The Admissibility of Confessions under Sections 84 and 85 of the Evidence Act *1995: An English Perspective*

IAN DENNIS*

1. *Introduction*

The *Evidence Act* 1995 (Cth) and its virtually identical companion the *Evidence Act* 1995 (NSW)[1] are major developments from several standpoints. Odgers has described the Acts as an "important milestone in the development of the Australian legal system".[2] They are the culmination of a project which began back in 1979 with a remit to the Australian Law Reform Commission (ALRC) to reform the law of evidence applicable in federal courts. Now that New South Wales has copied the Commonwealth Act it seems likely that other jurisdictions will follow the trend towards a uniform law of evidence in Australia. For foreign lawyers with an interest in evidence law the Act offers many possibilities for comparative research and some models for reform in their own jurisdictions. In this field the Act is likely to prove the most important development in the common law world since the publication 20 years ago of the American *Federal Rules of Evidence*.

For most practical purposes the *Evidence Act* 1995 will function as a code of evidence, as Smith J has acknowledged.[3] Where provisions of the Act deal expressly with topics in the law of evidence they are intended to replace the relevant provisions of the common law.[4]

In the case of the law of confessions the Act not only substitutes statutory rules for the common law but sets the law off in a new direction. Under sections 84 and 85 the old common law voluntariness rule is dropped. The requirement

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1 The *Evidence Act* 1995 (Cth) received the Royal Assent on 23 February 1995 and came into force on 18 April 1995. It applies to proceedings in federal courts and the courts of the Australian Capital Territory. The *Evidence Act* 1995 (NSW) received the Royal Assent on 19 June 1995 and came into force on 1 September 1995. The Acts have the same text for all but a handful of their 197 sections. Therefore I will refer in this article to the *Evidence Act* 1995 in the singular except where it is necessary to distinguish between the Commonwealth and New South Wales texts.

2 Odgers, S, *Uniform Evidence Law* (1995) at xix.

3 In his Foreword to Odgers, id at vii.

4 The *Evidence Act* 1995 (NSW), s9(1) preserves the common law of evidence "except so far as this Act provides otherwise expressly or by necessary intendment". This provision does not appear in the *Evidence Act* (1995) (Cth).

that a defendant's admission be voluntary, in the sense that it be made in the exercise of a free choice whether to make a statement or remain silent,[5] finds no place in either section. Instead the sections create two new rules.

Section 84 provides for the exclusion of admissions obtained by violent, oppressive, inhuman or degrading conduct. This section applies to both civil and criminal proceedings and to any admission of a party. In addition, section 85, which applies only in criminal proceedings, provides for the exclusion of certain admissions by defendants. These are admissions made in the course of official questioning, or in certain other circumstances. Evidence of such an admission is inadmissible unless the circumstances in which the admission was made were such as to make it unlikely that the truth of the admission was adversely affected.

The interpretation of both these sections will raise numerous questions, but the Acts will provide only limited answers. They do not define several important concepts in section 84 and do not deal with a number of other issues likely to arise, particularly under section 85. The Reports of the ALRC,[6] from which the Acts derive, do not make clear to what extent (if at all) the drafting of sections 84 and 85 drew on comparable provisions in the *Police and Criminal Evidence Act* 1984 (UK) (generally known as PACE). However, the similarities between the wording of the Australian and the English rules for the admissibility of confessions are sufficiently striking to be more than coincidental, particularly in relation to section 84. Section 85 differs in a number of respects from the equivalent English provision, but here too there are significant resemblances. PACE has been in operation in England for 10 years, and the Court of Appeal has interpreted the rules on the admissibility of confessions on many occasions. Given the similarities, this accumulated experience of the English rules may be a useful source of guidance to lawyers and courts in Australia applying the new Act. Therefore this article presents an English perspective on sections 84 and 85. It offers comment and discussion on the interpretive issues in the light of the English experience of PACE and also brings out the points on which the English and Australian rules differ.

2. *Section 84*

The section provides as follows:

> (1) Evidence of an admission is not admissible unless the court is satisfied that the admission, and the making of the admission, were not influenced by:
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> (a) violent, oppressive, inhuman or degrading conduct, whether towards the person who made the admission or towards another person; or
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> (b) a threat of conduct of that kind.

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5 For a concise statement of the common law rule in Australia see the judgment of Dixon J in *McDermott v R* (1948) 76 CLR 501 at 511–2. For discussion of the rule see Ligertwood, A, *Australian Evidence* (2nd edn, 1993) at 494–7.

6 Australian Law Reform Commission, *Interim Report on Evidence* (1985) Australian Government Publishing Service, Canberra (ALRC 26); Australian Law Reform Commission, *Final Report on Evidence* (1987) Australian Government Publishing Service, Canberra (ALRC 38).

(2) Subsection (1) only applies if the party against whom evidence of the admission is adduced has raised in the proceeding an issue about whether the admission or its making were so influenced.

This may be compared with the relevant subsections of section 76 of PACE (which applies only to criminal proceedings):

(2) If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained-

(a) by oppression of the person who made it; or

(b) ...

the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid.

(8) In this section 'oppression' includes torture, inhuman or degrading treatment, and the use or threat of violence (whether or not amounting to torture).

It is apparent that both the Australian and English provisions prohibit certain methods of obtaining confessions, namely those consisting of the use of violence, the threat of violence, inhuman or degrading conduct or treatment, and other forms of oppression. The PACE reference to torture does not appear in terms in section 84. PACE does not define torture, but the *Criminal Justice Act* 1988 (UK), section 134, which creates an offence of torture, defines it as the intentional infliction by a public official of severe physical or mental pain or suffering on another. It is inconceivable that such action would not amount to one or other of the prohibited forms of conduct under section 84.[7] Again, both the Australian and English provisions require the prosecution to prove an absence of causation. Once the issue has been raised by the accused,[8] the prosecution will have to show that the confession was not the product of any of the prohibited methods.

A. Issues of Interpretation: The Truth of the Confession

Given the very similar structure and wording of these provisions the English law may be especially valuable on issues of interpretation. An important preliminary point is that under PACE it makes no difference to the admissibility of the confession that the confession may be true. Section 76(2) states in parentheses that a confession procured in one of the prohibited ways is inadmissible "notwithstanding that it may be true". Thus, even if the accused admits in a later police interview that an earlier coerced confession was true, the first confession remains inadmissible. Section 84 of the *Evidence Act* 1995 does not contain such a provision in express terms, but it seems safe to assume that it is implied. The ALRC explained that extreme forms of physical coercion

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7 In *Republic of Ireland* v *UK* (1978) 2 EHRR 25 the European Court of Human Rights held that for the purposes of Art 3 of the European Convention on Human Rights torture includes particularly intense and cruel forms of inhuman or degrading treatment.

8 PACE s76(3) permits the court to take the issue of its own motion. A court might do so, for example, in a case where the accused was unrepresented at trial.

are prohibited methods of obtaining a confession not simply because the confession may be untrue. They are prohibited:

> ... also for reasons of public interest. Even if a confession obtained by such methods were proved to be true, it would still be excluded — the public interest in accurate fact determination and convicting the guilty would clearly be outweighed by the infringement of human rights and the need to deter such official misconduct.[9]

What then is the status of the second confession in such a case? Is this admissible even though the first confession is not? The answer begins with the proposition that the same rules apply. Therefore, under section 84, the prosecution must prove that the making of the second confession was not influenced by any violent, oppressive, inhuman or degrading conduct or a threat of such conduct. If the police conduct relied on by the accused is the same conduct which rendered the first confession inadmissible then the court will have to be satisfied that its influence had ceased to operate by the time of the second confession. This may often necessitate an inquiry into events occurring between the first and second confessions. In the English case of *R v Glaves*[10] the defendant made further admissions of involvement in burglary and manslaughter eight days after his first admissions. The trial judge excluded the first admissions under section 76 of PACE because of police misconduct in insisting that the defendant answer questions and in refusing to accept his repeated denials of involvement. However, the judge admitted the later admissions on the assumption that the defendant had received legal advice in the intervening period. This assumption was in fact incorrect. The Court of Appeal held that the later admissions should have been excluded also because the defendant might have been subject to the continuing influence that had caused him to confess earlier. At the same time the Court indicated that the judge's view could have been supported if the defendant had received legal advice before the second round of interviews. The point seems to be that such advice would have informed the defendant of his right to silence and would have counteracted the effect of the police misconduct. This authority suggests that it will therefore be a question of fact in each case whether earlier oppression continues to operate on the defendant's mind.[11] In many cases there is likely to be an inference that its effect is continuing unless something positive has intervened to curtail its effect. The inference of continuance may be particularly strong where there has been physical ill-treatment at an earlier stage. Even if a solicitor is present at the later interview the defendant may feel obliged to repeat a confession for fear of subsequent retribution if it is not confirmed.

A confession which passes the section 84 test may still be excluded in the exercise of judicial discretion. In contrast to its treatment of the voluntariness rule, the *Evidence Act* 1995 preserves the various common law discretions which may be used to exclude evidence of confessions. In particular, section 90 empowers the court to refuse to admit a confession if it would be unfair to the defendant to use it, having regard to the circumstances in which it was

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9 ALRC 26, above n6 at par 965.

10 *R v Glaves* [1993] Crim LR 685.

11 The Court of Appeal said that it did not take the view that in circumstances like this there must inevitably be a continuing blight on any subsequent confession: id at 686.

made.[12] This is supplemented by section 138(1) of the *Evidence Act* 1995. This provision codifies the discretion recognised in *Bunning* v *Cross*[13] to exclude illegally or improperly obtained evidence. It stipulates that evidence obtained in consequence of an impropriety is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence obtained in such a way. Both of these sections may be relevant where the history of the police-suspect interaction is alleged to contain police conduct of the type referred to in section 84. Both discretions are, however, less advantageous to a defendant than section 84 in so far as they require judgments to be made involving considerations of balancing. Under section 84 the issue is one of whether the prosecution can prove an absence of causation in fact. Unless the judge is satisfied that the admission, and the making of it, were not influenced by the prohibited conduct, the confession is inadmissible in law.

B. "Violent" Conduct

Turning to the conduct prohibited by section 84, the Act does not define any of the four adjectives used to describe the conduct. One reason for this may be that to some extent the concepts involved overlap. For example, the use of violence by police against a suspect is very likely to be oppressive, and serious violence will constitute inhuman treatment, as discussed below. This suggests that the section should be interpreted as prohibiting a range of conduct of varying shades of gravity rather than specific types of coercion. However, it is possible to expound the concepts with greater precision and to indicate their boundaries. "Violent" conduct is perhaps not quite as self-explanatory as first appears. In the context of the law of assault "violence" can refer to any application of unlawful force to a person.[14] Does this mean that say, giving a person a single push, or holding a person by the lapels of a coat, is enough to render a subsequent confession by that person inadmissible under section 84? *Cross on Evidence*[15] suggests in relation to section 76 of PACE that violence must indicate "more than a mere battery" and should "be construed as connoting a substantial application of force". There is something to be said for this view if the use of force is confined to a single minor incident, but repeated assaults, or assaults likely to cause bodily harm, should clearly be regarded as violent conduct. Different forms of aggressive or hostile behaviour (shouting, insults, invasions of personal space et cetera) may amount to a threat of violence as well as falling within one or more of the other prohibited forms of conduct.

C. "Oppressive" Conduct

PACE gives the term "oppression" a partial definition which includes the use or threat of violence and inhuman or degrading treatment. In section 84 these matters are alternatives to oppression. The effect is that both the English and

12 This is the discretion often referred to as the *Lee* discretion after *R v Lee* (1950) 82 CLR 133. See further, above n2 at 146; Ligertwood, above n5 at 498 ff.

13 *Bunning v Cross* (1978) 141 CLR 54. The High Court extended this discretion to confessions in *Cleland v R* (1982) 151 CLR 1.

14 See Blackstone's *Commentaries on the Laws of England*, vol 3 (17th edn, 1830) at 120; *Collins v Wilcock* [1984] 3 All ER 374 at 378 per Goff LJ.

15 7th edn, 1990 at 615.

Australian Acts allow for the possibility of other, undefined, cases to fall within the prohibition on the use of oppression. What then is the meaning of this term? English common law gave "oppression" a wide meaning. It denoted something which sapped the accused's free will to decide whether to make a statement or remain silent.[16] In *R v Prager*[17] the Court of Appeal relied, inter alia, upon a passage from Lord MacDermott's address to the Bentham Club in 1968:

> [Oppressive questioning is] questioning which by its nature, duration or other attendant circumstances (including the fact of custody) excites hopes (such as the hope of release) or fears, or so affects the mind of the suspect that his will crumbles and he speaks when otherwise he would have remained silent.[18]

Taken literally this principle made questioning of suspects in police custody virtually impossible. A prime object of questioning is to persuade the reluctant suspect to talk. As Gudjonsson has noted, few confessions will be forthcoming without some element of persuasion and pressure.[19] Numerous statements and actions by the police might have the effect of lowering a suspect's resistance to making a statement. It is well-recognised that in one sense the whole situation of detention and questioning in police custody is oppressive.

In practice the courts resolved the contradiction by generally requiring extreme conduct on the part of the police before the threshold of oppression was reached. Oppression was a matter of degree which depended to a considerable extent on the circumstances of the interrogation and the character of the suspect. For example, in *Prager*[20] questioning of a naval officer suspected of espionage occurred over fourteen and a quarter hours. Questioning occupied nine and a quarter hours, the last six hours being consecutive. The Court of Appeal held that this did not amount to oppression. On the other hand, in *R v Hudson*[21] a civil servant suspected of corruption was taken from his home in the early hours of the morning to a police station many miles away where he was held in custody for five days and questioned on and off throughout. The Court of Appeal accepted the defence argument that his confession had been obtained by oppression. When PACE was enacted it made express provision for the possibility of extended detention of suspects for the purpose of questioning. This made the emphasis given in *Hudson* to the period that the defendant spent in custody look distinctly problematic.

It was therefore an important question whether the common law meaning of oppression survived the enactment of PACE. In the leading case of *R v Fulling*[22] the Court of Appeal answered the question with a firm "no". In that

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16 *R v Priestley* (1965) 51 Cr App R 1 at 1–2 per Sachs J.

17 *R v Prager* [1972] 1 WLR 260 at 266.

18 Lord MacDermott, "The Interrogation of Suspects in Custody" (1968) 21 *Current Legal Problems* 1 at 10.

19 Gudjonsson, G, *The Psychology of Interrogations, Confessions and Testimony* (1992) at 323.

20 Above n17.

21 (1980) 72 Cr App R 163. Compare with *R v Dodd* (1982) 74 Cr App R 50 (where the accused were experienced criminals deliberately held incommunicado for four days; the Court of Appeal ruled that their confessions had not been obtained by oppression).

22 *R v Fulling* [1987] 2 All ER 65.

case the police suspected the defendant of having acted in concert with her lover to obtain property by deception. After her arrest she at first remained silent despite persistent questioning. She eventually made a confession after allegedly being told by the interviewing officer that her lover had been having an affair with a woman occupying the cell next to the defendant. On appeal against conviction she argued that the confession should have been excluded on the ground that it had been obtained by oppression. She claimed to have been so distressed by the information that she had confessed in the hope that she could thereby escape from an intolerable situation.

The Court of Appeal's rejection of the common law approach to oppression began with the proposition that PACE was a codifying Act and was therefore to be interpreted according to its natural meaning without any presumption as to the continuance or otherwise of the previous law.[23] This is debatable. PACE contained a handful of provisions on criminal evidence. It was plainly not a codification of the law of criminal evidence. It was not even a codification of the law of confessions since there were some aspects of that law with which it did not deal at all. On the other hand, the legislative history of PACE showed that it embodied reforms in section 76 which were intended to replace the voluntariness rule at common law.[24] Oppression was a significant component of the common law rule. Therefore it is undoubtedly plausible, particularly given the relationship of paragraphs (a) and (b) of section 76(2) (discussed further below), that the common law meaning of oppression was not intended to survive the Act.

In any event, having reached the conclusion that the "artificially wide" definition approved in *Prager* no longer applied, the Court of Appeal ruled that oppression should have its ordinary meaning. Surprisingly the Court did not refer to the partial definition in subsection (8) but instead consulted the dictionary for guidance. Accordingly the Court declared the ordinary meaning of oppression to be:

> ... [the] exercise of authority or power in a burdensome, harsh or wrongful manner; unjust or cruel treatment of subjects, inferiors etc.; the imposition of unreasonable or unjust burdens ....

The Court went on to add:

> There is not a word in our language which expresses more detestable wickedness than *oppression* ... We find it hard to envisage any circumstances in which such oppression would not entail some impropriety on the part of the interrogator.[25]

Applying this principle the Court held that even if the police statement was made as the defendant alleged, it was not so improper as to amount to oppression. Both the principle and its application in this case have been criticised.[26]

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23 Applying the principles laid down in *Bank of England v Vagliano Bros* [1891] AC 107 at 144–5.

24 The architects of the reforms in section 76 were the Criminal Law Revision Committee, *Eleventh Report Evidence (General)* (1972), Her Majesty's Stationery Office, London, and the Royal Commission on Criminal Procedure, *Report*, (1981) Her Majesty's Stationery Office, London. Their proposals for replacing the voluntariness rule in English law were based on a combination of principles aimed at ensuring the reliability of confessions, propriety of police conduct and protection of suspects' rights.

25 Above n22 at 69, citing the *Oxford English Dictionary*.

26 Zuckerman, A A S, *The Principles of Criminal Evidence* (1989) at 333.

However, in defence the partial definition in subsection (8) of PACE shows that oppression is essentially concerned with police misconduct, of which the definition sets out the central cases. Cases not falling within the list should therefore be construed ejusdem generis, as the Court of Appeal assumed with its reference to impropriety. It follows from this fairly narrow interpretation that any broader inquiries into the circumstances of the interrogation and their effect on the particular suspect will be undertaken under paragraph (b) of section 76(2) of PACE. Under this provision the court will ask whether anything said or done was likely to render any confession by the defendant unreliable. Lord Lane CJ commented in *Fulling* that paragraph (b) now covers some of the ground that was formerly covered by oppression at common law.

What *Fulling* has emphasised is that the court will no longer inquire, if indeed it ever seriously did, into the question of whether the confession was truly voluntary.[27] In *R v Miller*,[28] a case decided on the common law, the Court of Appeal held that there was no rule at common law that the prosecution had to prove that the defendant had the capacity to make a free choice whether to confess. The decision rejected Australian[29] and New Zealand[30] authority to the contrary, perhaps recognising the philosophical and psychological difficulties which would be generated by a forensic inquiry into the state of a person's free will in a police station. However, *Miller* was inconsistent in principle with *Prager* which seemed to envisage just such an inquiry. *Fulling* has resolved the inconsistency in favour of a more pragmatic and focussed inquiry into the degree of police misconduct.

Australian courts will almost certainly have to replay this debate about the meaning of oppression. The term was a late entry into formulations of the voluntariness rule in England,[31] and it is not generally used in the Australian formulations of the rule. However, the classic statements of the rule in the Australian cases consistently refer to confessions being involuntary if they are "the result of duress, intimidation, persistent importunity or sustained or undue insistence or pressure — anything that has overborne the will of the accused".[32]

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27 There would have been a good argument that the defendant's confession was involuntary at common law, having been obtained by oppression in the sense that the police officer's statement, assuming it was made, had so affected her mind that her will crumbled and she spoke when otherwise she would have remained silent. See further Keane, A, *The Modern Law of Evidence* (3rd edn, 1994) at 295–7.

28 *R v Miller* [1986] 3 All ER 119.

29 *Sinclair v R* (1946) 73 CLR 316; *R* v *Starecki* [1960] VR 141.

30 *R v Williams* [1959] NZLR 502. In relation to this case and the Australian cases cited in above n29 Watkins LJ commented: "Whether the true construction to be placed on those ... cases is that in those countries a judge is bound to rule inadmissible a confession obtained when an accused's mind was so disordered as to render it wholly unsafe to act on it, thus equating it with an involuntary confession as explained in *DPP v Ping Lin* [1976] AC 574, is not entirely clear. But assuming that to be the effect of them, we are not persuaded that they represent the law in this country." (Above n28 at 126).

31 It first appeared in the judgment of Lord Parker CJ in *Callis v Gunn* [1964] 1 QB 495 at 501, where he referred to statements being inadmissible if obtained in an "oppressive manner". A reference to oppression as rendering a confession involuntary was subsequently included in the Introduction to the revised *Judges' Rules* of 1964.

32 *MacPherson v R* (1981) 147 CLR 512 at 519 per Gibbs CJ and Wilson J.

This suggests that a very similar concept is involved, of police behaviour which is so overbearing as to deprive the particular accused of the free choice whether to speak or not. If so, Australian courts interpreting section 84 will have to decide the same issue as the English courts, namely, whether to construe oppressive conduct as denoting a partial continuation of the voluntariness principle, or as referring to unacceptable extreme forms of police misconduct.

There seems little doubt that the latter interpretation is the correct one. The ALRC expressed a clear intention to replace the voluntariness rule with a new test focussed on extreme impropriety.[33] Internal aids to construction reinforce the conclusion. The other words in section 84 are all concerned with abusive conduct amounting to breach of internationally recognised human rights. The exclusion of confessions obtained by means of such conduct is aimed at ensuring police propriety in the investigation of offences and providing a procedural remedy for breach of rights against abuse of power. It would be odd if oppression denoted a different type of prohibited conduct addressing the different objective of protecting a suspect's right to silence in the face of questioning. One would expect such an intention to be signalled more clearly in the section. On this view it follows that concerns about protecting the right to silence and about the effects of questioning techniques on the reliability of confessions will fall to be dealt with under section 85 and the exclusionary discretion under section 90.

It seems therefore that the Australian courts should apply the Fulling definition, or something like it, to the word "oppressive" in section 84. This is not to say that the test is always an easy one to apply. It calls for a judgment of the moral quality of police conduct, since it is only when the conduct can be characterised as "harsh" or "unjust" or of "detestable wickedness" that the threshold of oppression is reached. These are essentially contestable concepts and much will depend on the particular facts of each case. However, certain points about the application of the principle are reasonably clear and will now be considered.

First, the reference in the *Fulling* definition to "wrongful" conduct must be treated with care. In English law this test can undoubtedly include conduct which amounts to a breach of PACE or the Codes of Practice issued under PACE, such as where the suspect is deprived of sleep and questioned for long periods without a break.[34] However, the fact that police conduct is independently unlawful is neither a necessary nor a sufficient condition for it to be characterised as oppressive. It is not necessary in the sense that there may be oppression by conduct not dealt with explicitly by the English legislation, such as bullying, shouting and the extensive repetition of accusations of guilt. It is not sufficient in the sense that the concept of impropriety, coupled with descriptions of conduct as "cruel" and "wicked", suggests that at least a deliberate and serious breach will be required. In *Miller*[35] the admissibility of a confession made by a suspect suffering from paranoid schizophrenia was in issue. The trial judge had found that the interviewing officer had not deliberately set out to exploit the defendant's disordered state of mind. The Court of Appeal expressed the view in obiter that had the finding been otherwise, the confession

33 ALRC 26, above n6 at pars 766 and 965; ALRC 38, above n6 at pars 154(a) and 158(a).
34 Contrary to Code C pars 12.2 and 12.7 respectively.
35 Above n28.

would have had to be excluded as obtained by oppression. This is an important dictum since on the facts the case did not involve a breach of any legislative prohibition. When the English courts have considered discretionary exclusion of evidence for breaches of PACE or the Codes they have similarly attached a good deal of weight to the question whether the breach was in bad faith.[36]

In *R v Paris*[37] ("the Cardiff Three") the third defendant had confessed to murdering his girlfriend. His admissions were made during interviews totalling 13 hours, spread over five days. The Court of Appeal allowed his appeal and quashed his conviction for murder on the ground that the admissions were obtained by oppression. The interviews were oppressive when taken as a whole because of their length and tenor. The Court of Appeal, which listened to the tapes of the interviews, pointed to the officer's "bullying and hectoring" manner, his shouting at the defendant and his continual repetition of what he wanted the defendant to say despite the fact that the defendant denied involvement in the murder more than 300 times. The Court also quashed the convictions of the co-accused on the ground that they were possibly tainted by the inadmissible confession. The Court thought that the jury might have used the confession prejudicially against them despite the judge's instruction not to do so.

A particularly disturbing feature of this case was the fact that the defendant's solicitor was present throughout the interviews but did not intervene at any stage. The Court of Appeal expressed surprise at his passivity. The fact that he apparently took no steps to prevent the oppression offers a salutary reminder that the presence of a legal advisor is not necessarily a safeguard against police impropriety in all cases.[38]

This case can usefully be compared with *R v Heaton*[39] to underline the point that oppression is a matter of degree. In *Heaton* the defendant had confessed to manslaughter in the course of a 75 minute interview in the presence of his solicitor. Amongst other things he complained that the interviewing officers raised their voices and repeated questions. Having listened to the tape of the interview the Court of Appeal held that there was no shouting and no oppressive hostility shown to the defendant. Some repetition of questions was appropriate. The Court distinguished *Paris* on the facts, having referred with approval to the dictum in the earlier case that it is "perfectly legitimate for officers to pursue their interrogation of a suspect with a view to eliciting his account or gaining admissions. They are not required to give up after the first denial or even after a number of denials".[40]

The use of deliberate deception upon a suspect may contribute to a finding of oppression. In the trial of George Heron[41] for the murder of a little girl at the block of flats where he was a caretaker, Ognall J excluded Heron's confession

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36 See *R v Alladice* (1988) 87 Cr App R 380 at 385; *R v Walsh* (1990) 91 Cr App R 161.

37 (1992) 97 Cr App R 99.

38 For an illuminating study of the nature and quality of legal advice to suspects see McConville, M and Hodgson, J, *Custodial Legal Advice and the Right to Silence* (1993) Her Majesty's Stationery Office, London.

39 *R v Heaton* [1993] Crim LR 593.

40 Above n37 at 104.

41 *R v Heron, The Times*, 22 November 1993.

on the grounds both of the bullying manner of the interview and the lies told to Heron that two witnesses had identified him as being at the spot where the girl was last seen alive. In the earlier case of *R v Mason*[42] the Court of Appeal held that a lie that the defendant's fingerprints had been found on an article used in the offence should have resulted in discretionary exclusion of his confession under section 78 of PACE. The deception seems not to have been regarded as oppressive for the purposes of section 76(2)(a), but the point was not fully argued, possibly because no other impropriety was alleged against the police.

Under the *Evidence Act* 1995 the use of deception by the police to obtain an admission may be relevant in applying both section 84 and section 85, depending on its nature and the other circumstances of the case. It will also always be a relevant factor in the exercise of the discretion under section 138(1) to exclude evidence obtained improperly.[43]

Emotional cruelty, as possibly exemplified in *Fulling*, is more difficult to assess because of its infinite variations of degree and because the personal characteristics of the accused will be an important factor in deciding on its severity. What may be harsh or cruel in relation to a vulnerable individual may not be so to a phlegmatic or hardened suspect.[44] The officer's statement in *Fulling*, which, if it was made appears to have been true, may fairly be described as callous and unfeeling. Whether that is enough to qualify it as oppressive under the test set out in the case is a matter on which opinions will almost inevitably differ. Had it been a deliberate lie calculated to distress the suspect, or had it been coupled with other forms of objectionable behaviour, the case would have been much stronger. Under the *Evidence Act* 1995 such police conduct might ground an argument for exclusion of a confession either under section 84, or under section 85 (discussed below), or under the discretion conferred by section 90 to exclude a confession if its use would be unfair to the accused.

D. "Inhuman" and "Degrading" Conduct

Finally, section 84 excludes confessions obtained by inhuman and degrading conduct. These words also appear in PACE as part of the definition of oppression. They derive from international instruments on human rights, notably Article 3 of the European Convention on Human Rights. To date no English court has had to consider them, but decisions of the European Court of Human Rights and the European Commission of Human Rights on Article 3 will be influential when the occasion does arise.

In the *Greek Case* the Commission defined inhuman treatment to be such "as deliberately causes severe suffering, mental or physical", and degrading treatment to be that which "grossly humiliates the individual before others or drives him to act against his will or conscience".[45] The European Court of

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42 *R v Mason* [1987] 3 All ER 481.

43 *Evidence Act* 1995, s138(2)(b), and see the discussion of s138 generally by Odgers, above n2 at 234–43.

44 Compare with above n37. The common law allowed individual characteristics and susceptibilities to be taken into account in applying the voluntariness test (see *R v Priestley*, above n16), and in this respect the position has not changed under the revised English and Australian rules.

45 (1969) 12 *YB Eur Conv On Human Rights* 186.

Human Rights expanded these notions in *Republic of Ireland v UK*.[46] In this case the Court was concerned with five techniques of interrogation practised for a short period in 1971 on a group of terrorist suspects in Northern Ireland. The techniques were aimed at disorientation or sensory deprivation of the suspects and involved wall-standing, hooding, subjection to continuous noise, deprivation of sleep and deprivation of food and drink. The Court held that the techniques amounted to inhuman treatment because they caused intense physical and mental suffering and also led to acute psychiatric disturbances during interrogation. They were also degrading because they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance.

These explanations clearly contemplate major abuses of power. The very serious impropriety which seems to be required before conduct can be described as inhuman or degrading suggests that all such conduct would always fall within the description oppressive in section 84 of the *Evidence Act* 1995. PACE expressly defines inhuman or degrading treatment as examples of oppression. It may be therefore that the real function of the words "inhuman" and "degrading" in section 84 is to indicate expressly that international standards of human rights are to be incorporated into the conditions to be satisfied before confessions may be admitted.

3. *Section 85*

Section 85 provides:

> (1) This section applies only in a criminal proceeding and only to evidence of an admission made by a defendant:
>
> (a) in the course of official questioning; or
>
> (b) as a result of an act of another person who is capable of influencing the decision whether a prosecution of the defendant should be brought or should be continued.
>
> (2) Evidence of the admission is not admissible unless the circumstances in which the admission was made were such as to make it unlikely that the truth of the admission was adversely affected.
>
> (3) Without limiting the matters that the court may take into account for the purposes of subsection (2), it is to take into account:
>
> (a) any relevant condition or characteristic of the person who made the admission, including age, personality and education and any mental, intellectual or physical disability to which the person is or appears to be subject; and
>
> (b) if the admission was made in response to questioning:
>
> (i) the nature of the questions and the manner in which they were put; and
>
> (ii) the nature of any threat, promise or other inducement made to the person questioned.

The equivalent provision in section 76 of PACE reads:

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46 Above n7.

(2) If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained —

(a) ...

(b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof, the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid.

A. The Scope and Rationale of the "Reliability" Rule under PACE

Under paragraph (b) of section 76(2) of PACE the prosecution must prove that the confession was not obtained in consequence of any thing said or done which was likely in the circumstances to render any confession by the accused unreliable. The provision is based on a proposal of the Criminal Law Revision Committee.[47] The Committee envisaged that the trial judge would have to reconstruct in his or her mind the course of dealing between the police and the suspect. In other words the judge would have to imagine being in the role of the "fly on the wall", observing the progress of the interview and keeping in mind the other circumstances of the interview and of the suspect's detention in the police station. At the point when the actual confession was made the judge should ask whether at that stage *any* confession that the accused might have made was likely to be unreliable as a result of something said or done.

It should be stressed at the outset that this test is concerned with a hypothetical issue. The question is the likely reliability of *any* confession the accused might have made at the point of time that the actual confession was made. The court is not concerned therefore with the reliability of the actual confession itself. The prosecution must prove an absence of causation between what was said and done and the actual confession, but otherwise the importance of the actual confession is simply to fix the moment of time at which the hypothetical question must be answered. The Court of Appeal has had to remind trial judges of this point more than once.[48] It follows that because the court is dealing only with the hypothetical issue at the particular moment in the interview it is immaterial whether the actual confession subsequently turns out to be true. In *R v McGovern*,[49] an important case discussed further below, the accused admitted in a subsequent interview that her earlier confession to murder was true. Quashing her conviction the Court of Appeal held that the confession should not have been admitted because the prosecution had failed to discharge the burden of proof under section 76(2)(b). The defendant's later admission of the truth of the confession was not a relevant factor in this decision. The judge should have been concerned only with what preceded the confession, not with what followed it. As

47 Above n24 at par 64.
48 *R v Cox* [1991] Crim LR 276; *R v Kenny* [1994] Crim LR 284.
49 (1991) 92 Cr App R 228.

the subsection itself indicates, the judge may have to exclude a confession where the prosecution fails to satisfy paragraph (b), "notwithstanding that it [the confession] may be true".

On the face of it the result in *McGovern* is a remarkable one. It suggests the need for further discussion of the rationale of this part of section 76(2). The key to understanding the provision is the point that, like paragraph (a), it is concerned with the issue of the methods used to obtain the confession (the "legitimacy" issue) and not with the issue of whether the confession itself is true or false (the "reliability" issue). Under the PACE scheme the latter issue is essentially a question of weight for the jury. The issue under section 76(2) is essentially the legitimacy of the methods used by the police to obtain a confession. In summary the message which the provision conveys is that the police should not abuse their power to oppress a suspect into making a confession and they should not adopt other techniques of questioning likely to lead to an unreliable confession. The two paragraphs of section 76 thus reflect the two dimensions of legitimate verdicts in criminal trials.[50] The oppression rule is intended to safeguard the moral authority of the verdict, whereas the reliability rule in paragraph (b) is a rule intended to promote the factual accuracy of verdicts generally which are based on confession evidence.

B. The Scope and Rationale of Section 85 of the Evidence Act *1995*

Like the PACE provision just discussed, section 85 of the *Evidence Act* 1995 creates a rule of admissibility for a defendant's confession which entails an inquiry into the circumstances in which the confession was made. Again, as under the PACE provision, such an inquiry is not limited to matters which would have constituted inducements for the purposes of the voluntariness rule at common law. PACE refers to "anything said or done"; section 85 is even wider in its unqualified reference to "the circumstances" in which the admission was made. A third point of similarity is that under both the English and Australian rules, the court takes into account the defendant's individual characteristics and vulnerabilities. This is discussed further below.

However, section 85(2) departs from PACE in directing the court to examine whether the circumstances of the making of the admission were such as to make it unlikely that the truth of the admission was adversely affected. As explained above, the PACE inquiry is into the reliability of *any* admission the accused might have made in consequence of any thing said or done. This difference in wording raises an important issue about the nature of the test created by section 85. On one interpretation the difference is not significant. That is to say, following the analysis suggested by Odgers, the judge is required "to focus on the objective likelihood that the interrogators' conduct would affect reliability, not whether it did in fact".[51] In essence this is similar to the test under PACE, and it would follow that the issue would be determined as at the

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50 The theory that exclusionary rules of evidence are designed to promote legitimate verdicts in criminal cases is set out in Dennis, I H, "Reconstructing the Law of Criminal Evidence" (1989) 42 *Current Legal Problems* 21. See also Zuckerman, above n26, ch 16.

51 Above n2 at 139.

moment when the confession was made. Evidence of subsequent events going to the truth of the confession would not be relevant to this issue.

The alternative interpretation is that the section requires the judge to form an estimate of the likely truth of the defendant's actual confession, given the circumstances in which it was made. Such a test involves the judge duplicating one of the traditional functions of the jury. Clearly a crucial issue on this test is whether the judge may take into account any *other* evidence relevant to the truth of the confession. Suppose, for example, that the defendant admits in a later interview that the earlier confession is true, or suppose that the police subsequently find evidence which tends to confirm the truth of the confession. A judge in receipt of such evidence would almost inevitably conclude that the circumstances were unlikely to affect the truth of the confession because they did not in fact do so. Certainly if the inquiry is intended to be one into the reliability of the actual confession it would be arbitrary, if not self-defeating, to restrict the evidence on that issue to events up to, but not beyond, the making of the confession.

This interpretive issue gives rise to further questions about legislative intent and about the rationale of section 85. On the issue of admissibility of evidence of truth, clause 73 in the ALRC's draft Evidence Bill,[52] the clause from which section 85 ultimately derives, contained an express provision that, for the purposes of (what became) section 85(2), "evidence that the admission is true or untrue is not relevant" (subsection (3)). That provision clearly supported the first interpretation suggested above. However, that provision does not appear in the *Evidence Act* 1995. Instead section 189(3) provides that on the hearing of a preliminary question about whether a defendant's admission should be admitted into evidence "the issue of the admission's truth is to be disregarded unless the issue is introduced by the defendant".[53] This is less clear in its effect than clause 73(3). If the issue of truth is to be ignored it seems to follow that cross-examination of the defendant on the voir dire about the truth of the admission should be legally irrelevant, although the provision does not actually say this. If this is so, does the provision also prevent any other evidence of truth from being given on the preliminary question? Arguably it does, on the basis that the legislature did not intend to distinguish between cross-examination of the defendant about the truth of the admission and evidence in chief, say, of the defendant's pre-trial confirmation of the truth of the admission. However, there is a contrary argument that the issue on the preliminary question is not one of truth per se, but of *likelihood* of truth in the circumstances of the questioning. Section 189(3) does not say in terms (as clause 73(3) did) that evidence of truth is irrelevant to the latter issue. If such evidence is relevant and admissible then the second interpretation above is correct.

The legislative history shows that the ALRC changed its mind about the rationale of section 85 between its Interim and Final Reports. The interpretive problem has arisen because of the failure of the ALRC to carry through into the drafting of the section the implications of its switch. In the Interim Report

52 ALRC 38, above n6 at 169.

53 This provision did not appear in the corresponding clause 146 in the ALRC's Draft Bill: id at 201. It seems to have been substituted in the Act for clause 73(3): id at 169.

the ALRC expressed concern about tactics of interrogation which might produce false confessions.[54] It proposed what it called a "Truth Test" for the confession in question.[55] The judge would have to be satisfied that the admission was made in circumstances that were not likely to affect its truth adversely. The Report added: "It would also be relevant to this question whether other incriminating evidence was discovered or obtained as a consequence of the admission being made."

Accordingly the Report envisaged that the accused would be able to be questioned on the voir dire about the truth of the confession.[56] That would have reversed the common law position[57] but would have been consistent with the policy of asking the judge to make an initial decision about the reliability of the defendant's confession.

These proposals appear to have run into trouble on consultation. The ALRC's Final Report indicates obliquely that the proposals were criticised for failing adequately to meet an objective of protecting the accused's right to silence. It is implied that the critics of the proposals accepted that the voluntariness rule was an unsatisfactory mechanism for achieving this aim, but argued that any replacement should have the same aim. The Final Report admits that the proposals were aimed at other concerns, namely the reliability of confessions and the control of police methods of interrogation. The ALRC's solution was to delete the proposal to allow questions on the voir dire about the truth of the confession and to insert into clause 73 of the Draft Bill the subsection providing that evidence of the truth of the admission was irrelevant. This appeared to be an abandonment of the "Truth Test" policy. However, the abandonment was not carried through to the rest of clause 73 which still required the judge to rule on the likelihood of the truth of the actual confession. The ALRC would have done better to have adopted the PACE wording which does at least make it clear that a wholly objective test of likelihood of truth is intended. Even then this test is at best only an indirect way of ensuring that the defendant had a free choice whether to waive the right to silence. The reliability of a confession is not necessarily an infallible assurance of its voluntariness. Ideally section 85 should have been redrafted to target its objective more directly. As it is we have a provision in section 85 which is somewhat adrift of its rationale and which gives rise to a tricky issue of interpretation.

C. *The Police-Suspect Interaction: Impropriety and Vulnerability*

Deliberate impropriety by the police is a key element of oppression, but it is not a necessary condition to invalidate a confession under section 76(2)(b) of PACE. This follows from the characterisation of paragraph (b) as a rule intended to promote the factual accuracy of verdicts generally which are based on confession evidence. The point is that confessions may still be rendered unreliable as a result of police conduct performed in good faith and even with the interests of the suspect in mind. In *Fulling* Lord Lane CJ commented that

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54 ALRC 26, above n6 at par 764.
55 Id at par 765.
56 Id at par 766.
57 *Wong Kam-Ming v R* [1980] AC 247. See for further discussion Ligertwood, above n5 at 511–2.

a confession may fall to be excluded under paragraph (b) where there is no suspicion of impropriety.[58]

The reference in section 85 of the *Evidence Act* 1995 to the "circumstances in which the admission was made" carries no implication that impropriety is a condition of exclusion. Indeed, as under PACE, there is no requirement that the police engage in overt questioning of the suspect. Subsection (3)(b) of section 85 expressly envisages an admission not made in response to questioning.

However, under the PACE scheme, it follows from correct identification of the rationale of section 76(2)(b) that there must be something said or done which is external to the accused and which is likely to influence the accused to make a confession. The Court of Appeal clarified this point in the controversial case of *R v Goldenberg*.[59] The defendant was a heroin addict who had been in police custody for five days after his arrest and who had been charged with conspiracy to supply diamorphine. He asked for an interview in the course of which he made a confession. On appeal against conviction he argued that the confession should have been excluded at trial as being unreliable because it might have been made in the hope that he would be granted bail. The Court of Appeal held that the words "anything said or done" did not include things said or done by the person making the confession. They were limited to something external to that person and to something likely to have some influence on him. The fact that the defendant might have had a motive for confessing to secure his release on bail was not therefore something which affected the admissibility of the confession.

Implicit in this decision is a finding not only that the police had not held out any inducement to the defendant to confess but also that the mere holding of the interview in response to his request was not itself something said or done likely to produce an unreliable confession. Given that the concern of section 76(2)(b) is with behaviour-influencing methods of dealing with suspects this decision looks right on the facts. A defendant's possible anxiety to confess to secure some advantage, when not induced by the police themselves, is something which under the PACE scheme goes to the weight to be attached to the confession. It is regarded as an issue for the jury, not one of admissibility for the judge.[60]

It is an interesting question how *Goldenberg* would be decided under section 85. The "circumstances" would clearly include both the fact of interviewing the defendant at his request and the fact that he may have had a strong internal incentive to confess. Subsection (3)(a) specifically directs the court to take into account any mental or physical disability from which the defendant was or appeared to be subject. The issue then is whether these facts were such as to make it unlikely that the truth of the admission was adversely affected. It could well be argued that objectively a confession by a withdrawing drug addict was quite likely to be unreliable. On the other hand there was nothing untoward in

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58 Above n22 at 70.

59 (1989) 88 Cr App R 285. See also *R v Crampton* (1991) 92 Cr App R 369; *R v W* [1994] Crim LR 130.

60 See *Crampton*, ibid. The same principle applied at common law: *R v Rennie* [1982] 1 All ER 385, cited with approval in *Crampton* at 374.

the police conduct, and the confession itself appears to have merely repeated an earlier admission with the addition of the name of the defendant's supplier.

It has to be admitted that under PACE there may sometimes be a difficult line to draw between the principle established by *Goldenberg* and the principle that a suspect's individual vulnerabilities are relevant in determining the application of the test under paragraph (b). In the leading case of *R v Delaney*[61] the defendant was convicted of indecent assault on a little girl aged three. The only evidence against him was his admissions, which he began to make after some 90 minutes questioning. The defendant was aged 17, intellectually disabled with an IQ of 80, and there was psychological evidence that he was subject to quick emotional arousal which might lead him to wish to rid himself of an interview as quickly as possible. The interviewing officers admitted that they had taken pains to minimise the gravity of the offence to the defendant and had suggested to him that such an offender needed psychiatric help rather than punishment. These suggestions might well have been enough on their own to justify exclusion of the confessions under paragraph (b). Even if well-intentioned they were things said which were likely to produce from this vulnerable defendant a false confession made to escape the pressure of the interview. In allowing the appeal the Court of Appeal also took into account breaches of the recording requirements for interviews.[62] It was held that these deprived the Court of the best evidence of what was said and done during the interviews. The Court could not be sure therefore that the prosecution had discharged their burden of proof under section 76(2)(b), particularly given the suggestions made by the police.

McGovern[63] is a case to similar effect. The defendant was aged 19, with a greater degree of intellectual disability, an IQ of 73 and a mental age of 10. She was also six months pregnant, was physically ill before the interview and emotionally distressed during it. The things "said and done" by the police in this case consisted of an unlawful refusal of access to a solicitor[64] and breaches of the recording requirements. As in *Delaney* the Court of Appeal held that the confession (to murder) should have been excluded on the ground that the prosecution had failed to discharge the burden of proof under section 76(2)(b). The Court said that the denial of access to a solicitor was likely to render any confession by this defendant unreliable in the circumstances. The assumption appears to have been that a solicitor would have prevented the interview taking place at all on the basis that the defendant was not then fit to be interviewed and might say anything. *McGovern* is a strong case. It illustrates the impact of section 76(2)(b) in a murder case, and, in addition, exemplifies the operation of the "tainting" principle. In a second interview a day later, with a solicitor present, the defendant had made a longer, more detailed and more coherent confession. The Court of Appeal held that this also should have been excluded. It was tainted by the first confession in the sense that the second

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61 (1989) 88 Cr App R 338.

62 The court found that the officers were in breach of pars11.3 and 11.4 of the PACE Code of Practice C by failing to make a contemporaneous record of the interview.

63 Above n50.

64 Under s58 of PACE the defendant has a right of access to legal advice, which the Court of Appeal has described as a "fundamental right" : *R v Samuel* [1988] QB 615 at 627.

interview was a direct consequence of the first interview, but the solicitor had not been informed of the breach of section 58 of PACE. Had she been, she might have prevented the second interview taking place.

It is apparent also from *McGovern*, and a number of other cases, that "anything said or done" is much wider than the notion of an inducement at common law. The phrase certainly includes inducements such as holding out the possibility of release on bail,[65] or suggesting that offences could be taken into consideration rather than specifically charged,[66] or offering a hope of treatment rather than punishment.[67] It also includes such matters as the length of detention and the number of interviews. In *R v Moss*[68] the Court of Appeal quashed convictions for indecent assault on young children where the defendant's main admissions came in his eighth interview after he had been in custody for six days. The defendant was mentally handicapped, or nearly so, and no solicitor was present.

The confessions by the particularly vulnerable defendants in these cases would, on the face of it, all be strong candidates for exclusion under section 85 of the *Evidence Act* 1995. There would certainly be no difficulty in bringing the facts of *Delaney* and *Moss* squarely within either interpretation of the section. However, *McGovern* may be more problematic. Would a court find that the circumstances in which her *second* confession was made were such as to make it unlikely that the truth of the confession was adversely affected? It appears that she had then calmed down somewhat, was no longer physically ill, and she had her solicitor present. As stated above, the second confession was longer, more detailed and more coherent. On either interpretation of section 85 it is not easy to see why this later confession should be thought likely to be unreliable. It is notable that section 85(2), unlike section 76(2)(b) of PACE, does not require the prosecution to prove absence of causation between earlier police behaviour and the making of the actual confession in question. Presumably, though, if the defence did not succeed in having the confession excluded under section 85 they would argue that it should be excluded in the exercise of the discretion under section 90. Given that the solicitor might have prevented the second interview taking place at all had she known the full circumstances there is a good argument for saying that it would be unfair to the defendant to admit the second confession.

Police failures to comply with what may be called the due process requirements of PACE are quite a common feature of the cases under section 76(2)(b). Thus breach of the statutory right of access to legal advice may well lead the court to conclude that the prosecution cannot discharge the burden of proof; this is on the basis that a solicitor might have prevented a vulnerable suspect from being interviewed at all or have advised the suspect not to answer further questions after repeated denials of the offence. Similar thinking underlies the decision in *R v Everett*[69] where the Court of Appeal quashed the conviction of the defendant for indecent assault. This was on the basis that the

65 *R v Barry* (1992) 95 Cr App R 384.
66 *R v Phillips* (1988) 86 Cr App R 18.
67 Above n61.
68 (1990) 91 Cr App R 371.
69 [1988] Crim LR 826.

trial judge had failed to take into account medical evidence of the defendant's mental condition when considering the admissibility of his admissions. The defendant was aged 42 but had a mental age of eight. In the view of the Court of Appeal, under the Code of Practice for the questioning of suspects he should have been interviewed in the presence of an independent mature person; such a person could presumably have been expected to exercise a protective role for the defendant.

A more problematic decision is *R v Doolan*.[70] The defendant had been convicted of robbery. At trial he had denied admitting to a police officer in interview that he had been in the company of the victim on the evening of the robbery. The officer admitted a failure to caution the defendant as well as breaches of the recording requirements which included a failure to make a contemporaneous record and a failure to show the notes of the interview to the defendant for verification. The Court of Appeal held that the evidence of the interview should have been excluded under section 76, but applied the proviso[71] to uphold the conviction on the grounds that the remaining evidence was more than enough to justify the jury's verdict. The reasoning here seems confused. A failure to caution is unlikely to render a confession unreliable, unless perhaps the defendant is a vulnerable person who is likely to say anything to escape the pressure of the interview. There was no evidence in *Doolan* that the defendant was such a person. Equally, a failure to record or to have the record verified cannot logically be said to render the confession unreliable. It may of course mean that the evidence of the *making* of the confession is unreliable, but that raises the separate issue of the authenticity of the confession, with which section 76 of PACE is not concerned. However, unexplained breaches of the "verballing" provisions of PACE and the Code of Practice may result in discretionary exclusion of a confession under section 78 of PACE. This would have been the correct ground of decision in *Doolan*. Where breaches of the recording requirements are coupled with other things said or done likely to influence the defendant to make an unreliable confession then they will be indirectly relevant to the question whether the prosecution can discharge the burden of proof under section 76(2)(b).

4. *Conclusions*

The provisions of sections 84 and 85 of the *Evidence Act* 1995 have replaced the voluntariness rule at common law with rules of admissibility for confessions similar in many respects to the rules contained in the *Police and Criminal Evidence Act* 1984 (UK). The English experience of PACE not only reveals the kinds of issues which may arise under the new legislation in Australia but also offers valuable suggestions for their solution. At the same time interpreters of the new legislation should be aware of certain differences between PACE and section 85 which restrict the application of some of the English authorities.

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70 [1988] Crim LR 747.
71 *Criminal Appeal Act* 1968 (UK), s2(1).

This commentary has also shown that there is a significant ambiguity in the test created by section 85. This ambiguity reflects an underlying confusion about the rationale for the provision and about the allocation of functions between judge and jury in relation to confessions in criminal trials. Because the section enacts a rule that the confession is inadmissible unless the conditions of subsection (2) are satisfied, it is an issue of major practical importance exactly what those conditions are and what evidence may be relied on to establish them. Academics and practitioners alike will look forward to the inevitable High Court decisions on these questions.