. Mag. Ct).

of the Judges' Rules would be relied upon to exclude a confession in Canada. It is perhaps this unimportant role played by the Judges' Rules that explains the absence of authority in Canada's highest court which would embrace the doctrine of oppression. There is recent authority, however, albeit in concurring reasons, that "oppression" may be linked with the *Ibrahim* rule in Canada. In *Horvath* v. *The Queen*[16] a seventeen-year-old accused, charged with the murder of his mother, was brought by the investigating detectives to a police specialist in interrogation. A psychiatrist testified at the trial that the specialist had by his methods of interrogation unwittingly induced a mild state of hypnosis. The accused's statements were excluded by the trial judge and the issue of their admissibility reached the Supreme Court of Canada on appeal from acquittal. A majority of four judges confirmed the inadmissibility of the accused's statements, but they were divided in their reasons. Two members of the Court held for exclusion on the narrow ground that statements induced by hypnosis were not voluntary within the scope of the *Ibrahim* rule.[17] Of interest for present purposes is the opinion of Spence J., Estey J. concurring, in which, after reviewing the authorities, the learned judge concluded that a statement could be involuntary even if not induced by hope of advantage or fear of prejudice. After citing *McDermott* v. *The King*[18] and *R.* v. *Priestley*,[19] Spence J. reviewed the circumstances of the impugned interrogation and concluded that no statement made by the accused could have been voluntary. Nowhere does Spence J. say explicitly that the doctrine of oppression is part of Canadian law, but his judgment strongly implies that circumstances construed as oppressive by an English court should also give rise to exclusion in Canada under a broad view of the notion of voluntariness set out in *Ibrahim*.[20]

While perhaps not formally embracing the oppression doctrine in its faithful application of the *Ibrahim* rule, it appears that there is a tendency for the Supreme Court of Canada to apply the rule so as to exclude involuntary statements which were not induced by fear of prejudice or hope of advantage. The Law Reform Commission of Canada has recommended an interesting two-step rule

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[16] [1979] 2 S.C.R. 376: see the excellent comment by Hutchinson & Withington, *Horvath v. The Queen: Reflections on the Doctrine of Confessions* (1980) 18 Osgoode Hall L.J. 146.

[17] *Ibid.*, 426 *per* Beetz J., Pratte J. concurring.

[18] (1948) 76 C.L.R. 501 (Aust. H.C.).

[19] *Supra*, note 8.

[20] See also *R.* v. *Erven*, *supra*, note 14, 930 *per* Dickson J. for an oblique reference to oppression.

to govern the admissibility of the accused's statements.[21] First, evidence would be excluded if it had been obtained in such circumstances that its use in court would bring the administration of justice into disrepute. Second, statements made by accused persons in circumstances rendering them unreliable are also excluded. The proposal is interesting in that it manages to combine notions which are often considered antithetical, that is, exclusion for unfairness and inclusion for reliability.

The rule in *Ibrahim* also appears to be the foundation of the Australian law of confessions but the breadth of the trial judge's discretion to exclude minimizes the importance of the rule or perhaps expands its scope. Dixon J.'s classic statement of the voluntariness rule was given in the *McDermott* case:

> If [the accused] 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. But it is also a definite rule of the common law that a confessional statement cannot be voluntary if it is preceded by an inducement held out by a person in authority and the inducement has not been removed before the statement is made.[22]

As there is no recent authority to doubt that *McDermott* remains good law, the common law position in Australia resembles the English combination of the rule in *Ibrahim* and the doctrine of oppression. An important exception to this position is found in section 141 of the Victorian *Evidence Act*, 1928 (now *Evidence Act*, 1958, s. 149) which prevents exclusion of a confession made in response to a threat or promise where that inducement was not "calculated to cause an untrue admission of guilt to be made". In *R.* v. *Lee*[23] the High Court of Australia construed this section strictly in holding that it only applies to confessions *stricto sensu*, that is, statements amounting to admissions of actual guilt, and that the section only prevents exclusion of confessions which the common law would reject as involuntary because induced by a threat or promise. Statements otherwise rejected by the common law (*e.g.*, because of oppression or unfairness) are unaffected by the legislation. The Australian Law Reform Commission has recommended that confessions induced other than by physical violence or the threat thereof should only be excluded if the inducement is considered likely to have caused the confession to be untrue. The recommendation closely resembles section 149 of the Victorian *Evidence Act*, 1958,

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[21] *Report on Evidence* (1975), §§ 15, 16.
[22] *Supra*, note 18, 511.
[23] (1950) 82 C.L.R. 133.

and is similar to the positions taken by the law reform commissions of England and Canada.

II. The rule in relation to the rationale

Though certain elements of the confession rule as outlined above are criticized throughout this paper, in this section the test is assumed to be essentially that outlined by Lord Sumner in *Ibrahim*, that is, voluntariness. A historical analysis of the case law with a view to defining the rationale of the confession rule would be beyond the scope of this paper. Rather, it is proposed to survey the principal rationales that have been advanced in academic writing and to relate these to recent judicial applications of the rule. It will be argued that, while the English judiciary has not extended or limited the rule by applying it as a function of a rationale, the Canadian courts (and the Legislature of the State of Victoria) have limited the rule, almost to the point of replacing it, by the doctrine of reliability or trustworthiness. The courts of other Australian jurisdictions seem to have extended the scope of the rule by use of the judge's exclusionary discretion to something more than a guarantee of trustworthiness.

Wigmore's view of the rationale was that voluntariness guarantees the probable truthfulness of the confession.[24] Professor Ratushny has written that a proper understanding of this rationale is not concerned with the actual truthfulness of an impugned confession but with its *potential* truth[25] — that the rule is to be applied independently of the policy which gives rise to it by avoiding a direct inquiry into the veracity of the confession itself. Even those who deny that the trustworthiness or reliability doctrine is the only rationale for the confession rule concede that there is much case law to support it, including cases decided before *Ibrahim* as well as after.[26]

Despite the allure of the reliability notion, it does not adequately explain all the case law and is probably not the sole policy to motivate the confession rule. Although, as Wigmore points out, the privilege against self-incrimination has a different origin from the confession rule,[27] a strong argument has been made that the two

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[24] See *Evidence*, 3rd ed. (Chadbourn revision) (1940), Vol. III, § 822.

[25] *Unravelling Confessions* (1971) 13 Crim. L.Q. 453, 476.

[26] See Cowen & Carter, "Confessions and the Doctrine of Confirmation by Subsequent Facts" in *Essays on the Law of Evidence* (1956), 41, 42 *et seq.*; Del Buono, *Voluntariness and Confessions: A Question of Fact or a Question of Law?* (1976) 19 Crim. L.Q. 100.

[27] *Supra*, note 24, § 823.

rules have somewhat fused in practice.[28] Close to this notion lies the policy of discouraging improper police methods, often referred to as the disciplinary rationale. This rationale is more traditionally identified with the doctrine of "the fruit of the poison tree" in American law,[29] but there is little support for it in Commonwealth case law. It has been criticized as confusing the issues of the accused's criminal liability with his rights against those who may have used actual or threatened violence to coerce his confession. The same critic has argued that it is no more rational to exclude a confession as a sanction of police malpractice than to reject any other illegally obtained evidence.[30] It has also been suggested that the rationale which most consistently explains the case law (at least in England) is the protective principle; that is, as the legal system has standards of criminal investigation, the citizen has a corresponding right to be treated in a certain way and not to be disadvantaged when his rights are infringed.[31] Since the confession rule excludes statements obtained when the accused is treated in a certain manner, it is said that the rule is essentially concerned with the protection of suspects. It is submitted that such a protective rationale is little more than a specific manifestation of the privilege against self-incrimination.

It is of note that in England the Criminal Law Revision Committee believes that the reliability principle is the historical foundation of the confession rule.[32] As well, the Canadian and Australian law reform commissions have in varying degrees embraced this approach.[33]

While there is direct authority in the English Court of Appeal that the basic reason for the rejection of involuntary confessions is the risk that they may be untrue,[34] there are cases where confessions were excluded upon application of the *Ibrahim* rule, even though in

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[28] Cowen & Carter, *supra*, note 26, 47 *et seq.*

[29] On this topic, see generally Maguire, *How to Unpoison the Fruit — the Fuorth Amendment and the Exclusionary Rule* (1964) 55 J. Crim. L., C. & P.S. 307; Pitler, *"The Fruit of the Poison Tree" Revisited and Shepardized* (1968) 56 Cal. L. Rev. 579; Comment, *Fruit of the Poisonous Tree — A Plea for Relevant Criteria* (1967) 115 U. Pa L. Rev. 1135.

[30] Andrews, *Involuntary Confessions and Illegally Obtained Evidence in Criminal Cases* [1963] Crim. L.R. 15 & 77, 18.

[31] See Ashworth, *Excluding Evidence as Protecting Rights* [1977] Crim. L.R. 723.

[32] See *supra*, note 10, § 56.

[33] *Supra*, note 21, § 16; Australian Law Reform Commission, *Report* (No. 2) (1975), 69.

[34] *R.* v. *Ovenall* [1969] 1 Q.B. 17, 23 (C.A.) *per* Blain J.

the circumstances they could be considered reliable.[35] In *Commissioners of Customs and Excise* v. *Harz and Power*, Lord Reid observed in *obiter dicta* that the two lines of thought underlying the case law on confessions are unreliability and *nemo tenetur seipsum prodere*.[36] However, his Lordship did not venture a preference for either rationale. In *D.P.P.* v. *Ping Lin* the House of Lords directed the lower courts to apply the *Ibrahim* rule in a simple, common-sense manner. 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.[37]

More recently, in *R.* v. *Sang*,[38] Lord Diplock expressed the view that though the rationale of the confession rule may originally have been reliability it is now *nemo debet prodere se ipsum*, that is, the right to silence.[39] It is hard to accept that reliability is no longer a justifying policy for the rule. His Lordship evidently recognizes the inter-relationship of the various rationales, as he refers to the confession rule as an exceptional instance where the judge, for historical reasons, imposes sanctions for improper police conduct. His Lordship thus appears to conflate, at least in the historical context, reliability with control of police conduct.[40] Such a conflation may well be correct, and the approach of entwining diverse rationales is supported by Lord Hailsham in his dissenting reasons in *Wong Kam-ming* v. *The Queen*, where he noted that both reliability and the control of police practice support the confession rule.[41] Nonetheless, these views of Lords Diplock and Hailsham are isolated examples. The majority of the Bench in *Sang* was loyal to the approach in *Ping Lin* by stating no preference of rationale.[42] The consensus of the House in *Sang* appears to be that the confession rule is essentially concerned with fairness to the accused. Such a view of the

[35] *R.* v. *Cleary* (1964) 48 Cr. App. R. 116 (C.C.A.); *R.* v. *Richards* [1967] 1 W.L.R. 653 (C.C.A.); *R.* v. *Northam* (1967) 52 Cr. App. R. 97 (C.C.A.). See also Cross, *Evidence*, 4th ed. (1974), 485 and Morissette, *Improperly Obtained Evidence Other than Confessions: A Comparative Study* (unpublished D. Phil. thesis, University of Oxford, 1977), 307 (publication forthcoming).

[36] *Supra*, note 4.

[37] *Supra*, note 2, 595 *per* Lord Morris of Borth-y-Gest; 607 *per* Lord Salmon.

[38] [1980] A.C. 402 (H.L.).

[39] *Ibid.*, 436.

[40] For clarity, it should be noted that the House of Lords held in *Ping Lin* (*supra*, note 2) that police impropriety as such is irrelevant in applying the confession rule.

[41] [1980] A.C. 247, 261 *et seq.* (P.C.).

[42] *Supra*, note 38, 444-5 *per* Lord Salmon; 450 *per* Lord Fraser; 453 *per* Lord Scarman.

confession rule is, however, consistent with the various rationales proposed; for example, it is fair that the accused not have his unreliable statements received against him, just as it is fair that his right to silence be respected or that he not be subject to mistreatment by the police. If a wide policy basis is recognized in *Sang*, even implicitly, is there inconsistency with the direction in *Ping Lin* that the confession rule should be applied without concern for its rationales? It is submitted that the two views are not necessarily contradictory. It is feasible to deal adequately with simple cases by a mechanistic application of the rule. In hard cases, however, the rationales should be considered. If a discretion to exclude confessions not caught by a strict application of the rule exists, and if that discretion is applied as a function of the various rationales, then *Sang* and *Ping Lin* need not be viewed as contradictory. The simple case will be governed by the rule, the hard case by the rationales. The rule itself will thus remain intact while all confessions offensive to its policy basis will be excluded as well. This of course rests on the assumption that the House of Lords did indeed recognize a broad basis in policy underlying the confession rule, and that the various rationales together constitute the broad criteria governing the application of the exclusionary discretion.

The Supreme Court of Canada in recent years has moved toward an acceptance of the reliability rationale, to the extent of limiting the rule by it (and perhaps replacing the rule with this rationale). In *R.* v. *Wray*,[43] a majority of the Supreme Court approved *R.* v. *St Lawrence*[44] in holding *inter alia* that that part of an otherwise inadmissible confession confirmed by real evidence discovered as a result of the accused's statement is admissible. The reason for this conclusion is that the discovery of real evidence removed the danger of untrustworthiness from that part of an involuntary confession thus confirmed. In *DeClercq* v. *The Queen*,[45] while maintaining that the ultimate issue on the *voir dire* is voluntariness, the Court permitted that the accused, testifying in the trial within a trial, be asked whether the impugned confession is true. The Court felt that the truth of the statement had a logical bearing on whether or not it was voluntary and that it was relevant to an assessment of the accused's credibility as a witness during the *voir dire*. It was pointed out by dissenting members of the Court that allowing such a question was irrelevant to voluntariness and would undermine that criterion. Although the majority emphasized the main issue

[43] [1971] S.C.R. 272.
[44] [1949] O.R. 215 (C.A.).
[45] [1968] S.C.R. 902.

on the *voir dire* as voluntariness, it is submitted that allowing a direct inquiry into the truth of the statement implies at least tacit recognition of the reliability rationale and a tendency to subvert the rule (concerned with voluntariness) for a consideration of the rationale as the test on the *voir dire*. In *Boulet* v. *The Queen*[46] the Supreme Court had to consider the admissibility of statements made by the accused without the "protection of the court" at the preliminary inquiry of his accomplice. Beetz J. spoke for the Court and held that statements made under oath by an accused in a prior judicial proceeding are admissible without evidence of voluntariness. The reason given was not that the law presumes such statements to be voluntary but that they were given under pain of perjury. His Lordship went on to mention such objective guarantees of trustworthiness as the safeguard of rights by the presiding judge and the lack of physical constraint. The obvious influence upon the Court of the reliability rationale is especially interesting when one considers that the case might have been decided on the basis that the *Ibrahim* rule has no application to statements made in judicial proceedings and, in particular, that a judge presiding over adversarial proceedings is not a person in authority as understood in the law relating to confessions. The pinnacle of this movement from the rule to the reliability rationale came in the Supreme Court's judgment in *Alward and Mooney* v. *The Queen*,[47] where Spence J., speaking for the majority, quoted with approval the following passage from the judgment of the lower court:

> 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.[48]

The confession in *Alward* was made as a result of a false statement by a police officer, to the effect that the victim had regained consciousness and would be able to identify his assailants. Limerick J.A., speaking for the New Brunswick Court of Appeal,[49] held that the type of fear induced by such a statement was not that of reprisal for remaining silent with which the confession rule is concerned. His Lordship stated that the principle upon which the rule is founded is one of trustworthiness and then went on to state the rule as quoted above. On the basis of these four cases it is submitted that however much the Supreme Court may maintain in *obiter*

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[46] [1978] 1 S.C.R. 332.

[47] [1978] 1 S.C.R. 559.

[48] *Ibid.*, 562, quoting Limerick J.A. (1977) 73 D.L.R. (3d) 290, 306 (N.B.C.A.).

[49] *Supra*, note 48.

dicta that the issue in the *voir dire* is voluntariness,[50] it has demonstrated a preference for the reliability rationale and a tendency to construe and apply the *Ibrahim* rule as a function of that rationale to the point of limiting the rule's exclusionary effect to statements caught by the rationale, not the rule. Furthermore, in *Alward* the Court approved a formulation of the rule which appears tantamount to a replacement of that rule by its rationale.

The State of Victoria has explicitly opted for the reliability rationale in section 149 of the *Evidence Act*, 1958,[51] but the High Court narrowly construed the ambit of that enactment in *Lee*,[52] holding that the common law still applies to matters not covered by section 149, that is, statements other than those induced by a threat or promise. The common law was held to include judicial discretion to exclude statements admissible under the *Ibrahim* rule. In view of the statute, regard could be had in exercising the discretion to the probable truth of the statement, though the ultimate consideration was held to be fairness to the accused.[53] It was added that it is relevant to consider compliance by the police with the Judges' Rules in adjudicating on the issue of fairness. It could be asserted on the basis of *Lee* that the High Court accepted reliability as the rationale of the confession rule but that other policy considerations are relevant to the exercise of the discretion. However, it is equally consistent to assert on the basis of *Lee* that the Court, in narrowly construing section 149 and affirming the fairness criterion of the discretion, felt that the rationale of the *Ibrahim* rule lay in something more than reliability, and that the common law discretion exists to exclude for unfairness a statement admissible (and reliable) under *Ibrahim*. This position is borne out by subsequent judgments in other Australian states. In *R.* v. *Wright*[54] repression of improper police tactics was thought to be a rationale. That decision supported the judgment of Neasey J. in *R.* v. *Toomey*,[55] where the learned justice expressed the following view, which summarizes well 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

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[50] *E.g.*, *DeClercq* v. *The Queen*, *supra*, note 45; *Horvath* v. *The Queen*, *supra*, note 16, 432. See also Roberts, *The Legacy of Regina v. Wray* (1972) 50 Can. Bar Rev. 19; Note, *Developments in the Law — Confessions* (1966) 79 Harv. L. Rev. 935.

[51] See text following note 22, *supra*.

[52] *Supra*, note 23.

[53] *E.g.*, *McDermott* v. *The Queen*, *supra*, note 18.

[54] [1969] S.A.S.R. 256, 264-5 (S.C. *in banco*).

[55] [1969] Tas. S.R. 99 (S.C.).

> 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 question of unreliability.[56]

It is submitted that the attitude of the Australian courts is preferable. The approach of the House of Lords in *Ping Lin*, adhering to the rule without consideration of its rationale, may be sound in precedent and appears to promote certainty in the law. However, that same refusal to discuss the underlying policy affords no guidelines to trial judges in applying the rule and in exercising their discretion. But this may be mitigated if, as suggested, the House is taken to have endorsed a wide policy basis by its classification of the confession rule in *Sang* as a rule of fairness. The plain and exclusive acceptance of the reliability rationale by the Supreme Court of Canada is, it is respectfully submitted, wrong. The original rationale of the confession rule will probably never be known with certainty, but it seems clear that reliability is not the only answer. The divergence of credible academic opinion and the reluctance of the House in *Ping Lin* to enter the debate bear this out. Furthermore, the *Ibrahim* rule, applied without consideration of its policy, does exclude statements which might be reliable.[57] It is submitted that a rule, such as the confession rule, concerned with the manner of obtaining evidence should be allowed to exclude that which might be reliable evidence. The considerations surrounding the application of the confession rule should not be confounded with the admissibility of illegally obtained (real) evidence. The criterion pertinent to admissibility of the latter type of evidence is relevance. The manner in which such evidence has been obtained is not relevant to a consideration of its *prima facie* admissibility. The essence of the confession rule demands that it respond to the manner in which evidence was obtained; for example, did a person in authority hold out hope of advantage?[58] The rule concerned with the admissibility of illegally obtained evidence operates irrespective of the manner in which evidence has been obtained. The illegal or improper means of obtaining is irrelevant to *prima facie* admissibility. As such, this rule of admissibility is basically inclusionary. Opposing the confession rule to the relevance rule, as the latter relates to illegally obtained evidence, invites a judicial inclination toward exclusion of

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[56] *Ibid.*, 104.

[57] *E.g.*, *R.* v. *Cleary*, *supra*, note 35; *R.* v. *Richards*, *supra*, note 34; *R.* v. *Northam*, *supra*, note 35.

[58] See *R.* v. *Sang*, *supra*, note 38, 274 *per* Viscount Dilhorne.

confessions. Such an attitude is justified not only by examining the confession rule in the aforementioned context, but by the very articulation of the rule itself; that is, the *Ibrahim* formulation presupposes, as a starting point, inadmissibility of admissions made to persons in authority. Advocating such an exclusionary attitude in relation to confessions obviously embraces a policy basis that is wider than mere reliability. As such, this position imports to the law of evidence considerations of controlling police behaviour and the protection of individual rights and liberties. Some may argue that such an approach is foreign to the common law of evidence. The response to such an argument is that principles such as *nemo tenetur seipsum prodere* are as much an integral part of the law of evidence as is the admissibility of that which is relevant. Those who feel hostile to such an attitude may rebut it with the contention that this exclusionary, protective approach inclines toward the underlying reasoning of the doctrine of "the fruit of the poison tree" of American Law, a concept that is foreign to British legal and constitutional traditions.[59] However, that is to look at the wrong side of the coin. It is hardly alien to the common law tradition that liberty of the individual should be safeguarded by rules entrenched in precedent and not in constitutional documents.

It is therefore submittted that to construe the confession rule merely as a function of the reliability rationale disregards policy considerations which are built into the rule itself and which are perfectly harmonious with a coherent law of evidence.

III. The type of inducement that will vitiate a confession and the role played by the accused's state of mind in making that determination

It is not the aim here to set out a list of inducements held by the courts to have rendered confessions inadmissible. Such a determination is a question of fact to be considered in the circumstances of each case. In *Ping Lin* the House of Lords strongly urged the lower courts to avoid an overly legalistic attitude and to apply the *Ibrahim* rule to the facts at hand without reference to previous decisions resting on similar evidence.[60] In view of this it is only necessary to review several general points of principle.

Is the promise or threat exercised by the person in authority to be analyzed objectively or subjectively? In *R.* v. *Northam*[61] the

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[59] See text at note 29, *supra,* and the sources cited in that note.

[60] See *D.P.P.* v. *Ping Lin, supra,* note 2, 600 *per* Lord Hailsham, 606 *per* Lord Salmon.

[61] *Supra,* note 35.

accused was arrested for house-breaking at a time when he was on bail awaiting trial for a similar charge. The accused ventured, without contradiction by the police, that if he admitted his involvement in the house-breaking for which he was under arrest it might be taken into consideration at the trial of the other charge. In quashing the conviction Winn L.J. held that the investigating detective had accepted the accused's suggestion, and that the standard against which to assess the inducement is not that of the reasonable man but the average, normal, and probably unreasonable person. His Lordship decided that there was an inducement

> capable of influencing the mind of this appellant, albeit he himself appears to have misunderstood the inducement which was being offered to him. In a sense he was self-induced by a mistaken view, but not a view which it is impossible that he could honestly have formed, as to what was the effect of the arrangement that had been come to.[62]

Winn L.J. obviously manifested a preference for the subjective approach. It has been asserted that such an approach which looks at the accused's mental processes connotes an acceptance of the rationale of reliability and the privilege against self-incrimination, while an objective construction of inducements in terms of police conduct would imply an acceptance of the rationale of controlling police behaviour.[63] Though support for the pure subjectivist view can be found in Lord Reid's speech in *Commissioners of Customs and Excise* v. *Harz and Power*,[64] the House of Lords appears in *Ping Lin* to have adopted a view which is partly objective and partly subjective, holding that the test is concerned with the reasonable reaction by the suspect in question to what was said.[65] In view of this thesis it would appear that the House, in adopting an approach which is partly objective and partly subjective, either accepts or denies both types of rationale. It will be remembered that the House in *Ping Lin* explicitly refused to enter the rationale debate and thus maintained consistency with its analysis of the inducement.

There does not appear to be any recent Australian authority directly on this point, perhaps because the question is obviated by the integral part played by the trial judge's discretion to exclude. Since the subjectivity/objectivity issue will only arise in marginal cases (as is borne out by the facts of *Northam* and *Ping Lin*), the discretion to exclude would probably be relied upon by the trial

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[62] *Ibid.*, 105.

[63] See Prentice, *Confessions — Controlling the Police* (1968) 31 M.L.R. 693-6.

[64] *Supra*, note 4, 820.

[65] See Joffe, *Voluntary Confessions* (1976) 39 M.L.R. 226.

judge and thus the issue would not come before an appellate body. However, it is submitted that the apparent acceptance of both the rationale of reliability and control of police conduct connotes a combined objective and subjective approach.[66] On the basis of similar reasoning it might be asserted that the apparent acceptance of the reliability rationale by the Supreme Court of Canada implies a subjective view.[67]

Must the inducement relate to the charge in the prosecution of which the confession so obtained is sought to be adduced? In *Commissioners of Customs and Excise* v. *Harz and Power* the House of Lords answered this question in the negative. The facts were these: the defendants were being investigated by Customs officers for defrauding the plaintiff of purchase tax. Upon Harz's refusal to answer questions, he was told by the interrogating officers that he could and would be prosecuted for failing to answer, and his solicitor mistakenly believed this to be the case. Harz answered the questions and it was the admissibility of the statements so made that was in issue before the House. Lord Reid, with whom the other members of the Bench agreed, held that there was no solid authority for the assertion that if the promise or threat did not relate to the charge the statement induced is admissible. In pointing out that the alleged rule is also unreasonable and illogical, his Lordship presented a hypothetical case to show that an inducement not relating to the charge may in some circumstances be more powerful and more likely to lead to an untrue confession.

The writer is unaware of either Canadian or Australian authority decided since *Harz and Power* where this issue was raised and which might indicate, albeit *sub silentio*, that the point is considered as determined in that case. The view has been advanced that though the Canadian courts have not really discussed the issue, they have not limited the doctrine to inducements relating to the prosecution.[68] Few would deny that trustworthiness is at least one underlying policy basis of the confession rule. Though inducements relating to the prosecution may be the most effective, it is consistent with the reliability rationale that other types of inducement not be excluded from the ambit of the confession rule.

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[66] See the *dictum* of Dixon J. in *McDermott* v. *The King*, *supra*, note 18, 511, quoted at note 22, *supra*.

[67] *Cf. R.* v. *Muise* (1975) 21 C.C.C. (2d) 487, 494 (N.S.S.C., App. Div.), supporting *R.* v. *Fitton*, *supra*, note 15.

[68] Schiff, *Evidence in the Litigation Process* (1978), Vol. 2, 871; see also McWilliams, *Canadian Criminal Evidence* (1974), 252 and authorities cited therein.

The inducement need not relate to the charge or, for that matter, to the accused himself. In *R.* v. *Middleton*[69] the accused was arrested for burglary. He had stored the allegedly stolen goods at the home of a long-time friend. The police, knowing this, told their suspect that unless he confessed his friend would be arrested and her children put up for foster placement. In holding the confession so obtained inadmissible, Edmund-Davies L.J. (as he then was), speaking for the Court of Appeal, stated that the more remote the person involved in the inducement from the suspect, the more difficult it may be to establish that the confession was vitiated, though that is a consideration going to the weight of the evidence that a threat was made. The Lord Justice added that it does not go to the admissibility of the confession if it is established that the threat was actually made. The issue then appears to be one of fact. The writer knows of no authority that it is otherwise in Australia. In Canada *R.* v. *Jackson* would support the view that a promise relating to a person other than the accused will only vitiate a confession so induced if, in the circumstances, the promise would tend to induce an untrue statement.[70] This offers another example of the Canadian tendency to limit the rule to that which is deemed to be its exclusive underlying policy — the guarantee of reliability. An adherence to the rule alone or to the right to silence would demand that the judgment in *Jackson* hold that the promise relating to a third party would only vitiate the confession if it would tend to induce a statement that would not otherwise have been made.

Once an inducement has been made by a person in authority, it may or may not vitiate any statement made thereafter by the suspect, depending on whether the inducement is still operative. In *R.* v. *Smith*[71] the accused, a soldier, was charged with the stabbing murder of another military man in the course of a fight. Immediately after the fatal brawl the regimental sergeant-major put the whole company on parade with the stated intention of keeping them there until he learned who had been involved in the incident. As a result of this the accused made a statement that was eventually held inadmissible at trial. On the next day, the accused repeated his confession to a special investigator who had referred to the accused's original statement. In considering the admissibility of this second confession, Lord Parker C.J., speaking for the Court Martial Appeal Court, stated that the principle to be deduced from the case law is

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[69] [1974] Q.B. 191 (C.C.A.).
[70] (1977) 34 C.C.C. (2d) 35, 38 (B.C.C.A.).
[71] [1959] 2 Q.B. 35 (C.M.A.C.).

> that if the threat or promise under which the first statement was made still persists when the second statement is made then it is inadmissible. Only if the time limit between the two statements, the circumstances existing at the time and the cautions are such that it can be said that the original threat or inducement has been dissipated, can the second statement be admitted as a voluntary statement.[72]

On the facts his Lordship felt that, although the investigator hoped to get a continuing confession by referring to the first, the effect of any original inducement or threat under which the first statement was made had been dissipated; nine hours had passed, the parade had ended and two cautions had been given. *Smith* has been distinguished on the point that a promise will be harder to dissipate than a threat.[73] The judgment has also been cited with approval by the Privy Council.[74] The principles enunciated in *Smith* apply in Canada[75] as well as Australia.[76] Obviously, in the final analysis, the issue is one of fact.

If it is the suspect who initiates the inducement it would appear that any statement made will be vitiated if the person in authority has assented to or adopted the inducement. In *R.* v. *Zaveckas*[77] the suspect, while under arrest for larceny, asked a policeman if he would get bail if he made a statement, to which the policeman answered yes. The confession made as a result of this was held inadmissible, it making no difference that the person in authority only assented to a suggestion made by the accused himself. There was no distinction to be made with the converse situation, where the policeman might have said, "If you make a statement you will get bail". In this light, *Zaveckas* is not a hard case on its facts and as such the House of Lords did not disapprove it in *Ping Lin*, despite citing it as an instance of a judgment that hindered legitimate police practices.[78] In the latter case the accused was apprehended for smoking heroin and charged with conspiracy to supply a controlled drug. Upon interrogation he maintained that he smoked heroin but did not sell it. The accused attempted to buy leniency by offering the names of important dealers, a bargain refused by the police. Eventually the accused admitted his trafficking activities but persisted in trying to strike a bargain. Finally, after the

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[72] *Ibid.*, 41.

[73] *R.* v. *Williams* (1968) 52 Cr. App. R. 439 (Central Crim. Ct).

[74] See *Sparks* v. *The Queen* [1964] A.C. 964, 988 (P.C.).

[75] See *Horvath* v. *The Queen, supra*, note 16, 33 *et seq.*

[76] See *Pascoe* v. *Little* (1978) 24 A.L.R. (A.C.T.R.) 21 (S.C.); *R.* v. *Plotzki* [1972] Qd R. 379 (C.C.A.); *R* v. *Clark* [1970] 1 N.S.W.L.R. 589 (C.C.A.).

[77] [1970] 1 All E.R. 413 (C.C.A.).

[78] *Supra*, note 2, 594 *per* Lord Morris of Borth-y-Gest, 602 *per* Lord Hailsham.

accused had admitted selling heroin, the interrogating officer expressed the view, in response to the accused's continued efforts to negotiate leniency, that if Ping Lin supplied information on important drug retailers, the judge would surely bear it in mind when passing sentence; but again the police officer refused to make any explicit deals. The issue as to whether or not the *Ibrahim* rule has been contravened, albeit by an inducement initiated by the accused, is a question of fact. The House so ruled in *Ping Lin*, holding that the trial judge had been entitled to find the accused's statement voluntary. However, it is submitted that the principle of *Zaveckas* is not overruled by *Ping Lin*, regardless of one's opinion of the holding on the facts in the latter. If one does not view the policeman's comment concerning sentence as an inducement, in that the actual words, combined with the cautions given and repeated refusals to make any deals, did not constitute an assent to the suspect's suggestion, then that ends the matter. On the other hand, even if what the policeman said is construed as an inducement, one can simply argue on the facts (as did three of the Law Lords[79]) that the actual confession of Ping Lin's guilt was made before any inducement was made. After the inducement, he simply filled in details and named his supplier.

It appears that this issue, being essentially one of fact, is not treated differently in the other jurisdictions. In New South Wales, at least, it appears that where the accused attempts to strike a bargain, any statement will not be vitiated if the police make their position of providing no guarantees clear to the suspect or dissipate the effect of any inducement (*i.e.*, their consent to the accused's suggestion) by a firm and clear caution.[80]

Where a suspect is "tricked" into confessing by a person in authority the issue of admissibility will again be one of fact to be decided in individual cases by applying the *Ibrahim* rule. There are Canadian cases which set out a principle to the effect that a confession extracted by means of police subterfuge will only run afoul of the *Ibrahim* rule where the trick conveys hope of advantage or fear of prejudice.[81] It is submitted that these holdings do not really advance the state of the law more than particularizing the application of the *Ibrahim* rule to a certain category of fact pattern.

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[79] *Ibid.*, 601 *per* Lord Hailsman, 605 *per* Lord Kilbrandon, 607 *per* Lord Salmon.

[80] *E.g.*, *R.* v. *Clark*, *supra*, note 76.

[81] *R.* v. *Materi & Cherville* [1977] 2 W.W.R. 728 (B.C.C.A.); *R.* v. *Robinson* (1975) 21 C.C.C. 2d 385 (Ont. C.A.), leave to appeal refused [1975] 1 S.C.R. xi; *R.* v. *McLeod* (1968) 5 C.R.N.S. 101 (Ont. C.A.).

It has also been held that any fear aroused by a detective's false statement that the victim will be able to identify his attacker is not caught by the *Ibrahim* rule, since that rule is concerned with fear of reprisal for failing to speak and not a fear of being caught or identified.[82] The Canadian refusal to embrace the rationale of controlling police conduct may offer an explanation for these decisions. It should also be remembered that these Canadian judgments are unfettered by considerations of fairness to the accused, as would probably be the case before an Australian court. However, it has been asserted that there are few Australian cases where confessions made pursuant to untrue representations were excluded on discretionary grounds, despite Dixon J.'s *dictum* in *McDermott*[83] to the effect that a police trick is an important factor in the court's consideration of discretionary exclusion.[84] In New South Wales, an untrue representation made by a person in authority will by virtue of section 410 of the *Crimes Act*, 1900 vitiate a confession obtained as a consequence thereof. However, the section operates only in respect of crimes already committed, so that statements which themselves constitute the crime (*e.g.*, conspiracy) will not be excluded by operation of the disposition, although they were made as a consequence of police trickery.[85]

Such cases as *Northam* may have indicated a *per se* approach by the Court of Appeal in the sense that once an inducement is held out it will vitiate any statement made, regardless of the lack of a causal link between the two.[86] Such a bent clearly must be contrary to *Ibrahim* on the very wording of the rule. Furthermore, the tone of the judgment of the House of Lords in *Ping Lin*, as well as certain turns of phrase employed therein,[87] would suggest that there must be a causal link between the inducement and the confession. It will also be remembered that Lords Hailsham, Kilbrandon and Salmon felt that on the facts any inducement occurred after the confession had been made and thus could not have caused it. There appears nothing to suggest that the law is otherwise in Australia and there are Canadian cases holding that the existence of an inducement is in itself insufficient to vitiate a confession; it must cause the making

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[82] *Alward and Mooney* v. *The Queen*, *supra*, note 47.

[83] Quoted in text at note 22, *supra*.

[84] See Waight, Comment [1979] Crim. L.J. 156.

[85] *R.* v. *G., F. & W.* [1974] 1 N.S.W.L.R. 31 (C.C.A.).

[86] See Prentice, *supra*, note 63.

[87] See *supra*, note 2, 607 where Lord Salmon refers to the ultimate issue in the following terms: "was the confession or statement procured by the express or implicit threat, promise or inducement?" See also Lord Hailsham, *ibid.*, 602.

of the statement.[88] The issue of causation may often be confounded with the question of whether or not there was something that could have been an inducement; it is this confusion which may have led to doubts in such cases as *Northam*, as to whether causation is a requirement.

Finally, what is the role played by the accused's state of mind at the time the statement was made, and how does this affect the admissibility of the confession? If the test of voluntariness is at least partially subjective, this criterion must be relevant even if the accused's state of mind existed independently of the behaviour of persons in authority. Also, as Cross points out, if a rationale of the confession rule is trustworthiness of the statement then the state of mind of the accused will be relevant in determining whether it is safe to act upon the statement.[89] However, that depends upon what one means by state of mind. If a suspect's disposition is such that he is more likely to make a statement then his state of mind would be relevant to the determination of whether any inducement exercised by a person in authority caused him to make a statement. If his state of mind is such that he is no more liable to speak than under "normal" conditions, but what he says is untrustworthy (*e.g.*, because he is under the effects of an hallucinogen), then the considerations evoked would seem to bear not on the applicability of the confession rule, but on the weight attributable to the statement once given. (This is not to say, however, that the judge sitting on the *voir dire* should not exclude such a statement on the basis of his discretion especially where its probative value is trifling in relation to its prejudicial effect, or simply on the basis that the statement is so unreliable that it would not be safe to admit it.) If the above two hypotheses are combined (which is probably the likelihood of their occurrence in fact) then both considerations become relevant, but at different times, that is, at the *voir dire* and trial proper respectively. It should be underlined that in relation to the first hypothesis there must be an inducement, however slight, held out by a person in authority. If that is not the case then any exclusion of a statement based on considerations of trustworthiness would not be based on an application of the confession rule as such since the required inducement is absent. Rather, exclusion would be based on considerations of reliability independent of the confession rule. That is to say that, since the confession is unreliable, it is excluded because it offends the rationale of the rule (though not

[88] *R.* v. *Saglioco* [1978] 3 W.W.R. 193, 200 (B.C.C.A.); *R.* v. *Frank* (1969) 8 C.R.N.S. 108, 113 (B.C.C.A.).

[89] *Evidence*, 5th ed. (1979), 545.

the rule itself), and thus it would be unsafe to admit. In order to offend the rule itself, the utterance of the statement must be connected to the inducement, though the unreliability might exist independently. The judge, if he is to apply the rule and not the rationale, must reason that because of something said or done by a person in authority to this accused whose state of mind was such that he easily succumbed to the inducement, the statement is unreliable. As suggested above, the second type of case (*i.e.*, where because of the accused's state of mind his statement is unreliable though not made as the result of an inducement) should be the proper subject for exclusion on the basis of discretion. It is asserted that this is the proper approach. It is submitted that Cross's view appears to conflate the application of the confession rule with the application of its rationale. It is now proposed to examine the case law by means of this analytic framework.

In England, there has been an *obiter dictum* in the Court of Appeal to support the above distinction. In *R.* v. *Isequilla,* Lord Widgery C.J. spoke of the situation where a

> suspect's mental state is such that he is deprived of the capacity to make a free choice whether to confess or not then any confession which he makes is necessarily not a voluntary confession because it was not supported by the capacity to make a voluntary choice.[90]

Presumably, the existence of an inducement held out by a person in authority would also be required. If there was no inducement but the suspect's mental disability was so severe, and his ability to comprehend and answer questions so lacking that the probative value of any admissions would be small compared to their prejudicial effect such as to make it unfair to admit the statements, they would be excluded. That was the situation in *R.* v. *Stewart*[91] where medical witnesses testified that the mental age of the accused was between three and five years. It is of note, however, that it was conceded in *Stewart* that there was no inducement and as such the case must be viewed as an example of the second hypothesis outlined above. An *obiter dictum* in the Court of Appeal and a trial judgment may not be the strongest authority, but one hopes that this is the state of the law on this matter in England, as it is consistent with the hypotheses outlined above, which conform to the *Ibrahim* rule and save the confession rule from confusion with one of its rationales. These hypotheses also maintain the trial judge's discretion to ensure fairness *and* to exclude statements which,

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[90] [1975] 1 All E.R. 77, 82.

[91] (1972) 56 Cr. App. R. 272 (Central Crim. Ct); see also *R.* v. *Kilner* [1976] Crim. L.R. 740 (Kent Crown Ct).

though not strictly offensive to the rule, offend one of the rationales for it.

In Australia there is fairly recent authority affirming the principle set out in *Sinclair* v. *The King*,[92] that the accused's state of mind give rise to two separate matters, that is, the ease with which the suspect succumbs to inducements and the weight or trustworthiness of what he says.[93] The latter can give rise to discretionary exclusion by the trial judge or at least a direction to the jury as to the weight attributable to the statement in view of the accused's state of mind. When one recalls that the Australian courts have accepted a wide policy basis for the rule, and that there are various policy-oriented criteria upon which the exclusionary discretion can be exercised (*e.g.*, reprehensible police subterfuge, unreliability, *etc.*), it becomes quite plausible that the trial judge's discretion has been developed along the lines stemming from the various rationales in order to exclude statements not caught by the rule itself. In *Jackson* v. *The Queen*[94] the High Court quashed a conviction where a judge refused to allow psychiatric evidence at trial going to the weight of a confession which had been admitted. The case also seems to hold, if only *sub silentio*, that the same psychiatric evidence had been admissible at the *voir dire* as going to the involuntariness of the confession. As such it seems that the Court had in mind that the accused's state of mind could go to the trustworthiness of his statement as well as to its voluntariness.

The Supreme Court of Canada recently considered this issue in *Ward* v. *The Queen*,[95] a case concerning the admissibility of a suspect's statement made shortly after regaining consciousness following an automobile accident. Much evidence was adduced at trial as to Ward's state of mind at the time of making the statements and to the effect that he was still in a state of shock when he spoke to the police. Spence J., speaking for the Court, felt that the determination of voluntariness of a statement remained to be made although no inducement had been held out by a person in authority. His Lordship held that it was relevant for a trial judge to consider the accused's state of mind in determining the voluntariness of the impugned statement, with regard both to the issue of whether a person in the suspect's condition would be more sus-

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[92] (1946) 73 C.L.R. 316 (Aust. H.C.).

[93] *E.g.*, *R.* v. *Starecki* [1960] V.L.R. 141 (S.C. *in banco*); *R.* v. *Ostojic* (1978) 18 S.A.S.R. 188 (S.C. *in banco*).

[94] (1962) 36 A.L.R. 198 (Aust. H.C.).

[95] (1974) 44 C.C.C. (2d) 498; see also *Nagotcha* v. *The Queen* [1980] 1 S.C.R. 714.

ceptible to an inducement than someone in a normal state, and to whether "the words could really be found to be the utterances of an operating mind".[96] It is submitted that the judgment would be more coherent had his Lordship added that this latter aspect of his test would lead to exclusion of the statement because a confessional statement not made by an "operating mind" could not have sufficient probative value to outweigh its prejudicial effect. Instead, Spence J. confirmed the trial judge's approach saying that the latter had properly considered admissibility and not probative value. It is certainly true that the former is the subject of determination on the *voir dire*. However, it is respectfully submitted that the latter is also relevant to that determination, especially in the context of the discretion to exclude as articulated by the Supreme Court in *Wray*. Despite this critique, it does seem that the position taken in *Ward* resembles that taken by the English and Australian courts. However, there is still a conceptual problem in *Ward*, stemming, it seems, from the apparent adoption by the Supreme Court of the reliability rationale as the sole policy basis underlying the confession rule, and from the Court's refusal to recognize a wide exclusionary discretion in the trial judge. The unreliability of Ward's statement militated in favour of exclusion, but it does not appear from the report that there was any inducement made by a person in authority. Thus, the statement could not be caught by the *Ibrahim* rule. It is this conceptual bind that makes the judgment in *Ward* awkward. Embracing the reliability rationale alone, coupled with a reluctance to exclude on the basis of a judicial discretion, leads to the inference that the Supreme Court in *Ward* has taken yet a further step beyond the formulation of the confession rule which it approved in *Alward*. Indeed, it appears from *Ward* that the requirement of an inducement may have been eliminated.[96a] This can be shown not only from the holding but from Spence J.'s comment that

> the examination of whether there was any hope of advancement or fear of prejudice moving the accused to make the statements is simply an investigation of whether the statements were 'freely and voluntarily made'.[97]

It must be that *Ward* implicitly eliminates the criterion of inducement, or at least makes it optional, unless the judgment is taken as authority for the exclusion of statements which offend the reliability rationale. Such a view demands an acceptance of a judicial discre-

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[96] *Ibid.*, 506.

[96a] See *R.* v. *Sabean* (1980) 35 N.S.R. (2d) 35, 43 (N.S.S.C., App. Div.).

[97] *Supra*, note 95, 506.

tion to exclude, and could only be consistent with the judicial discretion outlined in *Wray* if one regards Ward's statement as having been excluded because its prejudicial effect outweighed its probative value because of the accused's state of mind; and this, in turn, could only be the case if his mental state was such that what he said was unreliable. It could not be so if he were more likely to speak than under "normal" conditions, though the statement made was reliable.

IV. Person in authority

There does not appear to be any comprehensive definition of the term "person in authority" that has been accepted by the courts.[98] Cross suggests that it is

> anyone whom the prisoner might reasonably suppose to be capable of influencing the course of the prosecution, and there is nothing in the decided cases to suggest that this is incorrect.[99]

The Privy Council in *Deokinanan* v. *The Queen*[100] cited with approval a *dictum* of Bain J. in *R.* v. *Todd*,[101] which proposed the following definition:

> A person in authority means, generally speaking, anyone who has authority or control over the accused or over the proceedings or prosecution against him.[102]

Other definitions have been proposed but, it is submitted, that those cited above reflect the general tenor of the test that has influenced the courts in deciding whether or not any given individual is, on the facts, a person in authority.[103]

With the judgment of the House of Lords in *Harz and Power* to the effect that the inducement (or at least the threat) need not relate to the prosecution, the issue presented itself as to whether the requirement that the inducement be exercised by a person in authority was thereby done away with. The Privy Council considered this in *Deokinanan*, recognizing that an inducement held out by a person not in authority could equally cause an untrue confession.[104]

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[98] See *R.* v. *Wilson* [1967] 2 Q.B. 406, 415 (C.A.) *per* Lord Parker C.J.; *R.* v. *Parnerkar (No. 2)* (1974) 17 C.C.C. (2d) 113, 126 (Sask. C.A.) *per* Culliton C.J.S.

[99] *Supra*, note 89, 541.

[100] [1969] 1 A.C. 20.

[101] (1901) 13 Man. R. 364, 376 (C.A.).

[102] *Supra*, note 100, 33.

[103] See also Kaufman, *The Admissibility of Confessions*, 3rd ed. (1979), 81: a person with a "degree of power" over the accused who "could either make good his promise or carry out his threats".

[104] *Supra*, note 100, 33.

Despite any logical inconsistency, their Lordships would not strike down the requirement in the present state of the law that the inducement be exercised by a person in authority. Though the point was not expressly considered, it should be recalled that the House of Lords' unequivocal statement of the confession rule in *Ping Lin* included the person-in-authority requirement. That the English courts have upheld the requirement in face of the seemingly logical inconsistency adds strength to the view that control of improper police conduct may also be a consideration underlying the confession rule. Indeed the person-in-authority element is only illogical if reliability is the only rationale for the rule. It is noteworthy that the Criminal Law Revision Committee, which favours the reliability rationale, recommended that the person-in-authority criterion be abolished since an inducement made by anyone is likely to cause an untrustworthy confession.[105]

With one exception, there appears to be no recent authority to indicate that the requirement of the person in authority has been modified by the courts in the other jurisdictions. The Law Reform Commission of Canada would retain the criterion[106] but one wonders if the Canadian Supreme Court, which embraces the reliability rationale, might move towards the elimination of the person-in-authority concept. The exception is the judgment of the Court of Criminal Appeal of New South Wales in *R.* v. *Attard.*[107] Attard was tried for murder with two co-accused, K. and M. While in detention, the three suspects assembled with two other individuals and jointly completed a record of interview which exonerated K. but which was highly incriminatory for the appellant Attard. At the joint trial, K. produced the record of interview, over objection from Attard's counsel. It was agreed that all persons who took part in compiling the record of interview were not persons in authority. Nevertheless, the Court of Criminal Appeal held that the statement had wrongly been adduced at trial, as it had not been shown to have been made voluntarily. Walsh J.A., speaking for the Court on this point,[108] felt that the general rule is that a confessional statement which is not shown to be voluntary is excluded, and that the exclusion of involuntary statements induced by persons in authority is only a particular (and typical) instance of this general rule. His Lordship unequivocally stated on the basis of the High Court decisions in *Cornelius,*[109] *McDermott* and *Lee* that

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[105] *Supra,* note 10, § 58.
[106] *Supra,* note 19, 62.
[107] [1970] N.S.W.R. 750.
[108] *Ibid.,* 756.
[109] *Cornelius* v. *The King* (1936) 55 C.L.R. 235 (Aust. H.C.).

> the rule against the admission of involuntary statements is not confined to statements made as a result of threats or inducements by a person in authority.[110]

Without entering into detail, there may be implications in some of the *dicta* in the three High Court judgments relied on by Walsh J.A. to the effect that the prime criterion for admissibility is voluntariness. However, on their facts, all those cases dealt with statements made to persons in authority, and nowhere did the High Court explicitly advocate abolition of that criterion. *R.* v. *Attard* might be viewed as direction to trial judges to exclude involuntary statements, albeit not made to persons in authority, in exercise of their general discretion to exclude evidence so as to guarantee a fair trial. However, it is difficult to ignore Walsh J.A.'s clear expression that the rule, at least in New South Wales, does not require that the inducement be exercised by a person in authority.

In determining whether a given individual is a person in authority, is the test subjective or objective? It is submitted that the test in England must at least have a subjective element, since the courts have held that a detective posing as a fellow prisoner is not a person in authority.[111] However, there does not appear to be much judicial discussion directly on point, apparently because such police trickery is usually analyzed from the perspective of a violation of the Judges' Rules. However, the point has arisen in *R.* v. *Wilson*,[112] where it was held by the Court of Appeal that the owner of stolen property (as well as the house from which it was stolen), *who was known to be such by the suspect*, was a person in authority even though he had no actual power to stultify a prosecution.

The approach to police ruses by an equivalent to the Judges' Rules may also be the reason for the lack of abundant Australian authority addressing this question, though there is a judgment holding that a potential private prosecutor for perjury is a person in authority.[113] However, it could not be concluded on the basis of this view that the test is purely subjective, since, unlike the victim in *R.* v. *Wilson*, the private prosecutor did in fact have the power to stultify the prosecution. It should be mentioned that there is an *obiter dictum* indicating that where an accused considers a prison psychiatrist examining him on behalf of the Crown to be a person in authority, the latter will be held so to be.[114]

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[110] *Supra*, note 107, 756.

[111] *R.* v. *Stewart* [1970] 1 All E.R. 689 (C.C.A.); see also *R.* v. *Keeton* (1970) 54 Cr. App. R. 267 (C.C.A.), where the police listened to the accused's telephone conversation.

[112] *Supra*, note 98.

[113] *Gouldham* v. *Sharrett* [1966] W.A.R. 129 (S.C. *in banco*).

[114] *R.* v. *McNamara* [1963] V.R. 402 (S.C. *in banco*).

In Canada, where the Judges' Rules do not apply, the courts have squarely decided that a person in authority is to be identified subjectively from the point of view of the accused, and thus a police officer posing as a criminal is not a person in authority.[115] It has been held improper not to hold a *voir dire* to determine this issue where the impugned statement was made to a doctor treating the victim[116] or to a phony bondsman whom the accused may have thought had the power to return him to jail.[117] Similarly, the owner of stolen property, having the power to lay an information is a person in authority,[118] as is the victim of a crime where she was used by police as their agent to extract a confession.[119] The Canadian option for the subjective approach might be a result of the embrace by Canadian courts of the reliability rationale or, more accurately, the rejection of the policy ground of controlling police misconduct, in the sense that a policeman posing as, for example, a cellmate of the accused will not be held to be a person in authority. (However, this same subjective view may well regard a victim, for example, as a person in authority, though objectively he is not.) It should also be noted that not only do the Canadian courts not vigorously apply the Judges' Rules, but they also have no discretion to exclude evidence solely because it was obtained by police conduct liable to bring the administration of justice into disrepute.[120] If the acceptance of the subjective approach in Canada has its background in the acceptance of the reliability rationale (and the rejection of the control of police conduct rationale), then one should recall the arguments considered in *Deokinanan* and accepted by the Criminal Law Revision Committee that an inducement by a person not in authority also makes the confession obtained unreliable. Unlike England and Australia, where the Judges' Rules are applied, the approach may promote problems, if not bad law, where a police subterfuge is particularly reprehensible. Such was the problem in *R.* v. *Pettipiece,*[121] where the Court voiced its disdain for the police stratagem of feigning a bail hearing, presided over by a fake

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[115] *R.* v. *Towler* (1965) 65 W.W.R. 549, 553 (B.C.C.A.). See also Kaufman, *supra,* note 103, 81 *et seq.; Perras* v. *The Queen* [1974] S.C.R. 659, 664 *per* Spence J., dissenting (Laskin J. concurring), 663 *per* Ritchie J. dissenting; *R.* v. *Rothman* (1979) 42 C.C.C. (2d) 377 (Ont. C.A.), *aff'd* S.C.C. (2 March 1981) [see "Postcript", *infra,* p. 503].

[116] *R.* v. *Postman* (1977) 3 Alta L.R. (2d) 524 (S.C., App. Div.).

[117] *R.* v. *Pettipiece* (1972) 18 C.R.N.S. 236, 241 (B.C.C.A.) *per* Branca J.A.

[118] *Rimmer* v. *The Queen* (1969) 7 C.R.N.S. 361 (B.C.C.A.).

[119] *R.* v. *Downey* (1977) 32 C.C.C. (2d) 511 (N.S.S.C., App. Div.).

[120] See *R.* v. *Wray, supra,* note 43.

[121] *Supra,* note 117.

magistrate, where the accused was released into the custody of a phony bail bondsman. However, because it held that the accused might have considered the bail bondsman as a person in authority, the Court was able to allow the appeal on traditional grounds.[122]

Psychiatric examination at some point in criminal proceedings for one reason or another is not unlikely. Though on the subjective approach it will depend on the circumstances of each case whether the psychiatrist is a person in authority, it is submitted that in situations where the psychiatrist is appointed by the court and conducts the examination while the accused is in custody, courts should always hold a *voir dire* to determine the issue. This appears to be the view in the State of Victoria.[123]

While there does not appear to be any recent authority directly on point in England, the Supreme Court of Canada has held that where a psychiatrist is called by the Crown as an expert witness without the intention of adducing through him the accused's actual statement, there is no need to hold a *voir dire,* even though the accused's statements made to the psychiatrist might be elicited in cross-examination.[124] The Court did, however, indicate in an *obiter dictum* that it would not be correct to cite one of its earlier decisions as authority for the view that a psychiatrist is never a person in authority.[125] In that latter case the Court held that a psychiatrist acting for the court in proceedings to declare the accused a dangerous sexual offender[126] was not a person in authority, since he would have no control over the proceedings, as would persons concerned with the apprehension or prosecution of criminals and because the proceedings themselves were not directed to conviction for an offence, but to the determination of a type of sentence.

It is not absolutely essential that the inducement be made by the person in authority himself. In *R.* v. *Cleary*[127] the accused's father told him at the police station, in the presence of two detectives, to tell the police everything, and that if he (the accused) had not hit the victim he could not be hanged. The Court of Appeal held that the statement was an inducement and that

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[122] For further discussion, see Ratushny, *Statements by trickery: How far will they go?* (1972) 18 C.R.N.S. 257.

[123] See *R.* v. *McNamara, supra,* note 114.

[124] *Perras* v. *The Queen, supra,* note 115, 662; see also *Vaillancourt* v. *The Queen (No. 2)* (1975) 31 C.R.N.S. 81 (Ont. C.A.), *aff'd* (1975) 31 C.R.N.S. 93 (S.C.C.).

[125] *Wilband* v. *The Queen* [1967] S.C.R. 14.

[126] Pursuant to the *Criminal Code,* S.C. 1953-54, c. 51, s. 661 (Now R.S.C. 1970, c. C-34, s. 689).

[127] *Supra,* note 35.

> though the inducement be made by a person not in authority, the position is the same as if they had made it themselves unless they take steps to dissent from it.[128]

The law is probably the same in the other two jurisdictions.[129]

The final issue to be dealt with at this stage is the propriety of the conduct of the person in authority. Needless to say, if the conduct of a person in authority is improper and amounts to an inducement, that ends the matter: any confession obtained will be vitiated under the *Ibrahim* rule. But what if the person in authority induces the confession without conducting himself improperly? The two detectives in *Cleary* simply stood by while the accused's father made the inducement.[130] In *R.* v. *Isequilla*[131] the police were tipped off to an impending bank robbery. As the accused and his accomplice (who subsequently escaped) drove up to the bank, one of the waiting policemen jumped into the car, hand-cuffing the accused while his partner approached from the other side with pistol drawn. The accused confessed upon interrogation but it was found as a fact that from the time of his dramatic apprehension he was in a severe state of hysteria. In dismissing the appeal from conviction, Lord Widgery C.J., speaking for the Court, rejected counsel's contention that a confession may still be inadmissible even though the words or conduct of the person in authority were not directed to obtaining a confession. His Lordship held that the rejection of a confession is always related to the improper or unjustified conduct of a person in authority. This, it is submitted, is no longer the law. With its steadfast adherence to the *Ibrahim* rule, the House of Lords in *Ping Lin*[132] expressly decided that impropriety in the conduct of a person in authority is irrelevant, though their Lordships did not overrule the actual decision in *Isequilla.* Lords Morris and Hailsham felt that the *Ibrahim* rule, when applied to the facts, was quite sufficient to determine voluntariness,[133] while Lords Kilbrandon and Salmon added that the proposed criterion was redundant, since it is difficult to imagine a confession induced by proper means.[134] It will be remembered that the House refused to enter the rationale debate in *Ping Lin.*

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[128] *Ibid.*, 119; see also *R.* v. *Moore* (1972) 56 Cr. App. R. 373 (C.C.A.).

[129] In Canada see *R.* v. *Letendre* (1976) 25 C.C.C. (2d) 180, 185 (Man. C.A.), where *Cleary* would seem to have been adopted. In Australia see *R.* v. *Bodsworth* [1968] 2 N.S.W.R. 132 (C.C.A.).

[130] See *supra,* note 35, 121.

[131] *Supra,* note 90.

[132] *Supra,* note 2.

[133] *Ibid.*, 594 *per* Lord Morris of Borth-y-Gest, 602 *per* Lord Hailsham.

[134] *Ibid.*, 604 *per* Lord Kilbrandon, 606-7 *per* Lord Salmon.

One wonders if their Lordships, by holding irrelevant considerations of police impropriety, were covertly directing the law away from the use of the rule as a disciplinary measure of police conduct. Or perhaps the House wished to avoid a future issue of discretionary exclusion where a confession passed the *Ibrahim* test, even though obtained by means of unconscionable police conduct.

In Australia, impropriety of police conduct is most relevant to the trial judge's exclusionary discretion. This has been clear for many years since Dixon J. in *McDermott* stated that the judge

> should form a judgment upon the propriety of the means by which the statement was obtained by reviewing all the circumstances and considering the fairness of the use made by the police of their position in relation to the accused.[135]

It has been remarked that despite Dixon J.'s *dictum* there are few cases in Australia where confessions made pursuant to untrue representations have been excluded on discretionary grounds.[136] Recent decisions however may denote a reversal of that trend. In New South Wales any confession induced by an untrue representation is inadmissible.[137]

In Canada the Supreme Court has held in *Wray* that there is no foundation in law for a trial judge to exclude evidence on the basis of police conduct that is capable of bringing the administration of justice into disrepute. It will be recalled that in *Pettipiece*[138] the British Columbia Court of Appeal decided the issue on traditional grounds, though they strongly disapproved of the conduct in question. It is submitted that this bit of Canadian law is another instance of the rejection of the disciplinary principle, whereas Australia is consistent with its recognition of the wider policy basis by holding police conduct relevant to the admissibility of confessions.

V. Statements to which the confession rule applies

A confession is a type of admission, and as such it is tendered in evidence as an exception to the hearsay rule. This is an additional reason for not confusing confessions with illegally obtained (real) evidence. As hearsay exceptions it appears reasonable that statements within the confession rule should be assertive statements that are adverse to their maker's case, adduced as proof of the truth of their contents.

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[135] *Supra*, note 18, 513.

[136] See the authorities cited by Waight, *supra*, note 84.

[137] Pursuant to the *Crimes Act* 1900, s. 410.

[138] *Supra*, note 117.

A confession must above all be a statement. Not only can the accused's words be a statement but so can his conduct in so far as it is assertive. Thus, where evidence of the accused's behaviour is adduced to show, for example, his consciousness of guilt, but not to show his response to a question or adoption of a statement through conduct, the confession rule should not apply.[139] However, where the accused is induced by the police into being the actor in a filmed reconstruction of his crime, the confession rule will apply as if the statement were oral.[140]

Statements made in the presence of the accused may become his confession on the basis of the same considerations that simple admissions (*i.e.*, not made to persons in authority) may be adopted.[141] However, it appears that the courts will be less likely (than in the case of simple admissions) to impute adoption of another's statement to a suspect on the basis of mere silence when the transaction occurs in the presence of a person in authority.[142]

An out-of-court statement made by an accused can certainly be adverse to his case without being a full and complete confession of his guilt. Thus, it is hardly surprising that when the issue was raised in *Harz and Power*, the House of Lords held that the *Ibrahim* rule applies equally to confessions and admissions which fall short of a full confession.[143]

It would appear that an out-of-court statement by the accused that contains nothing adverse to his case could not be adduced as proof of its contents. The accused cannot adduce it as such, for to do so is obnoxious to the rule against narrative or self-serving statements. For the prosecution the statement, at least on its face, is not an admission and as such could not be adduced as proof of its truth under an exception to the hearsay rule, assuming that the Crown would wish to lead it in the first place. Nevertheless, it was such a situation that came before the Supreme Court of Canada in *Piché* v. *The Queen*.[144] The accused, while under arrest for the murder of her common law husband, told the police that on the night of his death she was at her mother's house. However, upon taking the stand at trial she told a different story, testifying that

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[139] See *Woon* v. *The Queen* (1964) 109 C.L.R. 529 (Aust. H.C.); *R.* v. *Starr* [1969] Q.W.N. 23 n. (S.C.).

[140] See *R.* v. *Lowery (No. 1)* [1972] V.R. 554 (S.C.).

[141] See *Barca* v. *The Queen* (1975) 7 A.L.R. 78 (Aust. H.C.); see also *R.* v. *Eden* [1970] 2 O.R. 161 (C.A.).

[142] *E.g.*, *R.* v. *Eden*, *supra*, note 141.

[143] *Supra*, note 4, 817-8 *per* Lord Reid.

[144] *Supra*, note 14.

she had shot her concubine, but by accident. Counsel for the Crown then sought to adduce the previous statement, but the judge, after conducting a *voir dire*, held that it was involuntary; accordingly, he refused to receive it in evidence. The question presented to the Supreme Court was whether the confession rule applies to exculpatory as well as inculpatory statements made by the accused to persons in authority. In sustaining the trial judge, Hall J., speaking for the majority, found that there is no authority for distinguishing between inculpatory and exculpatory statements. Judson J., dissenting, disagreed with Hall J.'s view of the authorities, and pointed out that, though Lord Sumner's *locus classicus* employs the word "statement", the facts of *Ibrahim* show that he was speaking of incriminating statements. Judson J. went on to emphasize that Lord Reid's *dictum* in *Harz and Power*[145] only referred to confessions and admissions falling short of full confessions, not to exculpatory statements. The concurring opinion of Cartwright C.J.C. offers more substantial reasons for the decision in *Piché*. On the basis of the reliability rationale, his Lordship reasoned that it would be illogical to exclude an involuntary inculpatory statement but to include an involuntary exculpatory statement which the Crown asserts to be false. Cartwright C.J.C. continued that if the rationale of the confession rule is *nemo tenetur seipsum accusare* then regardless of whether the outcome of any coercion was an inculpatory or exculpatory statement, the accused's rights have been violated. His Lordship also found it odd that the Crown could urge that an involuntary statement was exculpatory but contend that, had the statement not been excluded, the accused might not have been acquitted.

Crown counsel in *Piché* surely sought to adduce the accused's out-of-court explanation as a previous inconsistent statement, so as to impeach her credibility as a witness, but not as proof of the prior statement. In this regard, the confession rule, as a test of admissibility of statements adduced as exceptions to the hearsay ban, should not have applied. Is there an explanation for the decision in *Piché*, or is it simply wrong?

One author has argued that the effect of *Piché* is only to bring within the ambit of the confession rule exculpatory admissions, as opposed to exculpatory statements.[146] The former are explained as falling short of complete admissions of guilt. The author argues that *Piché* can go no further, since only admissions can be adduced as proof of the truth of their contents. But this explanation of the case

[145] *Supra*, note 4, 817-8.

[146] Ratushny, *Statements of an Accused: Some Loose Strands (Part I)* (1972) 14 Crim. L.Q. 306.

is unsatisfactory because it is clear that the Crown did not wish to adduce the accused's previous statement as proof of its truth. If the Crown asserted anything as to the contents of the previous statement, it was that it was false, as Cartwright C.J.C. pointed out.[147]

Perhaps the solution is indicated by Cartwright C.J.C. His Lordship commented on the Crown's duplicitous assertion that Piché's statement was exculpatory, and thus not the proper subject of a *voir dire,* but that its exclusion led to her acquittal. The view has been advanced that it is irrelevant that the statement is exculpatory;[148] rather, any statement which the Crown wishes to adduce against the accused, regardless of its tendency when viewed in isolation, is inculpatory. The authority cited for this opinion is Warren C.J., in *Miranda* v. *Arizona,*[149] who expressed the opinion that if a statement were truly exculpatory there would be no question of the prosecution using it.[150] It is certainly true that the impeachment of Piché's trial testimony by the out-of-court statement was highly incriminatory. Showing the accused to have lied to the police raises a strong implication of a guilty state of mind, and as such may well have the same evidentiary effect as an admission. Furthermore, on the facts of *Piché,* juxtaposing the out-of-court statement (*i.e.,* one of avoidance) with the testimonial statement (confession and avoidance) may well have had the same effect upon the trier of fact as an admission.

The decision in *Piché* is not consistent with an orthodox construction of the reliability rationale, since the intrinsic trustworthiness of a statement not adduced as proof of its contents is not particularly relevant. However, as soon as one is prepared to overcome the initial conceptual difficulty by looking at the ultimate purpose and effect of leading the statement, rather than the immediate evidentiary purpose behind adducing the statement, *Piché* becomes explicable under the reliability rationale. Why should a statement, albeit exculpatory on its face, whose effect will be to impeach the accused's trial testimony and thereby point, at least indirectly, to a guilty state of mind, not be tested as to its reliability? An exculpatory statement which is obtained in breach of the *Ibrahim* rule may be unreliable.[151] Even if one is not prepared

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147 *Supra,* note 14, 26.

148 Elliot & Wakefield, *Exculpatory Statements by Accused Persons* [1979] Crim. L.R. 428.

149 384, U.S. 436, 477 (1966).

150 See Elliot & Wakefield, *supra,* note 148, 429.

151 This is the position adopted by the Law Reform Commission of Canada, *supra,* note 19, § 16.

to make the conceptual leap, *Piché* can still be explained on the basis of the reliability rationale, since the Supreme Court may have felt that previous inconsistent statements made by the accused to the police demand special consideration, and should not be admissible even for the non-hearsay purpose of attacking credibility, unless they are reliable. *Piché* is, however, consistent with other policy bases. As Cartwright C.J.C. pointed out, an infringement of the right to silence is not diminished if the result of an inducement is an exculpatory statement.[152] Similarly, the sanction of improper police conduct need not depend on whether the result of the conduct is an inculpatory or exculpatory statement. In this light, the judgment of the Supreme Court of Canada in *Piché* is paradoxical when considered in the context of the Court's acceptance of the reliability rationale. Why did the Court not reason that, since the out-of-court statement was not being adduced as proof of the truth of its contents, its intrinsic trustworthiness was not relevant, and thus hold that the confession rule does not apply to exculpatory statements adduced for the non-hearsay purpose of impeaching credibility?

It is difficult to find Australian authority directly on this point. The High Court in *Lee* held that the modern common law allows the trial judge in the case of statements made to police officers, whether confessions or not, a discretion to reject evidence of such statements.[153] But this may have been a reference to admissions falling short of full confessions, and not to exculpatory statements adduced for some non-hearsay purpose. The issue is certainly one which might be treated as a matter of judicial discretion, and as such it is likely that the question would not arise as a point of law before an appellate court.

It has been submitted that the decision in *Piché* accurately states the law in England,[154] but the authorities relied on are *Ibrahim* and *Harz and Power* which, as stated above, do not really determine the confession rule's application to exculpatory statements. In *R.* v. *Storey and Anwar*,[155] the accused gave an explanation to the police which, if believed, would make her possession of narcotics (with which she was charged) innocent. Widgery L.J., speaking for the Court, said that an accused's statement to the police is always evidence in the case against him, though not necessarily evidence of the truth of the facts stated.[156] His Lordship

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[152] *Supra*, note 14, 25-6.
[153] *Supra*, note 23, 151.
[154] Elliot & Wakefield, *supra*, note 148, 430.
[155] (1968) 52 Cr. App. R. 334 (C.C.A.).
[156] *Ibid.*, 337-8.

continued that the statement, if voluntary, is admissible because it shows the reaction of the accused when first confronted with incriminating allegations. If the statement so made constitutes an admission, says the Lord Justice, it is proof of guilt. On the other hand, if the statement does not constitute an admission, it is not evidence of the truth of the words spoken, but of the accused's reaction. The issue as to whether the confession rule applies to the statement, regardless of whether it constitutes an admission, was not discussed in the judgment, though his Lordship mentions in passing that the statement must be voluntary. In the absence of authority directly on point it is difficult to assert with confidence that the confession rule applies, in England, to the accused's exculpatory statements.

Where an out-of-court statement made by the accused is partly incriminatory and partly exculpatory, it appears that the confession rule will be applied as a test of admissibility. This assertion is a corollary of the state of the law regarding "admissions falling short of full confessions". The confession rule could also be said to apply to such statements simply because the Crown adduces the statement as an admission. The case law does not bear directly on this question but rather on the issue of the evidentiary value of the self-serving part of the statement. The consensus in the three jurisdictions is that as a general rule the whole statement is received and the accused may rely upon its self-serving portions.[157] The legal justification for the admission of the self-serving parts has been described as a "hearsay exception of a parasitic kind".[158] However, it seems more reasonable to describe the admissibility of the favourable portions as necessary to the proper understanding of the inculpatory part, and thus of the weight to be given it. This appears to be the tenor of the *dictum* of James L.J. in the recent case of *R.* v. *Donaldson*,[159] where his Lordship stated that the jury considers the exculpatory portions of the statement in deciding whether the statement viewed as a whole constitutes an admission.[160]

Apart from the contents of statements made by the accused, what bearing will the circumstances of their utterance have on the application of the confession rule? The *Ibrahim* rule does not

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[157] In England see Cross, *supra*, note 89, 544-5 and authorities cited therein; in Canada see Kaufman, *supra*, note 103, 284 *et seq.* and Schiff, *supra*, note 68, 912-4; in Australia see Heydon, *Cases and Materials on Evidence* (1975), 332.

[158] Heydon, *supra*, note 157, 332.

[159] (1976) 64 Cr. App. R. 59 (C.C.A.); see also Elliot & Wakefield, *supra*, note 148, 423-4.

[160] *Ibid.*, 65.

generally operate to exclude statements made under compulsion of statute in judicial proceedings or extra-judicially.[161] However, at least in Australia and England, the compulsion to answer must not have exceeded the statutory power; and, in judicial proceedings, the privilege against self-incrimination cannot be invoked unless specifically abrogated in the instance by the specific statute. There appears to be no ground in law to prevent the Crown from adducing at retrial an admission made by the accused during his testimony at the first trial.[162] Clearly, this is not the type of situation with which the confession rule is concerned, as the circumstances of the court-room guarantee reliability and protection of the privilege against self-incrimination. Further, there need not be any concern for controlling police conduct in court.

Does the confession rule apply to statements not made under a statutory compulsion, but in circumstances such that they are obviously voluntary? In *R.* v. *Erven*,[163] two constables investigating a report of suspicious individuals on a beach approached the accused and his accomplice, and asked them to explain their presence. The two gave a false explanation of their business to the policemen, who testified at the subsequent drug-trafficking trial that at the time the statements were made they did not know what the accused were doing. (They were awaiting the arrival of a drug shipment.) The trial judge refused to hold a *voir dire* because the statements were obviously voluntary. Nevertheless, Dickson J., speaking for the majority of the Supreme Court, overruled this refusal, stating that a *voir dire* is always necessary, even if the statement appears to be obviously voluntary. His Lordship went further to express the view that, even if a statement made by an accused to a person in authority could be considered part of the *res gestae*, a *voir dire* is still required to determine the voluntariness of the statement. This observation cannot simply be dismissed as *obiter*, since on the facts of *Erven* the accused, when speaking to the police, were awaiting the arrival of a drug shipment. Therefore it appears that in Canada *res gestae* is not a sufficient ground of admissibility for suspects' statements made *in flagrante delicto* to

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[161] In England see *Commissioners of Custom and Excise* v. *Harz and Power*, *supra*, note 4, 816-7; *R.* v. *Harris* [1970] 3 All E.R. 746 (Central Crim. Ct). In Canada see *Boulet* v. *The Queen*, *supra*, note 46; *Marshall* v. *The Queen* [1961] S.C.R. 123, 129 *per* Cartwright J. In Australia see *R.* v. *West* (1972) 18 F.L.R. 333 (Central Dist. Crim. Ct of S.A.); *R.* v. *Travers* (1957) 74 S.R. (N.S.W.) 85 (C.C.A.); *R.* v. *Owen* [1951] V.L.R. 393 (S.C.) and authorities cited therein.

[162] See *R* v. *McGregor* (1967) 51 Cr. App. R. 338 (C.C.A.).

[163] *Supra*, note 14.

persons in authority. Thus the confession rule has perhaps been elevated to a higher plane than other exceptional grounds for the admissibility of hearsay. That is to say that on the basis of *Erven* it is not sufficient that a statement made by an accused to a person in authority be admissible on some ground (*e.g., res gestae*); it must be admissible on the ground of having satisfied the *Ibrahim* test on the *voir dire*. Admittedly, most statements admissible as *res gestae* would also be free and voluntary. But what of a situation where the accused confesses when caught house-breaking by police who sneak up behind him pointing a pistol at his head saying, "Tell us what you're doing or . . ."?

Upon what policy grounds could the decision in *Erven* rest? The police-conduct rationale is not really concerned with situations such as obtained in that case or with the hypothetical example given above, but with improper behaviour of police officers after the accused has been taken into custody, especially during interrogation. A similar observation could be made in relation to the rationale of the privilege against self-incrimination, though on a wide view of the privilege it might be argued that it has been infringed in the example above, and as such this rationale affords a policy justification for the ruling that admissibility of the statement by means of *res gestae* is not sufficient. Regarding the reliability rationale, one would imagine that, by definition, a statement qualifying as *res gestae,* and admitted as an exception to the hearsay rule, is reliable.[164] The above example might not bear this out, but what if the facts are changed, such that the police merely grab the burglar by the arm? On the issue of reliability, it is noteworthy that the Supreme Court in *Wray* ruled admissible those parts of an otherwise inadmissible confession which are confirmed by real evidence. Why is such a guarantee of reliability considered sufficient when reliability by means of *res gestae* is rejected? Certainly, in *Wray* the fact that reliability was guaranteed by real evidence is a point of distinction. The reliability of real evidence is extrinsic to an oral statement. Perhaps the Supreme Court did not wish to admit statements to persons in authority on the *res gestae* ground because of the confusion surrounding that notion generally in the law of evidence.[165] The answer may be much simpler. When viewed in conjunction with *Piché,* the decision in *Erven* reflects an attitude in the Canadian Supreme Court that any out-of-court statement made by an accused to a person in authority can be tendered only if admissible under the confession rule. This is so even if the state-

[164] See Cross, *supra,* note 89, 583; Heydon, *supra,* note 157, 336.
[165] See Heydon, *supra,* note 157, 334.

ment is adduced for some non-hearsay purpose, as in *Piché*, or if admissible on some other ground, as in *Erven*. It seems that in Canada the accused's statement must be reliable on the basis of the confession rule and no other, unless real evidence confirming the statement is tendered.

While there does not appear to be any recent authority in Australia, it has been submitted that in England an otherwise inadmissible confession could be admissible by means of the *res gestae* doctrine.[166] Judicial support for such a view can be found in the following *dictum* of Lord Hailsham in *Ping Lin*:

> A confession which is simply blurted out by a criminal caught *in flagrante delicto* is not the sort of thing at all to which Lord Sumner's principle applies. It is emphatically not 'fear of prejudice or hope of advantage excited or held out by a person in authority'. If it were, the classical confession: 'It's a fair cop' uttered by the burglar caught in the act would be excluded.[167]

Does the confession rule apply only to statements adduced by the prosecution or does it equally extend to confessions adduced by a co-accused? Both Cross[168] and the Criminal Law Revision Committee[169] think not. This writer knows of only one case to the contrary.[170] It will be remembered that *R.* v. *Attard* held that a statement made to a person not in authority was also subject to the confession rule. It further held that the rule applies to evidence tendered by one defendant "against" his co-accused. It was pointed out that, once admitted, such a statement becomes evidence for all purposes and is thus evidence "against" another accused.[171] In so far as the rule is directed not solely to deterring improper police conduct, but also to the policy that it is unsafe to leave such evidence to the jury, Walsh J.A. extended the rule to the production of the statement by a co-accused. This appears to be the furthest extension of the rule by Australian courts, based on their refusal to accept a narrow policy basis for the confession rule. Walsh J.A. was not unaware of the problems his decision could imply (*e.g.*, impeding the case of the co-accused wishing to adduce the confession), but obviously felt that they were outweighed by the problems of the opposite view (*e.g.*, allowing production of a confession adverse to a co-accused without the same safeguards he would enjoy if it were adduced by the

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[166] See Cross, *supra*, note 89, 593; Gooderson, *Res Gesta in Criminal Cases — II* [1957] Camb. L.J. 55, 67.

[167] *Supra*, note 2, 602.

[168] *Supra*, note 89, 535.

[169] *Supra*, note 10, § 53.

[170] See *R.* v. *Attard*, *supra*, note 107.

[171] *Ibid.*, 756.

Crown).[172] However, these policy considerations could have been respected by considering the admissibility of the statement under the discretion rather than by applying the confession rule. Nevertheless, it may be possible to reconcile the decision in *Attard* with an orthodox approach under the hearsay rule. When the Crown adduces a confession it does so as the accused's adversary, just as in a civil case an admission will be adduced against one party by his opponent. In view of the defence of Attard's co-accused (*i.e.*, that he was innocent and that Attard was guilty by admission), he stood in relation to Attard as an opposing litigant. If the co-accused could adduce the confession, it is not unreasonable that the rule governing the admissibility of confessions should apply. In this light the decision in *Attard* does not appear grossly inconsistent with the notion of confessions as a sub-species of the hearsay exception of admissions.

VI. The voir dire

In Canada, with the judgment in *Erven*,[173] a *voir dire* will always be necessary to determine the admissibility of the accused's statement to a person in authority, even if that statement is on its face voluntary. In that case, when the statements were made by the accused in response to a question posed by police investigating a report of suspicious individuals on a beach, the constables were unaware that the accused and his accomplice were awaiting a shipment of illicit drugs. Because the trial judge felt that the statements were obviously voluntary he did not hold a *voir dire*. On appeal, the Supreme Court decided that a *voir dire* should have been held, even though the statements appeared to be voluntary. This was felt necessary in order to ensure a full hearing on the issue of voluntariness, to guarantee the accused's right to testify on that issue without having to take the stand at trial, and to maintain the functional separation of the *voir dire* and the trial so that admissibility is determined before the voluntariness of a statement is challenged at trial.[174] *Erven* could be restricted to cases where the accused's statement is made in answer to a question posed by a person in authority. A *voir dire* should also be held where the trial is by a judge sitting without a jury.[175] No *voir dire* is necessary where the statement to be adduced was made under compulsion

[172] *Ibid.*, 757.

[173] *Supra*, note 14.

[174] *Ibid.*, 931-9 *per* Dickson J.

[175] *R.* v. *Gauthier* [1977] 1 S.C.R. 441; in Australia see *Smithers* v. *Andrews* [1978] Qd R. 64 (F.C.).

of statute in a prior judicial proceeding.[176] The situation with regard to a statement made under compulsion of statute, but not in a judicial proceeding, is not as clear, there being no Supreme Court case directly on point and differing views in lower appellate courts.[177] The phase of trial at which the Crown seeks to adduce a statement made by the accused will not affect the principle. Whether the prosecution wishes to produce a confession during its case in chief, upon cross-examination of the accused, or in rebuttal, it must establish voluntariness on a *voir dire*.[178] This does not mean that the Crown is free to split its case.[179] The Supreme Court expressly left open in *Erven* the possibility of the accused waiving his right to the *voir dire*.[180] There is also appellate authority in Ontario favouring the possibility of waiver.[181]

In England, it seems that a *voir dire* will in general only be required where an objection to admissibility is raised,[182] but there is apparently nothing to impede a trial judge from holding a *voir dire* on his own initiative. It also appears that the admissibility of a statement will be tested on a *voir dire* when an objection is taken,[183] even if that occurs during the Crown's cross-examination of the accused.[184]

There does not appear to be any recent Australian authority directly on point. However, there is an *obiter dictum* of a full Bench of the Supreme Court of Victoria to the effect that the trial judge must still determine the voluntary character of a statement sought to be adduced, even if a *voir dire* is not asked for.[185]

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176 See *Boulet* v. *The Queen*, *supra*, note 46.

177 See *R.* v. *Smith* (1974) 15 C.C.C. (2d) 113 (Alta S.C., App. Div.) (no *voir dire* necessary); *R.* v. *Slopek* (1975) 21 C.C.C. (2d) 362 (Ont. C.A.) (*voir dire* necessary).

178 *Monette* v. *The Queen* [1956] S.C.R. 400; see also *R.* v. *Rosa* (1979) 6 C.R. (3d) 84 (B.C.C.A.).

179 See *R.* v. *Dubois* [1977] C.A. 122; *R.* v. *Bruno* (1976) 27 C.C.C. (2d) 318 (Ont. C.A.).

180 *Supra*, note 14, 940; see also *Powell* v. *The Queen* [1977] 1 S.C.R. 362, 367.

181 See *R.* v. *Dietrich* (1970) 11 C.R.N.S. 22 (Ont. C.A.) (leave to appeal refused [1970] S.C.R. xi); *R.* v. *Sweezey* (1975) 20 C.C.C. (2d) 400 (Ont. C.A.); *R.* v. *Rushton* (1975) 20 C.C.C. (2d) 297 (Ont. C.A.); *R.* v. *Clayton* (1978) 3 C.R. (3d) 90 (Ont. C.A.).

182 See Phipson, *Evidence*, 12th ed. (1976), §§ 799, 800; *Conway* v. *Hotten* [1976] 2 All E.R. 213, 217 (Q.B.); *R.* v. *Francis* (1959) 43 Cr. App. R. 174 (C.C.A.).

183 Phipson, *supra*, note 182, § 800.

184 *R.* v. *Rice* [1963] 1 All E.R. 832, 839 (C.C.A.); see also *R.* v. *Treacey* [1944] 2 All E.R. 229 (C.C.A.).

185 *R.* v. *Deathe* [1962] V.R. 650, 652 (S.C. *in banco*) *per* Scholl J.

It need hardly be said that the burden of proof at the *voir dire* rests on the prosecution. In England, the standard of proof that the Crown must meet is that generally applicable to the ultimate test in criminal trials, proof beyond reasonable doubt.[186] The Criminal Law Revision Committee has recommended retention of this standard but in the context of a modified confession rule.[187]

In Australia, the High Court has held that the applicable standard is not proof beyond reasonable doubt but that the judge be satisfied of a statement's voluntariness on *prima facie* grounds.[188] This holding has been applied as imposing the standard of proof on a balance of probabilities.[189] Such a position may be awkward in cases tried before a judge without a jury, where the presiding judge will have to decide first the issue of admissibility on the balance of probabilities, but, in determining the weight to attribute to the confession, apply the standard of proof beyond reasonable doubt. However, if the jury reconsiders voluntariness on the issue of the weight to be accorded the statement, there will be no danger of their prevailing over the trial judge, since they have to be satisfied on a higher standard. This may be a flaw in the English position. It should also be noted that, though the Crown's task of passing the *Ibrahim* test may be easier, given the relaxed standard of proof, the accused in Australia can still have the statement excluded on discretionary grounds. The onus for such exclusion is borne by the accused,[190] presumably on the balance of probabilities.[191]

The weight of recent Canadian authority favours the standard of proof beyond reasonable doubt on the issue of voluntariness at the *voir dire*.[192] The Canadian Law Reform Commission favours the retention of this standard for the reason that, in most cases, the

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[186] See *R.* v. *Ping Lin, supra,* note 2, 597, 599 *per* Lord Hailsham; *R.* v. *Angeli* [1978] 3 All E.R. 950, 953 (C.C.A.); *R.* v. *Richards, supra,* note 34, 830; Cross, *supra,* note 89, 75 and authorities cited therein.

[187] *Supra,* note 10, "Draft Bill", clause 2.

[188] *Wendo* v. *The Queen* (1964) 109 C.L.R. 572-3 (Aust. H.C.); see also *R.* v. *Pfitzner* (1977) 15 S.A.S.R. 171, 189 (S.C. *in banco*).

[189] *R.* v. *Plotzki, supra,* note 76; *R.* v. *Saunders* [1965] Qd R. 409 (C.C.A.); *R.* v. *Bodsworth, supra,* note 129.

[190] *Sinclair* v. *The King, supra,* note 92, 340; *R.* v. *Bodsworth, supra,* note 129; *R.* v. *Smith* [1964] V.R. 95 (S.C.); *R.* v. *Batty* [1963] V.R. 451 (S.C.); *R.* v. *Collins* (1976) 12 S.A.S.R. 501 (S.C. *in banco*).

[191] *R.* v. *Buckskin* (1974) 10 S.A.S.R. 1, 2 (S.C.).

[192] *Ward* v. *The Queen, supra,* note 95, 506; *R.* v. *Hatton* (1978) 39 C.C.C. (2d) 281, 298 (Ont. C.A.); *R.* v. *Pickett* (1975) 31 C.R.N.S. 239, 241-4 (Ont. C.A.); *R.* v. *Jackson, supra,* note 70, 37.

admission into evidence of a confession will lead to the conviction of the accused.[193]

It is the duty of the trial judge sitting on a *voir dire* to decide the issue of voluntariness. He must not let the statement go before the jury *de bene esse* for them to decide the issue,[194] though they may reconsider the evidence going to voluntariness in considering the weight to be attributed to the statement. Should further evidence relating to voluntariness surface during the trial, the judge (at least in England) may 'reverse' his *voir dire* determination and exclude the confession.[194a]

What is the proper course for the trial judge if not only the voluntariness of the statement is attacked on the *voir dire,* but issue is raised as to whether the statement was made at all or, if made, as to what precisely was said? There is authority from the Supreme Court of Canada that, where the accused denies having made the impugned statement, the judge on the *voir dire* does not decide whether the statement sought to be adduced was actually made.[195] As being relevant to weight this issue was thought to be within the exclusive function of the jury:

> with regard to the question as to whether the statement was actually made and whether it is true, the judge presiding over a *voir dire* in a trial by jury is required to decide only whether there is evidence to be submitted to the jury; it is not for him to weigh such evidence.[196]

It is not clear if the judge makes no ruling whatsoever on the voluntary nature of the statement or if he decides that there is *prima facie* evidence that the confession was made.[197] If the former is correct it is difficult to comprehend how a judge can be convinced of voluntariness beyond reasonable doubt where there *is* doubt as to whether the statement was even made. Perhaps the answer is that the judge decides voluntariness *in abstracto;* that is, the statement, if it was made, is voluntary. However, does not a ruling that the statement is voluntary necessarily imply that it was made? Furthermore, if the judge decides on this basis that the statement, if made, is voluntary, and there is serious doubt raised as to whether it was made, could it not be said that any probative value that the statement might have would be outweighed by its prejudicial

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193 See *supra,* note 19, § 16.

194 *R.* v. *Richards, supra,* note 35.

194a *R.* v. *Watson* (1980) 70 Cr. App. R. 273 (C.C.A.).

195 *R.* v. *Gauthier, supra,* note 175, *approving R.* v. *Mulligan* (1955) 111 C.C.C. 173 (Ont. C.A.); see also *R.* v. *Ferguson* (1968) 62 W.W.R. 408 (B.C. Cty Ct).

196 *Supra,* note 175, 448.

197 As Cross states, *supra,* note 89, 71.

effect and should thus be excluded in the discretion of the trial judge?[198] If the latter hypothesis is correct there still appears an incongruity, for the judge is allowing the production of a statement, the existence of which is only established on *prima facie* grounds, but the voluntariness of which has been proved beyond reasonable doubt. However, the whole problem may lie not with the *prima facie* ruling on the statement's existence but with establishing beyond reasonable doubt that it is voluntary. Furthermore, it is incorrect to state simply that probative value is irrelevant to admissibility, if only because considerations of probative value are referentially incorporated into rules governing admissibility. The Supreme Court itself has accepted that the confession rule is essentially a test of reliability.

In Australia there is authority for this same view that the judge decides voluntariness, while the jury decides if the statement was made.[199] However, there is a distinction to be made between the case in which the accused denies making any confession as a result of threats or promises and the case in which exclusion of the statement (alleged by the Crown to have actually been made but denied by the defence) is sought on discretionary grounds, as for denial of the right to see a solicitor.[200] Indeed, the very fact that there is doubt as to whether the statement was made or is accurate is highly relevant to the exercise of the exclusionary discretion.[201] There is authority for the view that where the accused contends that no statement was made, a *voir dire* should not even be held because the issue raised is not one to be determined by the judge but by the jury.[202] This point has, however, been held not to apply where the accused complains of such unfairness in the conduct of an interrogation that no part of it should be received.[203] The High Court has not expressly ruled whether the issue of the existence of the statement is properly left to the jury. However, in *Burns* v. *The Queen*[204] the Court laid down a test to be incorporated into the trial judge's direction to the jury, whereby the jury can deduce, from the alleged statement's truth and the prior knowledge of the police of the facts purportedly admitted, whether the

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198 See *R.* v. *Wray, supra,* note 43.

199 *R.* v. *Matheson* [1969] S.A.S.R. 53 (S.C.).

200 *R.* v. *White* (1976) 13 S.A.S.R. 276, 280 (S.C. *in banco*).

201 *Driscoll* v. *The Queen* (1977) 15 A.L.R. 47 (Aust. H.C.).

202 *R.* v. *Gleeson* [1975] Qd R. 399 (C.C.A.).

203 *R.* v. *Hart* [1979] Qd R. 8 (C.C.A.); see also *R.* v. *Borsellino* [1978] Qd R. 507 (S.C.).

204 (1975) 6 A.L.R. 95, *applied* in *Matusevich* v. *The Queen* (1977) 15 A.L.R. 117 (Aust. H.C.).

statement was in fact made. The High Court thus appears to hold the view that it is for the jury to decide whether the statement was made. Though the same critique as was made of the Canadian position could be made of the Australian, there appear to be subtle differences. First, serious doubt as to whether the confession was made may, in Australia, give rise to exclusion on discretionary grounds.[205] Second, the standard of proof on the *voir dire* in Australia is the balance of probabilities, and thus the incongruities raised above do not exist, at least not to the same degree.

There does not appear to be any English authority directly on the point. Cross states the position as being essentially the same as that of Canada and Australia:

> it is for the judge to decide whether there is *prima facie* evidence that the confession was made, leaving the jury to determine whether it was in fact made.[206]

The learned author cites a Canadian case in support of this,[207] as well as *R.* v. *Roberts*,[208] the latter of which does not address itself directly to the issue at hand, but holds that fitness to plead could be left to the jury together with the ultimate issue. To hazard a guess based on the standard of proof at the *voir dire* would be difficult in so far as Canada and Australia, with different standards, have both held that whether a confession was in fact made is a matter to be decided by the jury, not by the judge presiding at the *voir dire.*

The Court of Criminal Appeal held in *R.* v. *Hammond*[209] that it was not improper for Crown counsel to ask the accused testifying on the *voir dire* if the impugned statement is true. The accused gave his story as to how the alleged confession was beaten out of him. In answer to the prosecuting attorney's question on cross-examination, he stated that the confession was true. On appeal, the Court decided that the question and answer were admissible on the *voir dire* as going to the accused's credibility since the truth of the statement was relevant to the issue of how he came to make it. Whether *Hammond* is still the law in England has been challenged by the Privy Council's refusal to follow it in *Wong Kam-ming* v. *The Queen*.[210] In fact, their Lordships stated clearly that *Hammond* is wrong,[211] and questioned the logic of the "relevant to credibility"

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[205] *Driscoll* v. *The Queen, supra,* note 201.
[206] *Supra,* note 89, 71.
[207] *R.* v. *Mulligan, supra,* note 195.
[208] [1954] 2 Q.B. 329 (Cardiff Assizes) *per* Devlin J.
[209] [1941] 3 All E.R. 318.
[210] *Supra,* note 41.
[211] *Ibid.,* 257.

ratio of *Hammond* by pointing out that if the accused denies the truth of the confession, the truth or falsity of this denial cannot be determined until the jury has rendered its verdict on his guilt. But if the defendant admits the truth of his confession this would show that his story of police violence is worthy of credit.[212] Their Lordships reiterated that the sole object of the *voir dire* is to determine voluntariness. They felt that to allow a question on truthfulness would undermine this purpose because confirmation of the confession's truth by the accused would inescapably lead to its admission, regardless of credible evidence of police violence.[213] Cross has also said that it is difficult to maintain that a true confession is more likely to be voluntary than a false one.[214]

The Supreme Court of Canada followed *Hammond* in its judgment in *DeClercq* v. *The Queen*.[215] The majority, while stressing that the ultimate issue on the *voir dire* is voluntariness, held 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. It appears that a finding of voluntariness based solely on the truth of an admission would be reversed.[216] *DeClercq* is somewhat more startling than *Hammond* in view of the fact that the trial in the former was by a judge sitting without a jury, and it was the magistrate himself who asked the accused if his statement was true.

The issue of admissibility of the question "Is it true?" in Australia seems to have been approached with caution. In Queensland at least, the accused can simply refuse to answer the question by claiming the privilege against self-incrimination.[217] This is not the case in Tasmania, where Neasey J., reasoning mainly on the dissenting opinions in *DeClercq*, disallowed the question on discretionary grounds.[218] He stated that if the accused admitted the truth of his statement on the *voir dire*, that admission would be admissible at the trial itself. Such a result, he concluded, would

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[212] *Ibid.*, 256, *approving* Heydon, *supra*, note 157, 181. See also Grimaud, *Declercq v. The Queen: A Confession's Reliability on Voir Dire* (1970) 8 Osgoode Hall L.J. 359, 561; Grayburn, *Truth as the Criterion of Admissibility of Confessions* (1962-63) 5 Crim. L.Q. 415, 421.

[213] *Supra*, note 41, 256, *approving R.* v. *Hnedish* (1958) 26 W.W.R. 685 (Sask. Q.B.).

[214] Cross, *The Functions of the Judge and Jury with Regard to Confessions* [1960] Crim. L.R. 385, 387.

[215] *Supra*, note 45.

[216] *R.* v. *Muncaster* [1975] 5 W.W.R. 605 (B.C.C.A.).

[217] *R.* v. *Toner* [1966] Q.W.N. 44 (S.C.); *R.* v. *Gray* [1965] Qd R. 373 (Crim. Ct).

[218] *R.* v. *Toomey*, *supra*, note 55.

lead to the breakdown of the criminal trial process. His Honour added that to allow the question would strongly discourage the accused from testifying, thereby depriving the court of his version of the interrogation, and thus undermining the policy ground of controlling improper police conduct. Furthermore, the knowledge of the confession's truth would tend to predispose the trial judge when addressing his mind to voluntariness. Neasey J. thus concluded that the question should not be allowed, especially where its relevance is only remote. His Lordship did speculate that there might be cases where the question could be relevant, such as where the accused alleges that the confession is a police invention.[219]

It appears from *R.* v. *Wright*[220] that in South Australia the question is strictly permissible but will be carefully scrutinized with an eye for discretionary exclusion. This seems to be the common ground of the three opinions comprising the judgment. The facts show that the accused succumbed to an exhortation made by his father in the presence of the police to tell the truth. Bray C.J. felt that the question of the confession's truth is generally relevant to credibility and could in exceptional circumstances be relevant apart from credibility where the inducement was to confess as opposed to an inducement to make a true confession, as was the case in *Wright*. In such a case his Lordship stated that the truth of the confession is irrelevant to the question of the effect of the inducement. Bray C.J. also stated that the truth of the confession is irrelevant to the exercise of the exclusionary discretion since objectionable police conduct, at the control of which the discretion is aimed, is no less objectionable because it elicits the truth. His Honour stated further that the ground of admissibility of questions as to the truth should be kept narrow, otherwise it would lead to the Crown calling extraneous evidence to prove the confession's truth and thus transform the *voir dire* into a duplication of the trial. Chamberlain J. disagreed with these last two reasons, stating, first, that truth of the confession is relevant to police impropriety and that the issue is not whether the police behaved improperly, but whether the admission was made as a consequence of such impropriety. Second, his Lordship was not disturbed by the possibility that the Crown might prove the confession at the *voir dire* by external evidence. Zelling A.J. said that though the accused could have refused to answer on the privilege against self-incrimination,

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[219] See *Burns* v. *The Queen, supra,* note 204, where the High Court laid down a test whereby the confession's truth confirms that it was not invented when the police were previously unaware of the facts admitted.

[220] *R.* v. *Wright, supra,* note 54.

the question was relevant to his credibility, but subject to the exercise of judicial discretion to exclude.[221]

Many of the criticisms to be made of the position adopted in *Hammond* and *DeClercq* have surfaced in the foregoing discussion of the case law, but there are still others. Asking the accused on the *voir dire* if he is guilty effectively violates the function of the trial within the trial as a separate inquiry into voluntariness, where the accused can testify without jeopardizing his right against self-incrimination on the ultimate issue of guilt.[222] Further, the prejudice which the accused suffers from such a question in a trial by judge without jury (as in *DeClercq*) is obvious. That the question's pertinence to credibility is illogical has been pointed out and recognized by the Privy Council in *Wong Kam-ming*.[223] It will be remembered that it has been held that the Crown must establish voluntariness on a *voir dire* whether it seeks to adduce the confession in its case in chief, in cross-examination or in rebuttal. It has been asserted that this rule is broad enough to exclude use of the statement for purposes of cross-examination at the *voir dire*.[224] The question "Is it true?" is in effect "Is it true that you committed the crime?" To put such a question at the *voir dire*, the purpose of which is to determine the confession's admissibility, is to put the cart before the horse. Cross has stated that the distinction between cross-examination as to credibility and cross-examination going to the issue is simply not applicable to situations like those in *Hammond* or *DeClercq*.[225]

If the accused is to be questioned on the *voir dire* as to the truth of his confession, it is submitted that the preferable approach is to be discerned from the Australian judgments; that is, to scrutinize the relevance of the question in the particular circumstances of the instant *voir dire*, the whole being subject to the judge's exclusionary discretion. The question should certainly be inadmissible where the trial is by judge alone. Furthermore, given the illogicality in the "relevance to credit" *ratio* of *Hammond* and *DeClercq*, it is submitted that even in Canada, and perhaps England, where the judge's exclusionary discretion is narrower than in Australia, the question should be excluded. If the judge's discretion to exclude is

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[221] In Victoria it seems that the question pertaining to the confession's truth can be asked subject to the judicial discretion to exclude: see *R.* v. *Amad* [1962] V.R. 545 (S.C.).

[222] See *DeClercq* v. *The Queen*, *supra*, note 45, 912 *et seq.*, *per* Hall J., dissenting.

[223] *Supra*, note 43, 86, n. 212.

[224] Ratushny, *Unravelling Confessions*, *supra*, note 25, 484.

[225] Cross, *supra*, note 89, 386.

limited to evidence with little probative value in relation to its grave prejudicial effect, then surely the question should not be allowed: its prejudicial effect is obvious and its relevance to credit, as pointed out above, is suspect.[226] This appears to be the view of the Canadian Law Reform Commission, which recommends that the prosecution should not be allowed to ask the accused if his statement is true or false.[227]

If the accused can be asked on the *voir dire* whether the confession is true, can he claim the privilege against self-incrimination? The issue becomes highly pertinent if an admission made during the accused's *voir dire* testimony can be used at trial. In Queensland the claim to privilege exists for the accused at the *voir dire*,[228] while in Tasmania it does not.[229] The situation is less clear in South Australia.[230] In a recent Canadian case it was held that the accused could not claim the privilege at the *voir dire* but, by the same token, the Crown could not adduce at trial admissions made by the accused during the *voir dire*.[231] The writer knows of no authority directly on point in England.

VII. The trial judge's discretion

Excepting occasional oblique references to the trial judge's exclusionary discretion, the foregoing discussion has been concerned with exclusion of confessions obtained in breach of the confession rule. Should the trial judge find on the *voir dire* that the confession is admissible under the rule, he may still exclude it at his discretion. The two distinct criteria upon which the exercise of this discretion rests are the Judges' Rules and unfairness. The two criteria shall be treated separately for convenience, though it appears that they have fused in practice.

The English courts have repeated that the Judges' Rules are not rules of law but administrative guidelines for the police in the interrogation of suspects.[232] Both in the literature[233] and in the case

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[226] See *DeClercq* v. *The Queen*, *supra*, note 45, 909 *per* Cartwright C.J.C.; Ratushny, *supra*, note 23, 491.

[227] *Report on Evidence*, *supra*, note 21, § 7(5).

[228] *R.* v. *Gray*, *supra*, note 217; *R.* v. *Toner*, *supra*, note 217.

[229] *R.* v. *Toomey*, *supra*, note 55.

[230] *R.* v. *Wright*, *supra*, note 54.

[231] *R.* v. *Magdish* (1978) 3 C.R. (3d) 377 (Ont. S.C.).

[232] For a detailed treatment of the Rules, see Gooderson, *The Interrogation of Suspects* (1970) 48 Can. Bar Rev. 270.

[233] See Brownlie, *Police Questioning, Custody and Caution* [1960] Crim. L.R. 298; Devlin, *The Criminal Prosecution in England* (1960); Gooderson, *supra*, note 232; Smith, *The New Judge's Rules — a Lawyer's View* [1964] Crim. L.R. 176; Criminal Law Revision Committee, *supra*, note 10, § 45.

law[234] it is asserted that the trial judge has a discretion to exclude statements obtained in breach of the Judges' Rules. However, there is a marked tendency in the courts not to exclude the statement simply because of non-compliance with the Rules.[235] The cases tend to stress that the prevailing concern is voluntariness, adding that the courts retain a discretion to exclude where the statement, albeit voluntary, was obtained in breach of the Judges' Rules.[236] It is difficult to deny the existence of the judge's discretion to exclude where the Judges' Rules have been breached, in view of the numerous *dicta* asserting the existence of that power. However, it is equally difficult to assert with confidence the existence of that discretion in view of the dearth of cases in which it has been exercised.[237] This, coupled with the repetitious assertion that the primary concern is voluntariness, leads the present writer to postulate that the discretion exists, but will only be exercised where the breach was not purely technical, and where the case for voluntariness is hard. That is to say that the contravention of the Judges' Rules will be allowed to tip the balance away from voluntariness where the case for the latter is marginal and the former is not purely technical. This will especially be the case where the severity of the breach of the Rules can be construed as going to the issue of voluntariness itself.

With slight variation of substance, the Judges' Rules have been adopted by each Australian state in some manner.[238] It appears that in Australia, they may be considered as a factor in the general discretion to exclude for unfairness.[239] A breach of the Rules will not in itself be sufficient for exclusion. This was the view taken

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[234] *R.* v. *Sang, supra,* note 38, 453 *per* Lord Scarman; *Dilks* v. *Tilley* [1979] 1 R.T.R. 459 (Q.B.); *R.* v. *Williams* (1967) 67 Cr. App. R. 10 (C.C.A.); *R.* v. *Allen* [1977] Crim. L.R. 163 (Norwich Crown Ct); *R.* v. *Lemsatef* [1977] 2 All E.R. 835 (C.A.); *R.* v. *Osborne* [1973] 1 Q.B. 678, 689 (C.A.); *R.* v. *Prager, supra,* note 6, 1118; *R.* v. *Ovenall, supra,* note 34, 126; *R.* v. *Collier & Stenning* (1965) 49 Cr. App. R. 344; *R.* v. *May* (1952) 36 Cr. App. R. 91, 93 (C.C.A.); *R.* v. *Bass* [1953] 1 Q.B. 680, 684 (C.C.A.).

[235] Baldwin & McConville, *Police Interrogation and the Right to See a Solicitor* [1979] Crim. L.R. 145 and authorities cited at 147; see also *R.* v. *Roberts* [1970] Crim. L.R. 464 (C.C.R.).

[236] See *R.* v. *Prager, supra,* note 6; *R.* v. *Roberts, supra,* note 235; *R.* v. *May, supra,* note 234; see also Smith, *supra,* note 233, 176.

[237] *R.* v. *Allen, supra,* note 234.

[238] See Aronson, Reaburn & Weinberg, *Litigation — Evidence and Procedure,* 2d ed. (1979), 337; Gobbo, *Cross on Evidence,* 2d Aust. ed. (1979), 532-3.

[239] See Weinberg, *The Judicial Discretion to Exclude Relevant Evidence* (1975) 21 McGill L.J. 1, 21; *R.* v. *Hart, supra,* note 203, 13; *Driscoll* v. *The Queen, supra,* note 201, 66.

by the High Court in *Lee*[240] and there appears nothing in the cases since *Lee* to suggest the contrary.[241] The view of the High Court is best explained in its own words:

> [The Judges' Rules] are not rules of law and the mere fact that one or more of them has been broken does not of itself mean that the accused has been so treated that it would be unfair to admit his statement. Nor does proof of a breach throw any burden on the Crown of showing some affirmative reason why the statement in question should be admitted. As has already been pointed out, the protection afforded by the rule that a statement must be voluntary goes so far that it is only reasonable to require that some substantial reason should be shown to justify a discretionary rejection of a voluntary admission. The rules may be regarded in a general way as prescribing a standard of propriety and it is in this sense that what may be called the spirit of the rules should be regarded.
>
> It is indeed, we think, a mistake to approach the matter by asking as separate questions, first, whether the police officer concerned has acted improperly, and if he has, then whether it would be unfair to reject the accused's statement. It is better to ask whether, having regard to the conduct of the police and all the circumstances of the case it would be unfair to use his own statement against the accused.[242]

The Court went on to repeat that the real justification for the Judges' Rules, and for the trial judge's exclusionary discretion, is the guarantee of fairness to the accused.[243] Though this is the general approach of the courts, there frequently is a difference of opinion as to when police misconduct will reach the point of making it unfair to adduce the accused's statement against him. Such difference of opinion has arisen, for example, in the case where the police persist in questioning a suspect who claims the right to remain silent, and eventually extract an admission from him.[244]

The Judges' Rules have never played any important role in Canadian law.

The general judicial discretion to exclude admissible evidence (*i.e.*, a confession not repugnant to the *Ibrahim* rule) presents interesting contrasts among the three jurisdictions. In Canada the discretion has been severely tapered by *Wray*, while in Australia it is an important part of the law relating to confessions. The

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[240] *Supra*, note 23.

[241] See, *e.g.*, *R.* v. *Deverall* [1969] Tas. S.R. 106 (S.C.); *Webb* v. *Cain* [1965] V.R. 91 (S.C.).

[242] *R.* v. *Lee*, *supra*, note 23, 154.

[243] *Ibid.*, 159; see also *R.* v. *Ragen* [1964-65] N.S.W.R. 1515, 1518-22 (S.C.).

[244] *R.* v. *Evans* [1962] S.A.S.R. 303 (S.C. *in banco*): *contra*, *Harris* v. *Samuels* (1973) 5 S.A.S.R. 439 (S.C. *in banco*); *R.* v. *Ireland* [1970] A.L.R. 727 (Aust. H.C.).

existence of a general discretion to exclude evidence otherwise admissible has been thought to exist in England, though rarely used. Recent developments tend to confirm the existence of a discretion but are not very illuminating as to its nature and scope.

In *Lee*[245] the High Court of Australia, in confirming *McDermott* v. *The King*, affirmed that there is a broad judicial discretion to exclude a voluntary confession where it would be unfair to use it against the accused. The trial judge should

> form a judgment upon the propriety of the means by which the statement was obtained by reviewing all the circumstances and considering the fairness of the use made by the police of their position in relation to the accused.[246]

The Court held that the foregoing describes the discretion rule and that no further attempt should be made to define it, as such an effort would limit its scope. The Court did say that unfairness relates to the circumstances under which the statement was made and not simply to its prejudicial effect upon the defence.[247] Furthermore, the likelihood of improper police conduct causing an untrue statement was held to be only one criterion relevant to the exercise of the discretion.[248] The Court thereby recognized a broader policy basis for the rule than mere reliability. The High Court added in *Wendo* v. *The Queen*[249] that the unlawful or irregular obtaining of evidence does not in itself afford a reason for excluding it. The Australian courts have, since *Lee*, not questioned the existence of the discretion,[250] and have added various criteria relevant to the exercise of the discretion, such as the physical condition of the suspect at the time of police questioning[251] and the balance of interests between conviction of the guilty and protection of the individual from unfair or illegal treatment.[252]

It is beyond doubt that the discretion to exclude for unfairness in Australia is very broad and aids the courts in excluding confessions not caught by a strict application of the *Ibrahim* rule. Furthermore, the discretion allows the Australian courts to put into

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[245] *Supra*, note 23, 151 *et seq.*

[246] *Ibid.*, *approving McDermott* v. *The King*, *supra*, note 18, 513 *per* Dixon J.

[247] *Ibid.*, 152.

[248] *Ibid.*, 153; see also *R.* v. *Starecki*, *supra*, note 93.

[249] *Supra*, note 188.

[250] For cases recognizing the existence of the discretion, see Weinberg, *supra*, note 239, 13, n. 50.

[251] *R.* v. *Von Aspern* [1964] V.R. 91 (S.C.).

[252] *R.* v. *Austin* (1979) 21 S.A.S.R. 315, 318 (S.C. *in banco*), applying to a confession the test in *Bunning* v. *Cross* (1978) 52 A.L.J.R. 561 (Aust. H.C.); see also *R.* v. *Killick* (1979) 21 S.A.S.R. 321 (S.C.).

application the recognition of broad policy grounds underlying the confession rule. Finally, the aforementioned makes it clear that the Australian concept of unfairness extends out of the court room to the manner of obtaining the confession, whereas in Canadian law it is limited to unfairness in the court room at trial. However, confessions in Australia have also been excluded where adducing them would cause unfairness at trial.[253]

In Canada, the judicial discretion to exclude technically admissible evidence has, as stated above, been severely curtailed by the Supreme Court in *R.* v. *Wray*.[254] Arrested for murder, the accused told the police that he had thrown the weapon in a swamp and, being guided to the place by the accused, the police found the weapon. It was conceded on the facts that the confession was involuntary and hence inadmissible. The Ontario Court of Appeal upheld the acquittal on the grounds that evidence of the discovery could properly be excluded by the trial judge in his discretion to reject evidence, the admission of which would be "unjust or unfair to the accused or calculated to bring the administration of justice into disrepute".[255] It should be pointed out immediately that the judgment in *Wray* on the discretionary power did not relate to the confession but to the finding of real evidence. (That part of the confession confirmed by the finding of the gun was held admissible.) However the judgment in *Wray* speaks broadly of the judicial discretion to exclude and it is generally thought that the law stated in the case applies to discretionary exclusion of confessions as well.[256] Martland J., writing for the majority, first pointed out that there is no judicial authority in Canada or England to support the proposition that a trial judge has discretion to exclude evidence because its admission is calculated to bring the administration of justice into disrepute.[257] As to the discretion to exclude for unfairness, his Lordship reviewed the case law[258] and concluded that, on the authorities, there exists no general discretion to exclude admissible evidence. His Lordship's view was that

> the exercise of a discretion by the trial judge arises only if the admission of the evidence would operate unfairly. The allowance of admissible evidence relevant to the issue before the court and of substantial

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[253] See *R.* v. *Amad, supra,* note 221; *R.* v. *Wright, supra,* note 54.

[254] *Supra,* note 43.

[255] *Ibid.,* 287.

[256] See, *e.g., Roberts, supra,* note 50, 29.

[257] *Supra,* note 43, 287. The Law Reform Commission of Canada recommended this as a criterion for the exclusion of evidence: *supra,* note 21, § 16.

[258] Notably *Noor Mohamed* v. *The Queen* [1949] A.C. 182 (P.C.); *Harris* v. *D.P.P.* [1952] A.C. 694 (H.L.).

> probative value may operate unfortunately for the accused, but not unfairly. It is only the allowance of evidence gravely prejudicial to the accused, the admissibility of which is tenuous and whose probative force in relation to the main issue before the court is trifling, which can be said to operate unfairly.[259]

Martland J. underlined the fact that unfairness relates not to the manner of obtaining evidence but unfairness in the actual trial of the accused.[260]

Though no mention is made of the policy considerations underlying the confession rule, that part of *Wray* dealing with the judicial discretion certainly rejects the control of police impropriety. Second, as Martland J. himself pointed out,[261] *Noor Mohamed*, upon which he based his view of the discretion,[262] was a similar-fact case. On these two footings the following criticisms can be made. The confession rule in its classic form, whatever be its underlying policy, is a rule of admissibility directed at the manner of obtaining a specific type of evidence. Is it then unreasonable or illogical that a judicial discretion to exclude a confession for unfairness also consider the method of obtaining? This is the option of the Australian courts but Martland J.'s "unfairness at trial" test precludes this option in Canada. Second, it is submitted that Martland J.'s test should be restricted to similar-fact cases where prejudicial effect is always great, relevance and admissibility are often tenuous, and probative force in relation to the crime charged has been at the crux of appellate judgments. In what circumstances could this test operate to exclude a confession on discretionary grounds? Of course admissibility could be tenuous where the evidence on the *voir dire* is marginal or approximative as to the *Ibrahim* requirement, and a confession will always be gravely prejudicial. However, when could the probative force of a confession be trifling *vis-à-vis* the main issue?[263] By definition, an admission of guilt can only have great probative value regarding the main issue. Juries can certainly re-hear evidence going to voluntariness in determining the weight of a confession, but the criteria governing the exercise of the discretion are directed at admissibility. This determination is at an end when the jury comes to consider

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[259] *Supra*, note 43, 293.

[260] *Ibid.*, 295.

[261] *Ibid.*, 290.

[262] *Ibid.*, 293.

[263] See, *e.g.*, *R.* v. *Deleo* (1972) 18 C.R.N.S. 261, 267-8 (Ont. Cty Ct). In *R.* v. *Stewart*, *supra*, note 91, the trial judge excluded admissions by a mentally disabled accused on this ground. It is curious, however, that the Supreme Court did not approach the issue in *Ward* (*supra*, note 95) in such a manner.

the confession. Accordingly, it is submitted that, despite the broad scope of the judgment in *Wray*, the test of discretionary exclusion expounded therein should not apply to confessions because it could rarely operate to exclude a confession. Might this mean that there exists no discretion to exclude confessions because of unfairness?

There are recent cases to be cited in support of a general exclusionary discretion in England.[264] There are also decisions in which the discretion was not applied.[265] English cases dealing with a discretion to exclude for unfairness, where the impugned evidence was a confession, are rare. In *R.* v. *Stewart*[266] the trial judge excluded the confession of a mentally disabled suspect whose admission, though voluntary within the meaning of the confession rule, could have little probative value in relation to its prejudical effect,[267] due to the suspect's inability to comprehend and answer questions. It was held to be unfair, and on the authority of an Australian case[268] the judge exercised his discretion to exclude.

In *R.* v. *Houghton*[269] the accused co-operated with the police by informing on his accomplices in expectation of immunity from prosecution. It was found as a fact that the police never agreed to such immunity nor did anything to arouse such expectation. At one point in the investigation the accused was illegally detained by the police for "further enquiries" with the apparent purpose of isolating him from his accomplices and the stolen money. The admissibility of Houghton's statements to the police was in issue before the Court of Appeal. Defence counsel argued for exclusion on the basis that the police had led Houghton to believe that as an informer he would be given immunity, and that the detention of his client up to the time that he asked to speak to the detectives was unfair. The Court recognized the existence of a general discretion to exclude for unfairness.[270] Furthermore, said the Court, evidence would

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[264] See *Jeffery* v. *Black* [1978] Q.B. 490 (D.C.); *King* v. *The Queen* [1969] 1 A.C. 304 (P.C.); *Callis* v. *Gunn, supra,* note 7; *R.* v. *List* [1965] 3 All E.R. 710 (York Assizes); *R.* v. *Payne* [1963] 1 All E.R. 848 (C.C.A.).

[265] See, *e.g., Jeffery* v. *Black, supra,* note 264; *King* v. *The Queen, supra,* note 264. See also Caplan, *The Judicial Discretion to Disallow Admissible Evidence* (1970) 114 Sol. J. 945 and authorities cited therein.

[266] *Supra,* note 91; see also *R.* v. *Kilner, supra,* note 91.

[267] See *R.* v. *Ovenall, supra,* note 34, 26 where the same criterion is mentioned as pertinent to the exercise of the trial judge's discretion to exclude under the Judges' Rules.

[268] *Sinclair* v. *The King, supra,* note 92.

[269] (1978) 68 Cr. App. R. 197 (C.C.A.).

[270] *Ibid.,* 206, *citing Callis* v. *Gunn, supra,* note 7.

operate unfairly if it had been obtained by oppression or force, by a trick,[271] or by conduct of which the Crown ought not to take advantage.[272] Based upon this, the Court decided that in considering whether to exclude a confession for unfairness the trial judge had to ask himself "What led the accused to say what he did?" Since in the circumstances of the case before the Court the police had cautioned the accused and had not detained him *incommunicado* in order to make him "crack", but only to isolate him from the stolen money, it was held that the trial judge had not exercised his discretion wrongly. The Court added that it might have decided differently if the accused were inexperienced or unintelligent or if he had demanded and been denied the right to a solicitor.

Though the Court of Appeal in *Houghton* appears to recognize the existence of a discretion, the criteria enumerated to guide its exercise would probably be satisfied by plain application of the confession rule and by the discretion thought to exist under the Judges' Rules. A similar observation can be made on the words of Lord Parker C.J., affirming the existence of the discretion in *Callis* v. *Gunn*[273] (one of the cases relied on in *Houghton*). His Lordship stated that in determining whether the evidence would operate unfairly, one should determine if the evidence had been obtained oppressively by force. In speaking of the specific case of confessions he stated that a much stricter rule applies. Lord Parker then stated, in his own words, the confession rule. This, coupled with the judgment in *R.* v. *Houghton*, makes one wonder if any field that a purported discretion to exclude relevant evidence in other areas might cover (*e.g.*, illegally obtained evidence) is not already allowed for in the confession rule itself. Further, if a discretion to exclude for breach of the Judges' Rules does indeed exist, the debate as to the existence of the fairness discretion may be moot in relation to confessions because the purported discretion could not broaden the ground already covered by the combination of the rule and the discretion under the Judges' Rules. It may be that the confession rule in England (coupled as it may be with a discretion to exclude for breach of the Judges' Rules) is but a particular instance of a general discretion in the trial judge to exclude evidence that would operate unfairly.[274] This approach becomes particularly tempting if

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[271] *Ibid., citing Kuruma* v. *The Queen* [1955] A.C. 197 (P.C.).

[272] *Ibid., citing King* v. *The Queen, supra,* note 264.

[273] *Supra,* note 7.

[274] See, *e.g., R.* v. *Nichols* [1977] Crim. L.R. 352 (Willesden Crown Ct), where the trial judge confused inadmissibility in law (because of an inducement) with the judicial discretion to exclude.

one is willing to accept a broader policy than trustworthiness for the confession rule. On such a basis it follows that: (i) the rule is designed to exclude evidence which, due to the manner in which it was obtained, has dubious probative value and would operate unfairly if admitted; and (ii) the rule is designed (at least in extreme cases) to exclude evidence obtained in an unfair manner, albeit that the conduct exhibited in obtaining it may not diminish the statement's probative value. Whether this statement accurately reflects the law may depend very much upon the meaning of the speeches in *R.* v. *Sang*.[275] In that case the House of Lords considered the existence of a general discretion to exclude evidence which is technically admissible. Upon a charge of uttering forged American bank notes, defence counsel made a motion to the effect that all evidence obtained through an *agent provocateur* be excluded by the trial judge in the exercise of his discretion. It was common ground that such exclusion would necessarily imply a directed verdict of acquittal, as in the circumstances there would be no remaining evidence upon which to base a conviction. The case came before the House of Lords on a question certified by the Court of Appeal as to the existence of a discretion to exclude relevant and probative evidence. Though evidence of confessions was specifically excluded from the question, the House deemed it necessary to speak of that matter as well. Despite unanimity on the answer to the certified question, the various speeches are difficult to reconcile with one another and it is not clear whether the discretion held to exist operates in the case of confessions, as an appendage to the exclusionary rule, or whether the rule is only a particular manifestation of the general exclusionary discretion. Though their Lordships directed themselves to the existence of discretion to exclude generally, the presentation here of their Lorships' opinions will, at the risk of embellishment, focus upon confessions. It appears that Lord Diplock[276] and Viscount Dilhorne[277] agree that the trial judge has a general discretion to exclude technically admissible evidence where its prejudicial effect outweighs its probative value. Lord Diplock adds:

> Save with regard to admissions and confessions and generally with regard to evidence obtained from the accused after commission of the offence, [the trial judge] has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means.[278]

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[275] *Supra*, note 38.
[276] *Ibid.*, 429 *et seq.*
[277] *Ibid.*, 437 *et seq.*
[278] *Ibid.*, 437.

Apparently, the kind of case Lord Diplock had in mind when speaking of evidence obtained from the accused after commission of the offence is exemplified in *R.* v. *Barker*,[279] where an incriminating document, which the accused had given to revenue officials upon an inducement, was excluded.[280] Viscount Dilhorne, while agreeing with Lord Diplock's answer, stresses that except for admissions and confessions the judge is not concerned with the manner of obtaining evidence. Though Lords Salmon, Fraser and Scarman express agreement with Lord Diplock's answer to the certified question, they appear to approach the issue differently than the latter. They all appear to agree that there exists one general discretion to exclude which is based on the criterion of fairness to the accused. In the view of Lords Salmon and Fraser the discretion is not limited to instances of prejudicial effect outweighing probative value. That is only one instance of discretionary exclusion, as are cases where the evidence is obtained from the accused himself[281] (*e.g.*, confessions by threats and promises[282]). Both Lords Fraser[283] and Scarman[284] are explicit that unfairness relates to the use of the impugned evidence *at trial.*

Before attempting to analyze the implications of *Sang* for the law of confessions, it should be pointed out that the case, on its facts, is one of entrapment. Entrapment is not a defence under the law of England, and as such it seems clear that their Lordships would not recognize an exclusionary discretion that could operate so as to let the defence of entrapment "in through the back door". Second, *Sang* cannot properly be viewed as a confession case, since by definition the suspect would not know that an *agent provocateur* is a police officer and thus, on the subjective view, the latter is not a person in authority. This is not merely a narrow (and perhaps trite) view of *ratio decidendi*, as these considerations caused confessions to be excluded from the ambit of the certified question. More importantly, it is submitted that these considerations must have had some effect on the Law Lords' approach to the issue. The question as to a general discretion was answered on the issue of improperly obtained evidence which is admissible without reference to the manner of obtaining. It is suggested that the results may have been different had the question of a general discretion arisen

[279] [1941] 2 K.B. 381 (C.C.A.).
[280] See *R.* v. *Sang*, *supra*, note 38, 434-5.
[281] *Ibid.*, 450 *per* Lord Fraser.
[282] *Ibid.*, 445 *per* Lord Salmon.
[283] *Ibid.*, 450.
[284] *Ibid.*, 452.

in the context of a confession, that is, evidence inadmissible by reference to the manner of its obtaining.

The consensus in *Sang* concerning a discretion to exclude for unfairness with regard to evidence of confessions is difficult to ascertain. Their Lordships appear to agree that the accused has a right to a fair trial and that the trial judge has a duty to ensure that right.[285] That duty gives rise to a discretion to exclude technically admissible evidence on the ground of unfairness.[286] As to the precise extent of that discretion, it is not clear on the basis of the different speeches whether it is a broad general discretion[287] or whether it is limited in scope to evidence of high prejudicial effect but low probative value.[288] It is also unclear, though it appears that with the exception of confessions and admissions (and evidence obtained from the accused which is akin thereto), the judge, in exercising this discretion regarding unfairness, is not to concern himself with the manner in which the evidence was obtained.[289] That is to say that the fairness which the judge is to ensure relates to the trial and does not extend out of the court room to the pretrial investigatory state. There appears to be agreement that the confession rule is a rule of fairness, though this view is not expressed in explicit terms by all the Law Lords.[290] It is less clear whether they view the confession rule as a particular instance of the judge's general discretion to exclude evidence that would be unfair to admit, or as a separate and distinct rule that is nonetheless rooted in the notion of fairness. In any event, there does seem to be consensus that the confession rule is concerned with the manner of obtaining evidence. As such it is exceptional in that the judge's concern for fairness is not limited to the use made of the evidence in the court room; rather, it can be directed outside of the court room to the manner in which the confession was obtained. But does the confession rule, considered in the aforementioned manner, allow for a discretion to exclude for unfairness to be appended to it; or does it, by its very nature, subsume any ground that a judicial

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[285] *Ibid.*, 436 *per* Lord Diplock, 439 *per* Viscount Dilhorne, 444 *per* Lord Salmon, 447 *per* Lord Fraser, 455 and 457 *per* Lord Scarman.

[286] *Ibid.*, 436 *per* Lord Diplock, 439 *per* Viscount Dilhorne, 444 *per* Lord Salmon, 447 *per* Lord Fraser, 457 *per* Lord Scarman.

[287] *Ibid.*, 445 *per* Lord Salmon, 447 *per* Lord Fraser, 452 *per* Lord Scarman.

[288] *Ibid.*, 434 and 437 *per* Lord Diplock, 438 *per* Viscount Dilhorne.

[289] *Ibid.*, 436 *per* Lord Diplock, 440 and 441 *per* Viscount Dilhorne, 449-50 *per* Lord Fraser, 452 and 456-7 *per* Lord Scarman.

[290] *Ibid.*, 444 *per* Lord Salmon, 453 and 454 *per* Lord Scarman; see also Lord Diplock who says at p. 436 that the rationale of the confession rule is the right to silence.

discretion to exclude for unfairness could purport to cover? If the latter hypothesis is correct then there is no discretion to exclude as such. Rather, the confession rule is the particular and exceptional manifestation of the fairness discretion as it applies to confessions — particular because it is aimed at a specific type of evidence, and exceptional because it is directed at the manner of obtaining the evidence. If this is the law then the confession rule applied without regard for its underlying policy[291] will not operate to exclude statements obtained in circumstances not technically obnoxious to the rule, but nonetheless offensive to the rationale. However, this construction is untenable since the minimum consensus of the speeches in *Sang* and the answer to the certified question conclude in the existence of *some* discretion. Given their Lordships' view that the case of confessions is special, it is difficult to imagine that there exists no discretion at all in relation to confessions. This becomes clear, it is submitted, when one considers that if there were no discretion whatsoever the confession in *Stewart* could not have been excluded because of the accused's mental abnormality, even though it had little probative value.

The first hypothesis above (*i.e.*, that there is a discretion to exclude appended to the confession rule) raises the question of the breadth of the discretion. There are, it is submitted, at least two possibilities discernible from *Sang*. First, the only discretion existing may be the narrow one outlined in Lord Diplock's answer to the certified question, that is, where probative value is trifling and prejudicial effect substantial. By definition, such a discretion is a matter of probity and applies to the use of the statement in the court room; it is not aimed at the manner of obtaining, as is the confession rule. There are both conceptual and practical difficulties with such a construction. Such a discretion is essentially a function of probity, since the prejudicial effect can only be determinant if probative value is slight. If the confession rule has a wide policy basis it seems awkward that a discretion to exclude should not operate as a function of all the same rationales as does the rule itself. Lord Diplock, it will be remembered, recognized the right-to-silence rationale. It is also noteworthy that the Supreme Court of Canada, which appears to accept only the reliability rationale, has recognized such a narrow discretion relating to probative value. From a pragmatic point of view, such a discretion would seldom operate to exclude confessions the probative value of which in relation to the issue of guilt is, by definition, high. The only type of

[291] As directed by the House of Lords in *Ping Lin, supra,* note 2.

case which would give rise to exercise of the discretion is that in which the statement is of low probative value because of the accused's state of mind.

The other obvious alternative is that the discretion to exclude confessions for unfairness is wide, encompassing not only considerations of probity but other considerations of fairness evoked by the various rationales of the confession rule. If, as suggested earlier, classifying the confession rule as one of fairness is an implicit recognition of a wide underlying policy, then it seems reasonable that the discretion be governed by the same considerations of fairness evoked by the various rationales of the rule. That is to say that, since the trial judge has a duty to ensure fairness and a discretion to exclude for unfairness, and since the confession rule is concerned with fairness in the manner of obtaining evidence, a confession obtained unfairly, albeit not strictly in contravention of the rule, can be excluded by the judge in his discretion. That discretion, which stems from the same policy considerations which give rise to the rule, is governed by the same rationales. Briefly stated, a wide discretion appears logically consistent and pragmatically coherent with a broad view of the policy basis underlying the confession rule. It would allow for exclusion in hard cases (*e.g.*, where a police subterfuge in extracting a confession is particularly reprehensible though not in contravention of the rule or Judges' Rules) without the necessity of embellishing the rule through awkward applications and rationalizations. The Canadian case law, it is submitted, offers proof of the difficulties that can arise when only a narrow policy basis and discretion are recognized.[292] Such a wide discretion is workable, given the rationales as criteria for its exercise and as evidenced by the Australian experience. It is not overly lenient, as the accused bears the burden of persuasion for exclusion on discretionary grounds.

In spite of the present author's bias in favour of a wide discretion, it must be stated that in England, given the incorporation of the concept of oppression into the confession rule, and given the apparent existence of a discretion to exclude for a breach of the Judges' Rules, the need for a wide exclusionary discretion is not urgent. The ground that would be covered by such a discretion rarely arises in actual cases. Nevertheless, it is submitted that a wide exclusionary discretion attached to the confession rule should be recognized in order to support, and maintain, consistency and coherence with a wide policy basis underlying the confession rule.

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[292] See *Ward* v. *The Queen, supra,* note 95; *Alward* v. *The Queen, supra,* note 47.

Only such a discretion could operate to cover hard cases offensive to the rationales of the rule.

VIII. Weight

The weight to be attributed to a confession is a matter determined by the trier of fact on the circumstances of each case. There is no rule of law in England[293] or Australia[294] to support the view that a conviction cannot rest wholly on a confession and this is probably the case in Canada as well. If a jury convicts solely on the basis of a confession they must be convinced that it is true.[295]

English law relating to reconsideration by the jury of evidence going to voluntariness was for several years in a state of disarray.[296] It is now clear that the law in England is correctly outlined in *R.* v. *Murray*[297] and *R.* v. *Burgess*.[298] The admissibility of a confession is decided by the judge; the jury considers its weight. It would be wrong to direct the jury to disregard a confession altogether because they are not satisfied beyond reasonable doubt that it is voluntary. In determining what weight to attach to the confession, the jury may consider all the circumstances surrounding its utterance, including evidence going to the voluntariness of the statement. That is to say that the jury is even entitled to re-hear the same evidence that was adduced on the *voir dire*, but only to aid them in their decision of determining the confession's probative value. A jury might attach no weight to the confession but, if properly instructed, the reason for this would be that they thought it was untrue; it would not be so because they were not convinced that the confession was voluntary. The Criminal Law Revision Committee would retain the law as stated above.[299]

Basto v. *The Queen*[300] established that the law is to the same effect in Australia, and indeed that case refused to follow *R.* v.

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[293] *R.* v. *Mallinson* [1977] Crim. L.R. 161 (C.C.A.).

[294] *Wright* v. *The Queen* (1977) 15 A.L.R. 305 (Aust. H.C.).

[295] *Ibid.*

[296] See Cross, *supra*, note 89, 72-3; Hoffman, *What Happened to the Voir Dire* (1967) 83 L.Q.R. 332; MacKenna, *The Voir Dire Revisited* [1967] Crim. L.R. 336.

[297] *R.* v. *Murray* (1951) 1 K.B. 391 (C.C.A.), *approved* in *Chan Wei Keung* v. *The Queen* [1967] 2 A.C. 160 (P.C.).

[298] [1968] 2 Q.B. 112 (C.C.A.), *adopting Chan Wei Keung, supra*, note 297; see also *R.* v. *Ovenall, supra*, note 34, *adopting Basto* v. *The Queen* (1954) 91 C.L.R. 628 (Aust. H.C.); *R.* v. *Murray, supra*, note 297; *Chan Wei Keung* v. *The Queen, supra*, note 297; *R.* v. *McCarthy* (1980) 70 Cr. App. R. 270 (C.C.A.).

[299] *Supra*, note 10, § 67.

[300] *Supra*, note 298; see also *R.* v. *Mahoney-Smith* [1967] 2 N.S.W.R. 154 (S.C.); *R.* v. *Stafford* (1976) 13 S.A.S.R. 392 (S.C. *in banco*).

Bass. The jury should not be instructed to disregard a confession because it is unconvinced that it is a voluntary statement,[301] but they may hear any evidence surrounding the making of it, including psychiatric evidence going to the suspect's sanity at the time he made the statement.[302]

It appears that the law is the same in Canada, though there are no recent cases.[303]

IX. The doctrine of confirmation

A. *Subsequent facts*

The issue here is the extent to which an inadmissible confession becomes admissible through confirmation of its contents by real evidence found as a consequence of the confession. It would be beyond the scope of this article to discuss the admissibility of real evidence found as a consequence of an inadmissible confession. With one exception, there have not been any major recent developments in the case law since this matter was exhaustively treated in the doctrine.[304] The exception is the judgment of the Supreme Court of Canada in *R.* v. *Wray*[305] which, without analysis of the matter, confirmed that the law in Canada is correctly stated in *R.* v. *St. Lawrence,*[306] a decision of the High Court of Ontario. That case held that the part of an involuntary confession confirmed by the discovery of real evidence is admissible because the truth of the statement is established by that evidence. Three comments are proposed. First, as implied by Hall J. in his dissenting judgment in *Wray,*[307] the practice of blotting out those parts of the confession not confirmed is a difficult task for the trial judge and presents an awkward statement to the jury. Second, the judgments in *St. Lawrence* and *Wray* assume that the rationale of the confession rule is trustworthiness, which, as has been pointed out, is probably not the only policy basis for the confession rule. It will be remembered that *Wray* was one of the judgments cited in support of the view that the Supreme Court of Canada has been subverting

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[301] See *Basto* v. *The Queen, supra,* note 298, 641, *disapproving R.* v. *Bass, supra,* note 234.

[302] *Jackson* v. *The Queen, supra,* note 70.

[303] See *R.* v. *McAloon* (1959) 30 C.R. 305 (Ont. C.A.), *approved* in *Chan Wei Keung, supra,* note 297.

[304] See Cowen & Carter, *supra,* note 26; Gotlieb, *Confirmation by Subsequent Facts* (1956) 76 L.Q.R. 209.

[305] *Supra,* note 43.

[306] *Supra,* note 44.

[307] *Supra,* note 43, 301 *et seq.*

the rule for the rationale of reliability.[308] This leads to the third point. On the premise of the reliability rationale, the reasoning in *St. Lawrence* seems logical. However, the premise that the reliability rationale is the exclusive policy basis for the confession rule is, it is submitted, false: hence the incorrect outcome of the judgment of replacing the rule with the reliability rationale. It is one thing to embrace the reliability rationale, it is another to establish it as the rule. If *St. Lawrence* and *Wray* do not replace the rule, then they could not have been decided as they were. If the *Ibrahim* rule is to govern the admissibility of confessions, as the House of Lords said in *Ping Lin* then a confession not held to be free and voluntary is inadmissible, regardless of its confirmation by collateral evidence.

B. *The accused's testimony on the voir dire*

If *Wray* and *St. Lawrence* are correct, would it not be possible for an involuntary confession to become admissible because its reliability is confirmed by its maker upon his testifying at the *voir dire*? With the allowance of the question "Is it true?", such confirmation becomes a very real possibility. In an indirect way, Cartwright C.J.C., in his dissenting reasons in *Wray*, pointed out that upon the reasoning which would admit the confirmed part of the confession in *Wray*, there is a possibility (if only to avoid a logical inconsistency) that an involuntary statement admitted by the accused under oath to be true would equally become admissible in evidence.[309]

There is at least one recent Canadian case, *R.* v. *Magdish*,[310] where the Crown attempted to adduce the accused's acknowledgement, given on the *voir dire*, that his confession was true. It should be noted that the outcome of the *voir dire* was that the confession was admissible. The Crown argued that, in so far as the trial within a trial is a separate judicial proceeding, the judgment of the Supreme Court in *Boulet* allows an admission made in such a proceeding to be adduced as of right without the necessity of a further *voir dire*. The trial judge disagreed. He held that the admission was not admissible, since to allow this would inhibit the accused from testifying on the *voir dire*, which he should be allowed to do without waiving his right to remain silent at the trial. It was also held that *Boulet* did not apply, since in that case Beetz J. justified his reasons by saying that the accused could have claimed the

[308] For a similar view, see Roberts, *supra*, note 50.
[309] *Supra*, note 43, 279.
[310] *Supra*, note 231.

privilege against self-incrimination. The trial judge in *Magdish* felt that the privilege did not apply to the trial, of which the *voir dire* forms a part. All he appears to have said is that he did not think that the *voir dire* is a judicial proceeding which is separate and distinct from the trial proper. The judge did not, however, rule out the possibility of the accused being cross-examined at trial upon statements made during the *voir dire* testimony.

It would appear appropriate to discuss also at this point the possibility of using at trial the accused's admission made at the *voir dire* as evidence of a new confession or as a previous inconsistent statement. Though this does not strictly relate to the doctrine of confirmation, the issues arising appear to have been conflated in the sparse case law, and hence it is convenient to treat this matter here.

Continuing, then, with the Canadian cases, in *R.* v. *Van Dongen*[311] the accused, charged with possession of stolen property, admitted on the *voir dire* that he knew the articles in his possession were stolen. The judge held the confession inadmissible at the *voir dire* but the trial, by a judge sitting without a jury, ended in a conviction. It was common ground on the appeal that the admission was the only evidence of the accused's knowledge that the property had been obtained by theft. Though the appellate Bench of three agreed that the conviction should have been quashed, Robertson J.A. did not think that the trial judge misdirected himself by considering *voir dire* evidence on the issue of guilt. He felt that since the *voir dire* is not a separate proceeding, but part of the trial, and since the question "Is it true?" is permissible, then evidence given on the *voir dire* may be considered at the trial. This judgment is empirical proof of the danger of *DeClercq*, and an effective reminder that this decision may imply the breakdown of the distinction between the trial and the *voir dire*. *Van Dongen*, however, is probably not the law in Canada. In *R.* v. *Gauthier*[312] the Supreme Court was faced with an acquittal, where the trial judge had pronounced that on all the evidence, including the accused's *voir dire* testimony, he entertained a reasonable doubt. Pigeon J., speaking for the majority, said that even at a trial by judge alone, evidence given on the *voir dire*, albeit favourable to the accused, is not evidence at trial. Presumably, this judgment would also govern the use at trial of the answer to the question "Is it true?". But, though the accused's testimony at the *voir dire* is not evidence at the trial, could

311 (1976) 26 C.C.C. (2d) 22 (B.C.C.A.).

312 *Supra*, note 175, *foll'd* in *R.* v. *Thorne* (1978) 15 Nfld & P.E.I. R. 168 (Nfld S.C., App. Div.).

it be used as a previous inconsistent statement to impeach his credibility? *Gauthier* does not treat the question specifically and *Magdish*[313] explicitly left the possibility open.

In Australia these issues were considered by the full Bench of the Supreme Court of New South Wales in *R.* v. *Wright.*[314] Upon cross-examination during the *voir dire,* the accused admitted the crime. The confession was held inadmissible by the trial judge on discretionary grounds. At trial, the Crown sought to adduce admissions made by the accused at the *voir dire.* On appeal the Court found that the Crown had a right to lead the evidence, subject to the trial judge's discretion to disallow it. Bray C.J. felt that, since the decision on use of the accused's *voir dire* testimony would apply to all witnesses, it might hamper the defence to rule out such use if, for example, it could not cross-examine a detective at trial on an inconsistent statement made at the *voir dire.* Furthermore, what the accused says in the witness box is voluntary,[315] and therefore if he confesses at the *voir dire* that confession is admissible at trial. However, Bray C.J. qualifies this by stating that if the original statement is held inadmissible, the Crown cannot by use of the accused's confession at the *voir dire* tell the jury that he confessed to the police:

> There may be cases where the accused's admission of the crime in the cross-examination on the *voir dire* is inextricably tied up with the making of the confession to the police. In such a case it should presumably be excluded before the jury, not because of its intrinsic nature as a confession to the crime, but because it contains evidence of an inadmissible confession to the police.[316]

Working on the premise that it would be irrelevant for the Crown to ask the accused on the *voir dire* if he committed the crime, but relevant to ask if his statement to the police was true, as going to credibility, it appears from Bray C.J.'s qualification that only in rare cases could the Crown prove at trial an admission made by the accused at the *voir dire.* This would appear to be the case whether or not the admission was adduced as confirmation of the original confession made to the police, or as a new confession. However, Bray C.J.'s qualification was not accepted by his brother Chamberlain J., who disagreed that a *voir dire* admission should be excluded when it is tied up with the making of the confession to the police:

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[313] *Supra,* note 231, 380.
[314] *Supra,* note 54.
[315] See *Stewart* v. *The King* (1921) 29 C.L.R. 234 (Aust. H.C.).
[316] *Supra,* note 54, 263.

> If it becomes necessary to prove what was said to the police in order to understand a confession made in evidence on the *voir dire,* then what was said to the police becomes admissible even if it could properly be excluded on other grounds.[317]

This *dictum* would appear to favour a doctrine of admissibility through confirmation.[318]

The decision in *Wright* would probably allow the accused's *voir dire* testimony to be used for purposes of cross-examination at trial in order to test consistency. There is also judicial support for such a procedure in Queensland.[319]

This writer knows of no recent English authority dealing directly with the issues presently being discussed. However, the Privy Council, in *Wong Kam-ming* v. *The Queen*[320] held that the Crown could not seek to adduce a confession at trial even if confirmed by the accused's admissions during the *voir dire,* nor could the Crown introduce evidence of those admissions. Their Lordships felt that to hold otherwise would infringe upon the privilege against self-incrimination. Implicit in this holding is that the accused could not claim the privilege at the *voir dire,* and hence that the *voir dire* is not a judicial proceeding distinct from the trial.[321] This deduction is consistent with the refusal of the Privy Council to follow *Hammond* and *DeClercq.* As long as the view is maintained that the *voir dire* is not a separate judicial proceeding,[321a] it appears that the English courts would exclude from the trial evidence of admissions made by the accused at the *voir dire.* The integration of the *voir dire* into the trial is of fundamental importance, for it will be remembered that evidence of admissions made by the accused at a first trial have been held admissible at a retrial upon the same indictment.[322] The analogy is obvious.

Phipson maintains that an admission made at the *voir dire* can be used at trial *qua* admission and as a previous inconsistent statement.[323] However, no authority is cited in support of this view.

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317 *Ibid.*

318 Other Australian authorities support the use at trial of an admission made by the accused at the *voir dire*: see *R.* v. *Toomey, supra,* note 55; *R.* v. *Monks* (1955, unreported Tasmanian trial judgment), *cited* in Neasey, *Cross-examination of the Accused on the Voir Dire* (1960) 34 A.L.J. 110, 111-2.

319 *R.* v. *Gray, supra,* note 217.

320 *Supra,* note 41.

321 However, their Lordships did emphasize (*ibid.,* 258) the importance of maintaining a distinction between the issue of voluntariness (decided at the *voir dire*) and the issue of guilt (decided at trial).

321a See *R.* v. *Watson, supra,* note 194a.

322 *R.* v. *McGregor, supra,* note 162.

323 *Supra,* note 182, § 800.

Wong Kam-ming held that the accused could be cross-examined on an inconsistent statement made at the *voir dire* but only if the confession had been ruled admissible. Their Lordships felt that no legal principle prohibits this and that an inconsistent statement made at the *voir dire* is as proper a subject for cross-examination as any other previous inconsistent statement. It will be remembered, however, that their Lordships, in not following *Hammond* and *DeClercq*, indirectly preclude the use of a statement going to the truth of the confession. There is no reason why this view of their Lordships is inconsistent with a view that the *voir dire* is not a separate proceeding since there appears to be nothing to preclude eliciting inconsistencies in statements all of which arise in the witness's trial testimony. Their Lordships' reasons for not allowing cross-examination as to inconsistency when the confession is excluded was stated as being the impossibility in principle of distinguishing between such cross-examination on the basis of the *voir dire* and cross-examination based on the contents of an excluded confession.[324] Is this, coupled with the overruling of *Hammond* and *DeClercq*, to be interpreted as support by the Privy Council of the view that the confession rule is sufficiently broad to exclude the use of a confession for *any* purpose unless first held admissible on the *voir dire?*

C. *... by other evidence adduced at trial*

It would seem trite to state that other evidence adduced at trial can be used to confirm the truth of an admissible confession. However, what are the considerations involved when the accused denies that the (admissible) confession was in fact made? Since the question is one of fact for the jury, the issue only arises as one of law in the context of the trial judge's direction to the jury. Such an issue came before the High Court of Australia in *Burns* v. *The Queen.*[325] Almost a year after an armed robbery the accused was arrested and taken to a police station where he allegedly made incriminating admissions in answer to police questioning. The police prepared a record of interview which was not signed. At trial they gave oral evidence of the alleged admissions. The defence conceded at trial that the accused had new wealth after the robbery but only the alleged confession linked this fact with the robbery. The accused denied having made any confession to the police. It was contended on appeal by the defence that, *inter alia*, the trial

[324] *Supra*, note 40, 258-9.

[325] *Supra*, note 204.

judge failed to direct the jury that the evidence of the accused's new wealth was irrelevant to the issue of whether a confession was in fact made. The majority of the High Court dismissed the appeal stating that evidence that the confession if made was true is relevant to whether it was in fact made. Thus, their Honours held that the fact that the accused to the knowledge of the police was wealthier after the robbery made it probable that the police would question him to this effect and was therefore relevant to the issue of whether the accused was questioned at all. However, their Lordships added, albeit *obiter*, that the trial judge should have warned the jury not to give undue weight to this:

> Where an accused by his confession admits facts not then known to his interrogators which are subsequently found to be true, this circumstance affords strong evidence that the confession was in fact made. Where, however, the accused by his confession admits only facts already known to his interrogators the probative value of the truth of what is admitted on the issue whether the confession was in fact made is less cogent and it should in general be excluded from the jury's consideration of that issue in fairness to the accused because its prejudicial effect in the minds of the jury may well outweigh any probative value it has.[326]

The second limb of this "test" is of course contrary to what their Honours actually held in *Burns*. The majority felt that the change in the accused's financial position had special significance on the facts of the case since it went to the issue of whether the accused was truthful when he denied having been questioned by the police.

The concurring reasons of Murphy J. merit mention. Similar to the majority, he stated that if part of an alleged confession is true that does not tend logically to prove that the accused made the statement. However, if the fact (of the new wealth) was not already known to the police then it would be relevant to whether the confession was made. His Lordship was careful to distinguish the case from "subsequent fact cases" where the subsequent fact could only have been discovered by the police if the confession was made.

The type of reasoning to which *Burns* may give rise becomes dangerous in the situation where the police did have prior knowledge of the fact. Murphy J. points this out in his enumeration of the contentions of the use that the new wealth in *Burns* could have had, to decide if the confession was made:

1) The existence of new wealth and police knowledge of that fact might have increased the likelihood that the police would ask questions about it;
2) The existence of new wealth supports the police account of the way in which the confession came to be made (*i.e.*, that they confronted the accused with the fact and he broke down and confessed);

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[326] *Ibid.*, 100.

3) The knowledge of the new wealth by the police provided them with opportunity and inducement to concoct the confession (as the accused claimed).[327]

It might seem clear that if the police can be shown not to have had knowledge of a fact disclosed by a confession before the confession was made then that fact would be evidence that the confession was made. However, upon application of the *Burns* test, the High Court seems to have held in *Matusevich* v. *The Queen*[328] that this is not the case. Matusevich was accused of murdering a fellow prisoner. He denied the truth of a statement allegedly made to the police and attributed to him by the Crown. The Crown wished to adduce at trial (as going, *inter alia,* to motive) evidence that the victim had been responsible for incriminating prison escapees. The Crown contended *inter alia* that this fact was relevant to whether the accused had made the statement since the police were not aware of it before the alleged confession. The High Court held on application of *Burns* that the evidence that the victim was the informant was inadmissible since it was not established that the police already knew this fact before the alleged confession was made. However, is it not just as logical to say that if the police did not have knowledge of the fact prior to the making of the confession then independent proof of that fact tends to prove the truth of the confession and hence that it was made? This reasoning admittedly breaks down in so far as the police could still have concocted the confession on learning the fact after the time of the alleged making of the confession, but before the trial. On the basis of the confusion to which all the above reasoning gives rise, it is respectfully submitted that the test in *Burns* should not have been laid down by the High Court but rather the situation should have been left open and reviewed on a case-to-case basis.[329] The test laid down in *Burns* may give rise to more appeals based on the trial judge's directions than it avoids.

The Australian Law Reform Commission, aware of the difficulties that can arise when the content of statements is disputed, has recommended a series of measures aimed at guaranteeing the trustworthiness of statements adduced in the court room.[330]

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[327] *Ibid.*, 102.

[328] *Supra,* note 204.

[329] See *R.* v. *Burke* (1979) 3 Crim. L.J. 112 (C.C.A., N.S.W.) where the Court held that the fact that the police were in possession of all the details of the crime did not make the confession of low probative value; this was merely a factor the jury could bear in mind in determining whether the confession was made or not.

[330] *Supra,* note 33, 70-4.

X. Conclusion

Consideration of the confession rules evokes various policy bases. While these rationales can be found beneath other rules in the law of evidence, they tend to converge on the confession rule such that confessions, though having points in common with other kinds of evidence, remain very much an entity unto themselves. Discussions of improperly obtained evidence, hearsay and the privilege against self-incrimination may all be related to an examination of confessions. However, the underlying policy considerations of any one of these notions cannot give a complete explanation of the policy basis of the confession rule. Whatever be the correct historical argument for the development of the confession rule, it must be accepted that today several rationales merit consideration. Without such acceptance, policy uncertainties and ambiguities will continue to give rise to inconsistent and perhaps unwise decisions. The Australian courts have in their wisdom accepted a broad policy basis underlying the confession rule. In Canada, exclusive acceptance of the reliability rationale has resulted in a case law which, though perhaps demonstrating logical consistency, is the least appealing of the three jurisdictions treated in this article. In terms of underlying policy it is more difficult to identify a definite pattern in the English decisions. Lord Hailsham appears to have been sensitive to this in his speech in *Ping Lin*, when he said that "on the subject of confessions, English law is not wholly rational".[331]

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Postscript

The Supreme Court of Canada rendered judgment in *Rothman* v. *The Queen* on 2 March 1981, after this article went to press.* The accused, who had been arrested for possession of hashish for the purposes of trafficking, refused an invitation by the police to make a statement. He was placed in a cell and was later joined there by a police officer acting undercover. After some chat between them, Rothman made an incriminating statement to the officer.

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[331] *Supra*, note 2, 599.

* See note 115 of the text, *supra*. The judgment has been reported at (1981) 35 N.R. 485.

The issue before the Supreme Court of Canada was whether the undercover policeman was, *vis-à-vis* the accused, a person in authority, and hence whether the confession rule was applicable to the statement. The majority of the Court, speaking through Martland J., confirmed the Ontario Court of Appeal's decision that the test is subjective. Since Rothman did not know that his cellmate was a person in authority, the statement was admissible without application of the confession rule. It is submitted that the decision of the majority is further support for the Supreme Court's refusal to acknowledge a wide policy basis underlying the confession rule. Martland J. expressly rejects a rationale based on the maxim *nemo tenetur seipsum accusare* stating that the privilege against self-incrimination can only be claimed by a witness in open court. Furthermore, when compared with the opinions of Lamer J. (concurring in the result) and Estey J. (dissenting, Laskin C.J.C. concurring therein), it becomes apparent that the majority also rejects any rationale based on concerns for controlling police conduct or for bringing the administration of justice into disrepute.[1]

The reliability rationale is clearly consistent with the decision of the majority in *Rothman.* However, Martland J. takes care to point out that the confession rule does not test a statement's trustworthiness but rather its free and voluntary nature. In that context his Lordship added that Rothman's ignorance of his cellmate's true identity did not affect the voluntary nature of the statement. His Lordship states that *Alward,*[2] *Horvath,*[3] *Ward*[4] and *Nagotcha*[5] did not change the confession rule. In the closing words of his judgment, however, Martland J. may have left the door open to the doctrine of oppression.

Lamer J. concludes his intricate and interesting opinion by formulating the following test:

> 1. A statement made by the accused to a person in authority is inadmissible if tendered by the prosecution in a criminal proceeding unless the judge is satisfied beyond a reasonable doubt 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;
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> 2. A statement made by the accused to a person in authority and tendered by the prosecution in a criminal proceeding against him, though

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[1] A stance which is consistent with the reasons of the majority given by Martland J, in *R.* v. *Wray* [1971] S.C.R. 272.

[2] *Alward & Mooney* v. *The Queen* [1978] 1 S.C.R. 559.

[3] *Horvath* v. *The Queen* [1979] 2 S.C.R. 376.

[4] *Ward* v. *The Queen* [1979] 2 S.C.R. 30.

[5] *Nagotcha* v. *The Queen* [1980] 1 S.C.R. 714.

> elicited under circumstances which would not render it inadmissible, shall nevertheless be excluded if its use in the proceedings would, as a result of what was said or done by any person in authority in eliciting the statement, bring the administration of justice into disrepute.[6]

This rule is virtually identical to that proposed by the Law Reform Commission of Canada[7] at a time when Lamer J. acted as vice-chairman of that body. The test explicitly incorporates considerations of reliability and bringing the administration of justice into disrepute. Implicit in the test is the controlling of police conduct since both arms of the test operate on the basis of something "said or done" by a person in authority. Lamer J. also points out that the right to remain silent in the face of police questioning rests not on the privilege against self-incrimination but on the absence of an obligation to speak. His Lordship adds, however, that an infringement of the latter is a factor to be considered in the operation of his test. Lamer J.'s reasons are an obvious break with the traditional position of the Supreme Court. However, upon application of this test, his Lordship would not have excluded Rothman's statement. He did not feel that the police conduct *in casu* was such as to bring the administration of justice into disrepute.

In dissent Estey J. expressed the view that the rationale underpinning the confession rule is the concern for the integrity of the administration of justice. His Lordship added that the requirement of voluntariness applies not simply to the articulation of the words but to the desire to make a statement to persons in authority. On the facts, Rothman had expressly declined, as was his right, to say anything to the police. Given this view of the rule and the accused's initial refusal to speak, Estey J. held that the statement elicited by the "cellmate" was not voluntary.

What may have appeared as the beginning of a due process rationale in *Horvath* and *Ward* has not come to pass.[8] The decision of the majority of the Supreme Court of Canada in *Rothman* is consistent with previous decisions of that court foresaking all but the reliability rationale as the underlying policy basis of the confession rule.

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[6] (1981) 35 N.R. 485, 523-4.

[7] *Report on Evidence* (1975), §§ 15, 16.

[8] See Bushnell, *The Confession Cases: Erven, Horvath and Ward — Towards a Due Process Rationale* (1980) 1 Supreme Ct L. Rev. 355.