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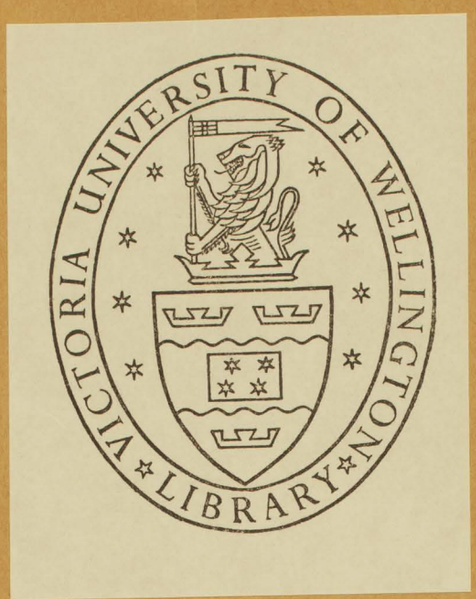
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M. E. PERKINS

A Comparative Study of the Law Relating to Confessions

"When a confession is well proved it is the best evidence that can be produced."

- Erle J. in R v. Baldry (1852) 2. Den 430 169 E.R. 568

Introduction

This paper will consider from a comparative point of view the Law relating to confessions in the three common law countries of England, Australia and New Zealand and the United States. In particular the study will be based on the controls which each country imposes on the manner in which confessions can be obtained and the effect which breach of the rules has on their admissibility in Court.

It will be seen that between the three common law countries to be discussed there are substantial variations ranging from the comparatively liberal approach (from the confessor's view point) adopted in England to the somewhat restrictive and confused approach adopted in New Zealand. In Australia there is even a great difference between the approaches of the various States.

As far as the United States of America is concerned this paper will consider mainly the series of decisions known as Miranda v. State of Arizona (1966) 384 U.S. 436; 16 L ed 694. It will be seen that the United State's Courts have approached this question from a completely different view point to that adopted in the common law countries. Whereas the rules have been evolved from gradually established legal principles in the common law countries the United States has evolved its rules through the 5th and 6th Amendments to the United States Constitution as contained in their Bill of Rights.

The effect of this approach in practical terms has meant that in the United States there is a far greater control on the authorities obtaining the confession (in the great proportion of cases the Police).

The English Law, which has developed unfettered by interference from politicians, also places stringent control on the authority whereas in the State of Victoria, Australia, and New Zealand the effect of Section 149 of the Evidence Act (Vict) 1958 and Section 20 of the Evidence Act 1908 (NZ) has meant that the authorities wishing to use the confession in evidence have greater freedom to admit it despite any irregularities in its eliciting. Curiously enough these Statutory provisions were originally enacted in an attempt to codify the common law rules.

The quotation from Baldry's case which opens this paper that a well proved confession is the best evidence that can be produced gives a clue to the central problem relating to confessions. This problem is that, because a confession when admitted in evidence will usually procure a conviction on a criminal charge, the law must take care to protect individuals from over zealous and unscrupulous activities by persons in authority and in the great majority of cases the Police. The respective demands of the society on the one hand for the conviction and punishment of a guilty party must be weighed against the right of the individual in a free society to be protected against abuse of powers given by the State to persons in authority.

In weighing up these factors it will be seen that the United States in adopting its approach has perhaps fallen too heavily in favour of the protection of the accused person's position. The position adopted in the United States is not surprising when one considers that the principles evolved in that country have a base in the Bill of Rights Amendments to the Constitutuion and therefore relate to the obsession which that country has to protection of the individual.

The New Zealand and Victorian positions have however gone to the opposite extreme and have allowed too much freedom to the Police and other persons in authority obtaining confessions. Both the New Zealand and Victorian positions were originally adopted in an effort to codify the common law rules. In 1949 it will be seen that the Statutory provisions were not as wide as originally thought and in New Zealand the Government Legislature, instead of completely reviewing the position, merely amended the legislation, which existed, to exclude a further part of the common law rules, which, up until that time, operated in New Zealand and the situation now is that a large number of confessions which under the common law would be improperly obtained are admissible as evidence.

The common law rules as they exist in England today present perhaps the most balanced approach to this question. These rules have been developed over a considerable period of time and have been tempered from time to time by the introduction of Judges' rules which in effect have

amounted to directions to the Police as to the manner in which they are to conduct themselves in obtaining confessions. This position is also true in the majority of Australian States.

In England in 1972 there was an attempt to review the law relating to confessions and the Criminal Law Revision Committee in its report on the rights of the accused recommended among other things that silence in the Police Station as regards any fact subsequently relied on at the trial could be made the subject of adverse comment by the prosecution and the Judge and could almost amount to corroboration. Following this report the English Criminal Bar Association prepared a critique whereby they stated that the Criminal Law Revision Committee's proposal would have the effect of abolishing the right to silence. The Bar Associations critique stated:

> "The right of silence is the concrete and visible assertion of the fundamental principle that the prosecution must prove their case, and no obligation lies upon the accused to prove his innocence.
>
> In our view the vital point for vigilance in a free society is the moment when the individual gets into the hands of the Police or an 'official'. At that moment he will be alone. He will be faced with a person wielding extensive powers given by the State, with knowledge how best and to what extent they may be exercised. He will require,

in a free society, some protection against the abuse of those powers."

It is proposed to consider at more length this critique which was reviewed in The Guardian of September 30 1972.

The English Common Law Position

There have been various attempts by legal writers to state the English Common Law Rule relating to admissibility of confessions.

Halsbury's Laws of England, Third Edition, states at page 469 of Volume 10 as follows:

"... admissions or confessions of guilt made by a defendant before his trial can only be proved against him if they were made freely and voluntarily in the sense that they were not obtained from him by fear of prejudice or hope of advantage exercised or held out by a person in authority. In giving evidence of such admissions or confessions it lies on the prosecution to prove affirmatively to the satisfaction of the Judge who tries the case that the admissions were not induced by any promise of favour or advantage or by the use of fear or threats or pressure by a person in authority."

The rule put another way can be found in Cross 'Evidence', Third Edition page 445:

> "A confession of crime is only admissible against the party making it if it was voluntary, i.e. provided it was not made in consequence of an unlawful inducement or threat of a temporal nature held out by a person in authority (the expression 'confession of crime' must be taken to include any inculpatory statement as well as a full admission of guilt)."

As to what form the inducement or threat takes Cross goes on to say at page 447:

> "... now that the accused can give evidence of their effect upon him, undue importance must not be placed on words. As much may depend on the circumstances as on the terms of the inducement ..."

Perhaps the most well known judicial statement of the rule can be found in the case of Ibrahim v. Rex [1914] A. C. 599 wherein a decision of the Privy Council delivered by Lord Sumner it is stated at page609 of the report:

> "It has long been established as a positive rule of English Criminal Law that no statement by an accused is admissible in evidence against him unless it can be shewn (sic) by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale."

Looking at the rule which is now firmly established in English law from the point of view of the effect of the rule in controlling the activity of the person in authority who is obtaining the confession it can be seen that such a person, who is usually a Policeman, must be careful in the words he uses in attempting to persuade the accused person to make a statement. It is interesting to consider several of the earlier decisions which are examples of the words which are commonly used. It can be seen that some words used are such that the rule operates to hold them inadmissible.

The case of R. V. Baldry which has been cited earlier involved the admissibility of a statement obtained from an accused by a police constable who stated to the accused prior to the giving of the admission that the accused need not say anything to incriminate himself, what he did say would be taken down and used as evidence against him. The Court held that the Policeman's statement did not breach the rule and the statement was therefore held to be admissible. In the case of R. V. Jarvis (1867) L.R. 1CCR96 an employer said to his employee " I should advise you that, to any question that may be put to you, you will answer truthfully, so that if you have committed a fault you may not add to it by stating what is untrue". It was held also in this case that this statement did not breach the rule and that the following confession was held admissible in evidence. In the case of R. V. Cleary (1963) 48 C.R. App. Rep.116 the accused's father said to the accused in the presence of police officers "put

your cards on the table, tell them the lot, if you did not hit him they can not hang you." The Court of Criminal Appeal held that in the circumstances the words used in this case were capable of constituting an inducement and therefore the confession was held inadmissible and the conviction was quashed. In the case of Sparks v. R. [1964] A.C.964 a confession of guilt of an indecent assault was held to have been wrongly received because it might have been made in consequence of suggestions by the Bermudan Police that, if the accused made a statement, he might be tried by a military court and his family would thereby be spared the embarrassment of publicity. In R. V. Smith [1959] 2Q. B. 35 a soldier was stabbed in a fight following which the Regimental Sergeant Major made the whole unit stand on parade until he learned from the unit who was involved in the stabbing. A confession which was made shortly after this was held to be inadmissible.

In English Law there is also authority for the proposition that even if a confession is properly obtained the Court has an overriding discretion to disallow it. This principle was most clearly stated by Lord Parker C. J. in the case of Callis v. Gurin [1964] 1 Q.B. 495, 501 where it is stated:

> "... in every criminal case a Judge has a discretion to disallow evidence, even if in law relevant and therefore admissible, if admissibility would operate unfairly against a defendant. I would add that in considering whether admissibility would operate unfairly against a defendant one

would certainly consider whether it had been obtained in an oppressive manner by force or against the wishes of an accused person. That is the general principle."

Lord Parker in the decision then went on to state the basic rule:

"When, however, one comes to the admissibility of of statements made in answer to the Police and to alleged confessions, a much stricter rule applies. There is a fundamental principle of Law that no answer to a question and no statement is admissible unless it is shown by the prosecution not to have been obtained in an oppressive manner and to have been voluntary in the sense that it has not been obtained by threats or inducements."

Lord Parker in his judgment then goes on to hold that the Judges Rules apply and indicate what Judges will exclude within the meaning of oppressive conduct and what is or is not a voluntary statement.

The Judges Rules were first formulated by the Judges of the Queen's Bench Division in 1912 to give an indication to the Police as to the proper course they should take at the various stages of an investigation. These rules have from to time been amended and the most recent list of rules was given by Lord Parker C. J. at the sitting of the Court of Criminal Appeal on 24 January 1964. These rules now apply in England but have not been adopted in New Zealand and in this country the rules existing before 1964 apply.

The amended rules announced in 1964 are as follows:

1. When a Police officer is trying to discover whether, or by whom, an offence has been committed he is entitled to question any person, whether suspected or not, from whom he thinks that useful information may be obtained. This is so whether or not the person in question has been taken into custody so long as he has not been charged with the offence or informed that he may be prosecuted for it.
2. As soon as a Police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence, he shall caution that person or cause him to be cautioned before putting to him any questions, or further questions, relating to that offence.

The cautions shall be in the following terms:

"You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence".

When after being cautioned a person is being questioned, or elects to make a statement, a record shall be kept of the time and place at which any such questioning or statement began and ended and of the persons present.

3. (a) Where a person is charged with or informed that he may be prosecuted for an offence he shall be cautioned in the following terms:

"Do you wish to say anything? You are not obliged to say anything unless you wish to do so but whatever you say will be taken down in writing and may be given in evidence."

(b) It is only in exceptional cases that questions relating to the offence should be put to the accused person after he has been charged or informed that he may be prosecuted. Such questions may be put where they are necessary for the purpose of preventing or minimising harm or loss to some other person or to the public or for clearing up an ambiguity in a previous answer or statement.

Before any such questions are put the accused should be cautioned in these terms:

"I wish to put some questions to you about the offence with which you have been charged (or about the offence for which you may be prosecuted). You are not obliged to answer any of the questions, but if you do the questions and answers will be taken down in writing and may be given in evidence."

Any questions put and answers given relating to the offence must be contemporaneously recorded in full and the record signed by that person or if he refuses by the interrogating officer.

(c) When such a person is being questioned, or elects to make a statement, a record shall be kept of the time and place at which any questioning or

statement began and ended and of the persons present.

4. All written statements made after caution shall be taken in the following manner:

(a) If a person says that he wants to make a statement he shall be told that it is intended to make a written record of what he says. He shall always be asked whether he wishes to write down himself what he wants to say; if he says that he cannot write or that he would like someone to write it for him, a Police officer may offer to write the statement for him. If he accepts the offer the Police officer shall, before starting, ask the person making the statement to sign, or make his mark to, the following:

"I, ... , wish to make a statement. I want someone to write down what I say. I have been told that I need not say anything unless I wish to do so and that whatever I say may be given in evidence."

(b) Any person writing his own statement shall be allowed to do so without any prompting as distinct from indicating to him what matters are material.

(c) The person making the statement, if he is going to write it himself, shall be asked to write out and sign before writing what he wants to say, the following:

"I make this statement of my own free will. I have been told that I need not say anything unless I wish to do so and that whatever I say may given in evidence."

(d) Whenever a Police officer writes a statement, he shall take down the words spoken by the person making the statement, without putting any questions other than such as may be needed to make the statement coherent, intelligible and relevant to the material matters: he shall not prompt him.

(e) When the writing of a statement by a Police officer is finished the person making it shall be asked to read it to make any corrections, alterations, or additions he wishes. When he has finished reading it he shall be asked to write and sign or make his mark on the following certificate at the end of the statement:

"I have read the above statement and I have been told that I can correct, alter or add anything I wish. This statement is true. I have made it of my own free will."

(f) If the person who has made a statement refuses to read it or to write the abovementioned certificate at the end of it or to sign it, the Senior Police officer present shall record on the statement itself and in the presence of the person making it, what has happened. If the person making the statement cannot read, or refuses to read it, the

officer who has taken it down shall read it over to him and ask him whether he would like to correct, alter, or add anything and to put his signature or make his mark at the end. The Police officer shall then certify on the statement itself what he has done.

5. If at any time after a person has been charged with, or has been informed that he may be prosecuted for an offence a Police officer wishes to bring to the notice of that person any written statement made by another person who in respect of the same offence has also been charged or informed that he may be prosecuted, he shall hand to that person a true copy of such written statement, but nothing shall be said or done to invite any reply or comment. If that person says that he would like to make a statement in reply, or starts to say something, he shallat once be cautioned or further cautioned as prescribed by Rule 3 (a).

6. Persons other than Police officers charged with the duty of investigating offences or charging offenders shall, so far as may be practible, comply with these rules.

It must be emphasised that the Judges Rules are not rules of law and were first formulated merely as rulings on a number of enquiries which had from time to time been made by the Police as to the proper course they should take in the various stages of investigation. Nevertheless the

Courts have appeared to place reliance on these rules when deciding whether to exercise their discretion to exclude a legally admissible confession if it was unfairly obtained. Callis v Gurin is just such a case. There have been similar decisions in the other Common Law countries. It can also be noted when discussing the discretion that it existed prior to the Judges Rules and was exercised before their promulgation.

Before leaving the discussion of the English law some general comments can be made on the basic rules set out at the commencement of the paper. A person in authority has been held to mean anyone whom the confessor might reasonably suppose to be capable of influencing the course of the prosecution. Quite often it is a Police officer but it can be someone else as can be seen from some of the cases discussed.

An inducement, the nature of which has been discussed earlier, is anything suggesting that the outcome of a confession might be some beneficial result in connection with the prosecution. It is necessary to mention here the case of Commissioners of Customs and Excise v Harz and Power [1967] 1 All E. R. 177 where it was held by the House of Lords that, the principal that a confession or statement by an accused person is not admissible in evidence at his trial if it was induced by a threat or promise, applies equally where the inducement does not relate to the charge or contemplated charge as where the inducement does so relate.

An improper inducement may be held to have become ineffective through lapse of time or because of some intervening cause.

It depends on the facts as to whether this happened.

A confession will be inadmissible if obtained at a time when the accused's mind was so unbalanced as to render it wholly unsafe to act upon it. There is Commonwealth authority for this proposition but no English authority. Where this ground is alleged it is suggested that the onus shifts to the accused rather than resting on the Crown as it does in all other cases. The fact, that the onus rests on the Crown in proving the confession was voluntary, was clearly stated in the case of R v Thompson [1893] 2 Q. B. 12 by Cave J. In each case the trial judge has to ask, "Is it proved affirmatively that the confession was free and voluntary - that is, was it preceded by any inducement to make a statement held out by a person in authority?".

There are three basic rationale for the present law as it exists in England. The rationale probably apply equally to the Commonwealth countries but have been fettered to some extent by the statutory position. First, a confession is the best evidence which can be produced. Secondly, if made freely it is probably true. Thirdly, there is the possibility that a confession which is not voluntary would be untrue and this fact has been uppermost in the Judge's mind when imposing the stringent requirements contained in the Judges Rules.

But unreliability does not appear to be the sole ground. Allowance must be made for the dislike shared by English lawyers and laymen alike of the spectacle of a man being made to incriminate himself. Also there is the desirability of doing everything possible to discourage improper Police methods.

In summary therefore it is suggested that the English law adopts a balanced approach to the question of what controls it imposes in the obtaining of confessions. First there is the basic rule that the confession must be voluntarily made. A confession can be an entire admission of guilt or any inculpatory statement. This rule alone places reasonable control on the Police when it is remembered that the Police have no power to detain any person for the mere purpose of interrogating him or while enquiries are being made.

As a secondary control there is still the Judge's discretion to refuse to allow a legally obtained confession if to admit it would unfairly prejudice the accused. In exercising this discretion the Judges appear to rely on the Judges Rules. These rules themselves, as amended in 1964, impose very stringent requirements on the Police but, unlike the American position, allow the Police to operate effectively within the framework of the rules.

The Australian Position

Before dealing with the New Zealand law it is proposed to deal briefly with the Australian situation because the law as it exists in the state of Victoria has had considerable effect on the New Zealand law.

Basically, in Australia the Common Law in England applies. The first deviation from the English situation as it exists at present is that the 1964 formulation of the Judges Rules does not apply in Australia.

Basically in Australia the Common Law in England applies. The first deviation from the English situation as it exists at present is that the 1964 formulation on the Judge's rule does not apply in Australia. The 1912 formulation has been adopted in varying forms but again, like England, does not have the force of law and is merely "a guide to the Police in the questioning of suspects and arrested persons" (Cross on Evidence Australian Edition - J A Gobbo - p. 576).

In the exercise of the overriding discretion which the Judge has to exclude a confession therefore the Judges' Rules 1912 apply in Australia. This means that the controls existing through evidentiary rules are less stringent than England in the majority of Australian States. Added to this is the fact that in Australia it is established that the accused person bears the onus of showing a case for the exercise of the Judge's discretion to reject a confession voluntarily made and therefore prima facie admissible.

It is now necessary to discuss the statutory provisions enacted in some of the Australian States which amount to the second deviation from the English law. In Queensland (Criminal Law Amendment Act 1894 S. 10) and New South Wales (N.S.W. Crime's Act 1900 S. 410) the Legislature has intervened only to the extent of certain deeming provisions that confirm and possibly extend the Common Law position.

In Victoria, however, section 149 of the Evidence Act 1958 saves from rejection as non-voluntary a confession induced

by a threat or promise if the inducement was not really calculated to cause an untrue admission of guilt to be made. The section reads as follows:

> "No confession which is tendered in evidence shall be rejected on the ground that a promise or threat has been held out to the person confessing, unless the Judge or other presiding officer is of the opinion that the inducement was really calculated to cause an untrue admission of guilt to be made; nor shall any confession which is tendered in evidence be rejected on the ground that it was made or purports to have been made on oath."

As stated earlier it is curious that the rationale for the rules was that it was an attempt to codify the common law. In fact it amounts to a serious abrogation of the common law and in theory equally seriously detracts from the controls which the Courts exercise through the evidentiary rules on Police practices. Naturally enough Australian (and as will be discussed later, New Zealand) lawyers made efforts to limit the effect of this statutory rule in Victoria. To the extent that the statutory rule could be excluded in its operation so would the greater controls existing under the English law apply. Originally the section was treated by the Victorian Court as covering the whole field of confessions and excluding totally the common law. This meant therefore that strictly interpreting the section even a threat of physical violence, if the Judge was of the view that this did not result in an untrue

confession, would not result in an exclusion of the confession from the evidence.

The harsh effects of the section were mitigated by the case of Cornelius v. R. (1936) 55 C. L. R. 25 and R. v. Lee (1950) 82 C. L. R. 133. These decisions made it clear that the section was limited to statements that amounted to admission of actual guilt of the crime in question and that were induced by a threat or promise by a person in authority. Where there was some other ground for rendering the confession non- voluntary or some other basis for exercising a discretion to reject, the section did not apply. Where it did apply, however, it was imperative and left no room for the exercise of discretion.

In the Cornelius case it was stated by the majority decision at page 246:

> "This, no doubt, correctly states the effect of the provision. When it appears that, but for a particular promise or threat made by a person in authority, the prisoner's confession would be voluntary, it becomes necessary for the Judge at the trial to decide whether the promise or threat in question was really calculated, that is, really likely, to cause an untrue admission of guilt to be made. But a promise of advantage and a threat of harm are not the only matters which may deprive a statement of its voluntary character. For instance, a confession which is extracted by violence or force, or some other

> form of actual coercion is clearly involuntary, and, therefore, cannot be received in evidence. The enactment does not relate to such cases."

The Courts, therefore, through these cases were limiting the section to the exact situations which it prescribed. In this way the common law rules came to have greater effect whereas previously it was thought they were completely excluded.

In Victoria it has obviously been seen by the Legislature that section 149, if its aim was to codify the common law, had a serious effect in limitation of the Police conduct by the Court. No further attempts have been made to close the gap which was created by the Lee and Cornelius decisions. The present law there can be regarded as unsatisfactory but not to the extent that New Zealand law can be regarded as being so where further attempts have been made by the Legislature in this country to seriously interfere with the common law.

The New Zealand Position

The extent to which the common law applies in New Zealand is determined by the effect of section 20 of the Evidence Act 1908 which is an enactment similar, although now far wider in its operation, to section 149 of the Victorian Act.

Because of the difficulty in New Zealand resulting from the fact that the common law rules have to be read in conjunction with section 20 there is some doubt as to what amounts to a

confession. This is important because section 20 relates only to confessions and if this is to be defined as meaning a full confession of guilt then this is a further way of excluding the operation of the section and allowing the less restrictive common law rules to apply.

The common law rules of course apply to both full admissions of guilt and mere inculpatory or exculpatory statements. If the latter does not come within the definition of 'confession' in section 20 then that section's operation is limited to only a complete admission. With any thing else the common law applies. The second New Zealand edition of 'Cross on Evidence' also discusses this problem and as a definition states at page 501:

> "There is some ambiguity in the notion of a 'confession', which has three possible meanings. It may mean, first, an acknowledgement of guilt of the crime with which the accused has been or is later charged. Secondly, it may mean a statement going to the length of suggesting the inference that the person making it is guilty of a crime (though not necessarily of the crime charged). Thirdly, it may include not only complete confessions of guilt, but also any admission of a fact in issue or other facts relevant to the proof of guilt."

The development of the New Zealand law relating to confessions can best be seen through a discussion of several of the major cases. It should be remembered that an overriding factor in all cases is the effect of section 20.

Up until 1950 the section read:

> "A confession tendered in evidence in any criminal proceeding shall not be rejected on the ground that a promise or threat has been held out to the person confessing, unless the Judge or other presiding officer is of the opinion that the inducement was in fact likely to cause an untrue admission of guilt to be made."

In the case of R. v. Coats [1932] N.Z.L.R. 401. an attempt was made to define the word 'confession' as it appeared in the section at that time. Myers C. J. stated at page 405:

> "The point that calls for determination here has to be determined on the construction of our own statute. In my opinion the word 'confession' means just what it says and no more.
>
> ...
>
> In my opinion, on the true construction of that section, the word 'confession' means an admission of guilt - that is to say, an admission of guilt of the offence which is actually before the Court."

Smith J. stated at page 408 of the report:

> "In my opinion, the confession referred to in S. 20 of the Evidence Act, 1908, must amount to an admission of guilt. The person charged must use such words in such circumstances as to show that he acknowledges his guilt."

This decision re-enforces the view that in New Zealand where section 20 applies it only applies to full admissions of guilt. The common law applies to anything less than that.

The next decision to consider is R. v. Gardner [1932] N.Z.L.R. 1648. In this case a young Maori boy aged 16 years suspected of a crime was taken from his guardians home at 11 p.m. He was handcuffed to a policeman and taken along an unlit bush track to a waiting police car. He was then taken to the police station where at 4 a.m. he finally made a statement confessing to a murder. He was not originally taken in for questioning on the matter of the murder but on other unrelated offences. Smith J. held that the confession was inadmissible but had this to say in interpreting section 20 of the Evidence Act: (page 1649)

> "In New Zealand, in all cases where a promise or threat has been used, the provisions of S. 20 of the Evidence Act, 1908, are applicable, with the result that, even though a confession is induced by a promise or threat, it is admissible unless the Judge is of the opinion that the inducement offered or made was in fact likely to cause an untrue admission of guilt to be made. In my opinion, this is not the only rule to be applied in excluding a confession in New Zealand. Where no promise or threat can be said to have been used, yet if a violent procedure has been adopted when the confession was obtained and the Crown cannot show that the confession was not induced

by such violent procedure, the confession then obtained cannot, in my opinion, be regarded as free voluntary."

This part of Smith J.'s judgment was expanded in the case of R. v. Phillips [1949] N.Z.L.R. 316. It was in fact an expression of the same rule put forward in the Cornelius decision in Victoria. When Gardner went on appeal, however, a different approach was adopted as can be seen from the two following passages. Myers C. J. page 1660 stated:

"I see no reason for thinking that for the purpose of this section it is necessary that a threat should be made in words. I cannot see why the circumstances may not be such as to imply a threat, and I think this is so in this case."

Herdman J. at page 1664 stated along similar lines:

"A promise or threat need not be expressed. It may be implied from the conduct of the person in authority, the declarations of the prisoner, or the circumstances of the case ..."

The Court then exercised its discretion under the section to exclude the statement. The introduction of the doctrine of implied threat followed by an exercise of the discretion vested when interpreting section 20 was one further attempt by the Court to diminish the effect of that section. However, it was perhaps placing too wide an interpretation on the words and was not endorsed by the case of R. v. Phillips

which adopted Smith J.'s interpretation in the judgment of the lower Court. The Phillips decision had far reaching effects on section 20 of the Evidence Act, 1908, and the Legislature in the following year in stead of taking the opportunity of re-considering and perhaps abolishing the section took the strange course of amending the section to close the gap which had been opened by the Court decisions. There is no real need for the provision in either New Zealand or Victorian law but the politicians, supposedly well advised, did not see it that way. While on the one hand the Courts were making valiant efforts to evolve more control over the taking of confessions by the Police the Legislature on the other hand was doing its upmost to lessen the control.

In the Phillips case a nurse faced charges relating to the poisoning of a nursing sister at her hospital. A confession was obtained after statements were made to her by the detective conducting the inquiry. These statements amounted to a persuasion to admit guilt and consisted in telling the accused that all the evidence pointed to her (which as it turned out was not correct), the harrassing nature of the questioning in the face of her many denials, the reference to her previous conviction for theft, the suggestion that if a statement were not made then a more serious charge such as attempted murder would be brought, and lastly the suggestion that her nursing bursary might be affected.

It was held that the detective was definitely a person in authority in terms of the common law rule.

The statements by the detective in this case amounted to

less than "a promise or threat" and the Court, instead of adopting the view taken by the Court of Appeal in Gardner, held that where there is something less than a promise or threat then section 20 does not apply at all and the common law rules are then adopted. In stating the principle O'Leary C. J. at page 340 said:

> "It was, I think, assumed in New Zealand, as apparently it was in Victoria, that the section was an accurate expression of the common law, which it was thought dealt only with confessions, and that "threats and promises" were the only kind of inducements which could be taken into consideration. This was not the full sweep of the common law, as I will show later."

The Cornelius decision had of course long been made when Phillips came before the New Zealand Court. O'Leary C. J. went on to say at page 344:

> "Summarising what I have said, the common law appears to be that evidence of a statement or confession by the accused is admissible only if the prosecution proves to the satisfaction of the Judge that it was made perfectly voluntary. Further, the evidence is inadmissible if it is the result of an inducement made by some person in authority, and inducements are not restricted to promises or threats. The inducement need not be of such a character as is likely to cause an untrue confession.

This, then was the position when S.20 was passed. That section dealt with two specific kinds of inducements - promises and threats - and such were not to be rejected unless they were in fact likely to cause an untrue admission of guilt. Obviously it did not cover the whole field of the common law, though, as I have said earlier, it apparently was mistakenly thought to do so. It therefore left the common law to apply in all respects other than those covered by the section itself.

Remembering that the common law rejects only statements or confessions induced by persons in authority, and that statements not so induced are admissible, the question arises whether there is any such limitation imposed by S. 20. On this the section is silent, but as it was to an extent stating the common law I think the restriction should apply to cases coming under that section - that is, it is only promises or threats made by a person in authority that are covered by the section."

The Court in this case also made it plain that in section 20 by a 'confession' is meant a complete admission of guilt in respect of the offence with which the accused is charged, but there may be statements exculpatory and other than confessions which may well be considered inadmissible for the same reasons that confessions are.

Despite the fact that the Court was attempting to limit the operation of section 20 so that the common law rules could be adopted, it could also see that there would be a danger in being too liberal. It has been stated earlier that there is a balance which must be obtained between allowing the criminal to be free from harrassment and allowing the Police enought freedom to adequately investigate crime. On this balance O'Leary C. J. had this to say at page 339 of the report:

> "... whilst no Judge desires to hamper the Police in the bringing of criminals to justice, some balance must be kept, and, whilst the law requirements must be complied with before statements of accused can be made use of in evidence, restrictions of two onerous a character should not be placed upon the person whose duty it is to investigate and detect crime. Without information, the truth cannot be ascertained and justice cannot be done, and it is the duty of the Police properly to secure information for use in the Courts of Justice."

Following the Phillips case the New Zealand Government introduced an amendment to the Evidence Act 1908 and a new section 20 was enacted. It reads as follows:

> "A confession tendered in evidence in any criminal proceedings shall not be rejected on the ground that a promise or threat or any other inducement (not being the exercise of violence or force or other form of compulsion) has been held out to

> or exercised upon the person confessing, if the Judge or other presiding officer is satisfied that the means by which the confession was obtained were not in fact likely to cause an untrue admission of guilt to be made."

The effect of the amendment was to bring to an end the interpretation adopted in Phillips and to change the onus of proof from the accused (as it had been under the earlier section) to the prosecution.

It is interesting to consider the parliamentary debates on the amendment. (New Zealand Parliamentary Debates, Volume 290 P.P. 1891-1895 and Volume 291 P.P. 238-2390). The Bill was introduced by the Hon. Mr Webb (Attorney General) who appears to have known precious little about the existing law when recommending the Bill to Parliament. In fact he went so far as to say that the amendment would bring New Zealand into compliance with English Law! A debate then arose between himself and the Right Hon. Mr Nash who thought the mere fact that we had section 20 at all was inequitable. One of the lawyers in the House, the Hon. Mr Algie (Minister of Education and later Speaker) appeased Mr Nash by advising him that the Courts had an overriding discretion to exclude this statement even if it was admissible under the first part of the section. In discussing the background to the amendment he stated:

> "In the early days of our criminal jurisprudence it was the policy of our law to force the Crown to prove its case against the prisoner right up to the hilt. The reason was that historically

it was in many cases not competent for the prisoner to give evidence on his own behalf; so those technical and artificial rules were developed from time to time, and nowadays they look rather extraordinary. The purpose of criminal justice is to put before the Court all the relevant evidence that is available. But it was for a long time a principle of our jurisprudence that if a promise, threat, or inducement was held out to a person confessing, then the confession was automatically rejected. That resulted in very good decisions being made in the great majority of cases, but this was the sort of thing that could occur: A promise, threat, or inducement might be proved, and then the confession would be automatically excluded whether the promise or threat had any operative effect."

The Hon. Mr Mason who had earlier been Attorney General in the Labour Government could see perhaps more clearly than all others involved in the debate what was basically the problem. This is seen in the following passages from his speech:

"Clause 3 raises difficulties ... but, unfortunately, in one sense the difficulty ... relates really to so much of the clause as expresses the present law - this is a re-enacting clause, but really all the words as to which he raises questions are

the old words.

The new part of it really is 'any other inducement'.

The point about it is that 'promise or threat' is the expression used in the existing legislation, and if the observation made to the prisoner is weaker than that, then the evidence cannot be tendered, no matter how much less that weaker thing was likely/to have had influence than would the stronger thing. That is the absurdity that we were confronted with and that is the difficulty of resisting this clause, because the clause eliminates what is complete absurdity. That is not to justify the old section, of course, and if one were entering upon that old section for the first time, then many considerations would arise ..."

The Bill was passed and the opportunity which had presented itself by virtue of the Phillips case was lost. In seeing the difficulties the Court of Appeal was under as a result of section 20 the Legislature should have abolished the section and reverted to the common law. For some strange reason they went in the opposite direction and what followed was the most repressive legislation in the law relating to confessions of any of the four countries here under consideration.

The original rationale for section 20 was that it was an attempt to codify the common law rules. This was understandable having regard to the zeal with

which New Zealand has codified its criminal law. The rationale for the amendment in 1950 is unclear. The New Zealand Edition of Cross on Evidence has this to say: (page 505)

> "The rationale of S. 20 in its present form is unclear. Professor Cowen and Mr Carter, who suggest that the words 'other form of compulsion' would cover Police interrogation of suspected persons in custody, comment that it is 'difficult to see the principle which tests confessions induced by threats or promises by truth, but not those obtained by the nagging tactics of Police interrogations'. But it is submitted that only an extremely oppressive interrogation could properly be described as a 'form of compulsion', so that this criticism may rest on a false premise.
>
> The basic idea underlying S. 20 is plain enough: Therecomes a point at which the dislike of self incrimination and the desirability of discouraging improper Police methods prevail over the objective of arriving at the truth, andthat point is reached when violence or force are used on a suspected person. Whether this rationale also serves when an 'other form of compulsion' has been used must remain doubtful so long as it is uncertain what amounts an 'other form of compulsion'."

An attempt by the Courts toprovide a rationale can be found in the judgment of Turner J. inthe case of Naniseni v. The Queen [1971] N.Z.L.R. 269,275:

> "It may indeed be possible to contend that the tide is turning and that in an age in which the general level of education has tended to make accused persons well aware of their rights it is not necessary to give them quite the same degree of protection as seemed to be required in the days of R v Thompson."

As stated earlier there is Commonwealth authority for the proposition that a confession will be inadmissible if obtained at a time when the accused's mind was so unbalanced as to render it wholly unsafe to act upon it. One such decision is R v Williams [1959] NZLR 502, a case incidentally where section 20 of the Evidence Act 1908 was held to be excluded because no promise, threat or inducement was made. Hardie-Boys J on the question of the accused's state of mind said :

> "Anything in a criminal case which purports to be a confession or admission is a solemn statement or document to which a clear and not a distorted or disordered mind should be brought; the very choice or decision to make it at all must be voluntary. It is essential that the Judgment is not clouded nor the mind overwrought, although mere remorse and a desire to repent do not make it inadmissible. It must be the result of conscious recollection of the detail of the events described and not a reconstruction put together while the body is exhausted and the mind in a condition to be over-borne, so that every instinct

would be to have it finished as shortly and as simply as possible and gain respite and rest ..."

The case of Naniseni, however, placed a limitation on the ambit of this statement. In the Judgment of Turner J at page 274 it reads :-

"What must appear, if a confession is to be held voluntary , is in our opinion no more and no less than that it has been made by the prisoner, his will in making it not being over-borne by the will of some other person by means of some consideration such as has been mentioned above. Not that the considerations which we have ennumerated are to be narrowly interpreted as constituting a necessarily exhaustive list. But the factor which is relied upon as having over-borne, or is apt to over-bear, the will of the prisoner must be found in the will of some other person, by the exertion of which his confession is induced or is deemed by the law to have been induced. The will of some other person is essential; the involuntariness cannot be produced from within. Such consideration as fatigue, lack of sleep, emotional strain, or the consumption of alcohol, cannot be efficacious to deprive a confession of its quality of involuntariness, except, perhaps, so far as any of these may have been brought about or aggravated, by some act or omission of other persons to the end that a confession should be made. Of course such considerations as we have mentioned, while not

> sufficient to deprive a confession of its "voluntary" quality, may yet be relevant to subsequent stages of the matter. They may be relevant in the exercise of the Judge's discretion, and which he may decide, as a matter of fairness , not to admit the confession in evidence. Further, if he decides to admit it, the same consideration may be canvassed again before a jury, as a point of criticism against its probative effect."

Despite the limitations imposed by Naniseni it is in this area relating to the confessor's mental state that the common law rule of voluntariness still applies so long as section 20 is excluded from operating by virtue of the facts of the case.

The operation of section 20 can also be limited to a large extent by the sensible exercise by the Courts of the discretion left to them by the section itself. In exercising this discretion the Courts will, as in England, be swayed by the effect of the Judge's Rules in each case. The 1964 amended rules do not apply in New Zealand but those applying are as follows :-

1. When a Police officer is endeavouring to discover the author of a crime, there is no objection to his putting questions in respect thereof to any person or persons, whether suspected or not, from whom he thinks that useful information can be obtained.
2. Whenever a Police officer has made up his mind to

charge a person with a crime, he should first caution such person before asking him any questions, or any further questions, as the case maybe.

3. Persons in custody should not be questioned without the usual caution being first administered.
4. If the prisoner wishes to volunteer any statement, the usual caution should be administered.

It is desirable that the last two words of the usual caution should be omitted, and that the caution should end with the words "be given in evidence".

5. The caution to be administered to a prisoner, when he is formally charged, should therefore be in the following words, "Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you wish to do so, but whatever you say will be taken down in writing and maybe given in evidence".

Care should be taken to avoid any suggestion that his answers can only be used in evidence against him, as this may prevent an innocent person making a statement which might assist to clear him of the charge.

6. A statement made by a prisoner before there is time to caution him is not rendered inadmissible in evidence merely by reason of no caution having been given, but in such case he should be cautioned as

soon as possible.

7. A prisoner making a voluntary statement must not be cross-examined, and no questions should be put to him about it except for the purpose of removing an ambiguity in what he has actually said. For instance, if he has mentioned an hour without saying whether it was morning or evening, or has given a day of the week and day of the month which do not agree, or has not made it clear to what individual or what place he intended to refer in some part of his statement, he may be questioned sufficiently to clear up the point.

8. When two or more persons are charged with the same offence and statements are taken separately from the persons charged, the Police should not read these statements to the other persons charged, but each of such persons should be furnished by the Police with a copy of such statement, and nothing should be said or done by the Police to invite a reply. If the person charged desires to make a statement in reply, the usual caution should be administered.

9. Any statement made in accordance with the rules above should, whenever possible, be taken down in writing and signed by the person making it after it has been read to him and he has been invited to make any corrections he may wish.

The cases B. v. Convery [1968] NZLR 426 and Naniseni also have something to say on the exercise of the

Judge's discretion. In Convery Turner J stated at page 436 :-

> "A challenge to the admissibility of incriminating statements made before trial by an accused person maybe presented on one of two quite distinct grounds. First, it maybe submitted that the Crown has not satisfactorily shown the statements to have been made voluntary. (It maybe added here that in cases where the Crown fails to prove involuntariness, S. 20 of the Evidence Act 1908 may still be invoked, and in cases to which that section is held applicable statements maybe admitted, even where not shown to be voluntarily.) Secondly, even if statements tendered are ruled admissible in law, the Trial Judge (at least in cases in which no ruling has been given in favour of the Crown under S. 20) still has a discretion to reject them if he is of the opinion that the procedure under which they were obtained was unfair to the accused. This discretion is a comparatively modern development."

The same Judge in the latter case at page 271 similarly stated :-

> "Even if a confession is shown to be voluntary ... it will not necessarily be allowed by the Trial Judge to be produced at the trial. The discretion of the Court may at this stage be used to reject a confession obtained by unfair means."

In summary therefore the New Zealand law as now developed

is extremely and unnecessarily complex. It is so because of the curious conflict which arose in the first half of the century between the Judiciary and the Legislature. This conflict was resolved in an unsatisfactory way by the amendment to Section 20 in 1950. It was unsatisfactory because insufficient weight appears to have been placed by Parliament on what the Judiciary was trying to say. If the common law is now to be excluded then in the words of Cross (NZed) :-

> "There is a case for an authoritative statutory formulation of a code dealing with confessions, not only to remove some of the uncertainties caused by partial statutory modification of the common law, but also to enable the law to be fashioned on the basis of a consistent rationale."

Before leaving the New Zealand situation and considering the American system which represents the opposite extreme, it is interesting to consider a recent development in New Zealand law which to some extent relates to the American. It is strange that this development should have occurred having regard to the complex situation set out above. It can be stated, however, that the New Zealand Courts have been extremely innovative in the field of confessions and this new development is merely a further example of it.

In an article "Access to a Solicitor after Arrest" by Dr M W Doyle [1974] NZL J 420 there is collected together

a number of recent unreported New Zealand decisions on the accused person's right to a solicitor after arrest. These decisions have also been briefly reported from time to time in Recent Law. There is no right in law in New Zealand to see a solicitor at the Police station at the time of arrest. There is, however, a Police Department directive that arrested persons be allowed to see a solicitor.

The Courts have based their intervention into this field on the discretion which they have to disallow a confession even though legally obtained. There are three cases where the Courts have dealt with the matter.

The first is Nazer v The Ministry of Transport reported [1973] Recent Law 117. In this case Speight J considered an appeal by a Defendant who had been convicted of refusing to supply a blood sample under section 58C of the Transport Act 1962. The Defendant claimed that as he was denied access to a solicitor after the second breath test the entire procedure was invalid. It is true that this case is outside the field of confessions but part of the Judgment relates in principle :-

> "I repeat that there can be no excuse for the conduct of the Officers engaged in this affair. Even if a person is arrested he must not be held incommunicado, and if a sensible bona fide request is made for a solicitor or any other appropriate person to be communicated with, then attempts should be made to facilitate this. It maybe that circumstances do not

> permit it for remoteness or other reasons. But here, at the Central Police Station, there is a public telephone in the lobby and doubtless ample Police Department telephones readily to hand. No procedures or requirements which it was the duty of Officers to carry out would have been impeded by allowing the suspect to communicate with his solicitor."

The Judge held that the breath test was valid but to further mark his disapproval the Judge discharged the Appellant under S. 42 of the Criminal Justice Act 1954.

The second case is R v Puhipuhi [1973] Recent Law 139. In this case a 16 year old Maori boy refused to make a statement unless he could contact a solicitor first. The Police took a verbal statement from him without allowing him to contact his solicitor and without informing him that a verbal admission could be used against him.

In considering whether to exercise his discretion to exclude the confession Cooke J adopted Convery's case and concerned himself with the spirit of the Judge's Rulesrather than the technical application. He decided to exclude the confession in this case.

The third case is R v McDonald (unreported - Auckland 9 May 1974 per Mahon J). In this case the accused was found by Police, searched and placed in a patrol car for transportation to the Police Station. He was told he was wanted for

questioning. The questioning lasted for two hours and was conducted in a manner amounting to cross-examination.

Mahon J accepted that the accused was unwilling to make a statement until he had seen a solicitor. Access to a solicitor was denied. Eventually he made a statement which the Judge held, following Convery, that although voluntary, was not admissible because it was unfairly obtained. There were three factors which made the Judge decide this way. First, the accused was "in custody" at the time of questioning though not under arrest. Secondly, the manner of questioning without caution and by cross-examination was improper under the Judge's rules and the law is against the concept of detention by the Police for the purposes of interrogation. Thirdly, the accused had sought legal advice before making a statement but this was refused.

In discussing the effect of the latter decision Doyle states (p 422).

> "The McDonald case is not only illustrative of the two pronged attack on confessions (voluntariness and unfairness), it points out the possibilities which exist under the Courts broad discretion to exclude, quite apart from the voluntariness of the statement under the common law or S. 20 of the Evidence Act 1908. Recent Judgments demonstrate that the discretion is concerned primarily with fairness, and while the Judge's Rules should be looked to for guidance,

violations will not necessarily result in exclusion, especially if they are merely technical. Conversely, evidence maybe excluded in a situation where no specific Judge's Rule was violated, as in the above cases confirming denial of access to a solicitor."

The United States Position

Whereas the common law countries discussed have evolved their rules gradually through evidentiary principals the United States law as it now stands is based completely on constitutional considerations. Originally the position in the United States was based, like the Commonwealth countries, on the English common law. For a long time the principles developed in the same way as the English law but with greater emphasis perhaps on the freedom of the individual. The approach adopted can be seen through examples such as Mallory v US (1957) 354 US 449 where the Supreme Court in exercising its supervisory power over the administration of Federal criminal justice rejected confessions that were secured during a period of detention that exceeded what was necessary to bring the accused before the Court without unnecessary delay after arrest.

In the 1960s/however the Supreme Court in the United States made a radical and far-reaching change in its approach to the matter of confessions. The situation which exists now means that the Police are theoretically extremely hampered in their investigation of crime. Since the decisions there are

suggestions that in practice the Police are not fettered to the extent originally thought. However, the balance mentioned at the beginning of this paper, and which operates in England, can be said to weigh too heavily in favour of the criminal in the United States.

The case which indicated the start of the new approach was decided in 1964. This is the decision of the United States Supreme Court in Escobedo v Illinois (1964) 378 US 478 (12 L. ed. 2. 977). Escobedo was charged with murdering his brother-in-law. The law enforcement Officials took the Defendant into custody and interrogated him in a Police station for the purpose of obtaining a confession. The Police did not effectively advise him of his right to remain silent or of his right to consult with his attorney. Rather they confronted him with an alleged accomplice who accused him of having perpetrated a murder. When the Defendant denied the accusation and said "I didn't shoot Manuel; you did it" they handcuffed him and took him to an interrogation room - there questioned him for four hours while he was standing - and denied him his right to speak to his attorney. His attorney in fact gave evidence as to this. At his trial the State, over his objection, introduced a confession against him.

The Supreme Court in holding the statement inadmissible stated that it was doing so on the grounds that the accused had been denied his fundamental right to Counsel under the 6th Amendment.

Chief Justice Warren in his decision in the later case of Miranda when referring to the Escobedo decision stated that the holding in Escobedo was not an innovation in jurispurdence but merely an application of principles long recognised and applied in other settings. Be that as it may it was the first in a series of decisions adopting a new approach to the question of confessions. If it had existed before it had certainly not been stated with such force in any earlier decision.

The next series of decisions related to the 5th Amendment right to the privilege against self incrimination. These are Miranda v State of Arizona; Vignera v New York; Westover v US and California v Stewart. All/are reported together (1966) 384 US 436, 16 L. ed. 2d. 694.

These cases deal with the admissibility of statements obtained from an individual who is subjected to custodial Police interrogation and the necessity for procedures which assure that the individual is accorded his privilege against self incrimination. In the opinion delivered by Chief Justice Warren expressing the views of five members of the Court, governing principles were laid down, the most important of which is that, as a constitutional pre-requisite to the admissibility of such statements the suspect must, in the absence of a clear, intelligent waiver of the constitutional rights involved, the warning prior to questioning that he has a right to remain silent, that any statement he does make maybe used as evidence against him and that he has a

right to the presence of an attorney either retained or appointed. Clark J dissenting in part and concurring in part, expressed the view that the admissibility of a confession obtained by custodial interrogation should depend on the "totallity of circumstances". Three Judges dissented expressing the view that the decision of the Court represented poor constitutional law and entailed harmful consequences for the country at large. In a further minority opinion written by Mr Justice White it was stated that the proposition that the privilege against self-incrimination forbids in-custody interrogation without the warnings specified and without a clear waiver of Counsel has no significant support in the history of the privilege or in the language of the 5th Amendment.

The facts of each of the cases is as follows :-

a. Miranda

The Defendant was arrested by the Police and taken to a special interrogation room where he signed a confession which contained a typed paragraph stating that the confession was made voluntarily with full knowledge of his legal rights and with the understanding that any statement he made might be used against him. At his trial in an Arizona State Court, at which the confession was admitted in evidence, he was convicted of kidnapping and rape. On appeal, the Supreme Court of Arizona affirmed on certiorari, the Supreme Court of US reversed, holding that the Defendant's confession was

inadmissible because he was not in any way appraised of his right to Counsel nor his privilege against self-incrimination effectively protected in any other manner.

b. Vignera

The Defendant made an oral confession to the Police after interrogation in the afternoon and then signed an inculpatory statement upon being questioned by an assistant District Attorney later the same evening. At his trial in a New York State Court on a charge of robbery, the defence was precluded from making any showing that warnings of his right to Counsel and his right to silence had not been given. His conviction was affirmed by the Appellate Division, Second Department and by the Court of Appeal, remittitur amended. On Certiorari the Supreme Court of the United States reversed on the ground that the Defendant was not warned of any of his rights before the questioning by the Police and by the assistant District Attorney, and that no steps were taken to protect these rights.

c. Westover

The Defendant was arrested by Kansas City Police as a suspect in Kansas City's robberies, and was interrogated in the private interview room of the Police Department for a lengthy period. He was then handed over to the FBI and interrogated by three special agents, who after some two hours obtained two signed confessions to each of two California robberies

(Federal offences). At his trial in the United States District Court for the Northern district of California, at which the confessions obtained by the FBI were admitted in evidence, he was convicted of the California robberies, and his conviction was affirmed by the Court of Appeal for the 9th Circuit. On certiorari the Supreme Court of the United States reversed on the ground that the Defendant did not knowingly and intelligently waive his rights to remain silent and his right to consult with Counsel prior to the time he made the confessions, since the interrogations, though conducted by two legally distinct law enforcement authorities, had the impact on him of a continuous period of questioning.

d. Stewart

Local California Police held the Defendant in the station for five days and interrogated him on nine separate occasions before they secured his confession, the defendant denying the alleged offences through eight of the interrogations. At his trial in a California State Court on a charge of kidnapping to commit robbery, rape and murder, his confession was introduced in evidence. He was convicted but on appeal the Supreme Court of California reversed, holding that the confession was not admissible because the defendant should have been advised of his right to remain silent and of his right to counsel. On certiorari, the Supreme Court of the United States affirmed on the ground that the Court would not presume that the defendant had been effectively

appraised of his right, on a record which did not show that any warnings had been given or that any effective alternative had been employed.

The Court in reaching these decisions delved far deeper into the principles relating to confessions in American Law than any previous Court had ever gone. At page 439 Chief Justice Warren who delivered the majority decision states:

"The cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence: the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crimes. More specifically, we deal with the admissibility of statements obtained from an individual who is subjected to custodial and Police interrogation and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself."

The holding of the Court is stated at pages 444-445 of the report and can be listed as follows.

(a) The prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self incrimination.

(b) By custodial interrogation the Court meant the questioning initiated by law enforcement officers

after a person had been taken into custody or otherwise deprived of his freedom of action in any significant way.

The procedural safeguards were also listed as follows:

(a) Prior to any questioning the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.

(b) The defendant may waive these rights provided the waiver is made voluntarily, knowingly and intelligently.

(c) If, however, he indicates in any manner at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning.

(d) Like wise if the individual is alone and indicates in any manner that he does not wish to be interrogated the Police may not question him.

(e) The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consented to questioning.

(f) If interrogation continues without the presence of an attorney and a statement is taken there is a heavy onus on the prosecution to demonstrate that the defendant knowingly and intelligently waived his

privilege against self incrimination and right to retained or appointed counsel.

In devising these rules the Court drew information from the Police techniques of interrogation as described in their manual rather than case records as a guide to what happened to the detainee after apprehension by the Police. The Court accepted that there were abuses of Police power and in fact set out examples of this. After discussing such examples Chief Justice Warren stated further at page 447:

> "The examples given above are undoubtedly the exception now, but they are sufficiently widespread to be the object of concern. Unless a proper limitation upon custodial interrogation is achieved - such as these decisions will advance - there can be no assurance that practices of this nature will be eradicated in the foreseeable future."

In considering the rationale for the Courts sudden change in approach it can be seen that the Court was concerned, first, with the eradication, if that were possible, of Police excesses in interrogation. Secondly, it was concerned that all confessions were voluntarily made and last that confessions were truthfully made. These underlying rationalisations are in many respects similar to those forming the basis of the common law rules.

As to what constitutes a voluntary confession the Court cited Mr Justice Brandeis in Wan v. U.S. 266 U.S. 1 where

he stated:

> "... the requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or threat. A confession is voluntary in law if, and only if, it was, in fact, voluntarily made.
>
> ...
>
> But a confession obtained by compulsion must be excluded whatever may have been the character of the compulsion, and whether the compulsion was applied in a judicial proceeding or otherwise."

In discussing the right to have counsel present Chief Justice Warren at page 466 of Miranda showed that the truth of confessions presented in evidence was a relevant consideration.

> "That counsel is present when statements are taken from an individual during interrogation obviously enhances the integrity of the fact finding processes in Court. The presence of an attorney, and the warnings delivered to the individual enabled the defendant under otherwise compelling circumstances to tell his story without fear, effectively, and in a way that eliminates the evils in the interrogation process."

To show that the Court was not concerned that their radical approach would lead to widespread lawlessness the Chief Justice considered the other jurisdictions of Scotland, England, India, Ceylon and the Uniform Code of

Military Justice wherein restriction on obtaining confessions are delineated. He then went on to say at page 489 of the report:

> "There appears to have been no marked detrimental effect on criminal law enforcement in these jurisdictions as a result of these rules. Conditions of law enforcement in our country are sufficiently similar to permit reference to this experience as assurance that lawlessness will not result from warning an individual of his rights or allowing him to exercise them. Moreover, it is consistent with our legal system that we give at least as much protection to these rights as is given in the jurisdictions described. We deal in our country with rights grounded in a specific requirement of the Fifth Amendment of the Constitution, whereas other jurisdictions arrive at their conclusions on the basis of principles of justice not so specifically defined."

It is considered, however, that in stating this he was oversimplifying the approach adopted in the other jurisdictions. The Miranda decision went far further than any decision, at least in England, had ever gone in granting freedom to an accused person in the manner of interrogation. It must be borne in mind also that in the Miranda decisions the convictions originally entered were quashed. This is not to say however, that should a confession be irregularly obtained in a trial then an acquittal will result. The Chief Justice in Miranda made it plain that

the states would need to develop some procedure whereby the validity of a confession could be tested independently of the main trial before it was admitted in evidence. In English law of course the procedure adopted is the voire dire. If a confession were to be excluded then a conviction could still result if the other evidence were sufficently strong.

Because the Miranda decisions were so innovative there was widespread discussion in the legal journals and periodicals of its likely effect. It has been stated earlier than the original expectations have not in all cases been met. There are suggestions that the Police have adapted their procedures to meet the requirements of Miranda and this has not lead to too severe a restriction on their activities in detection. In an article in the Harvard Law Review (1966) Volume 80 at page 201 it is suggested that one gap left in the wall of warnings set out in Miranda is that the Police need not advise the suspect that they may not ask questions until he consents. This gives some idea of the approach which the Police have used in adapting. The strict interpretation of restrictions in an effort to limit their application is by no means new as the New Zealand experience with section 20 of the Evidence Act 1908 shows.

In an article in the Columbia Law Review (Protections For The Suspect Under Miranda v. Arizona (1967) 67 Columbia L. R. 645) the authors considered the problem from a wider ambit and in an attempt to devise a procedure for improving the eternal problem of discrepancy between the Police and

the accused as to what happened during interrogation suggested the following:

(a) The use of lawyers present - although this presents a problem if the lawyer has to testify against his client.

(b) Tape recordings of the interrogation.

(c) Photographs and videotapes.

(d) Examination before a Magistrate.

(e) Widespread reform of Police procedures.

(f) Legislative reform limiting the time for interrogation, speedier arraignments and better records.

Herman Schwartz in an article in (1965/1966) 33 Chicago Law Review 719 discusses the reasons behind the decisions, in particular the Escobedo decision. One of the most common explanations, he says, is that the decision was designed primarily to eliminate the possibility of coerced confessions by preventing the creation of a coercive environment . A related explanation was that the case was a reaction to the Courts inability to penetrate the interrogation room to determine whether the confessions before it were indeed voluntary. Schwartz's article deals primarily with the retroactivity of the decisions and this matter was resolved for him when the Supreme Court one week after Miranda decided that both Escobedo and Miranda would operate in those trials which began after the respective dates of the delivery of the decisions in each.

Of the jurisdictions discussed in this paper the effect of Miranda and its related decisions in the United States has meant that that country has the greatest control on its Police in obtaining of confessions. It is debatable whether the law in that country is not now so restrictive that Police activity in obtaining confessions has been so curtailed as to be non-effective. There has certainly been a severe restriction placed on the detection of crime. The United States Supreme Court must have felt that the time had come to put some form of restraint on Police misuse of powers but at the same time it is considered that the Miranda decision has gone too far past the happy medium which exists in English law and most of the Australian States. That the majority was placing too wide an interpretation on the Fifth Amendment was not without comment amongst the dessenting decisions in Miranda.

Conclusion

In summarising the four jurisdictions it can be seen that at both ends of the scale from the point of view of control are the jurisdictions of the United States and New Zealand. The latter has evolved its rules in a somewhat confused way so that the control on Police activity is ultimately left to the completely subjective discretion of the presiding Judge. In the United States on the other hand the controls are so restrictive that the danger of incapacity on the part of the Police to carry out a traditional part of its detection of crime has arisen. The happy medium is perhaps seen in the English system where a system of time honoured principles of law and Judges directions to the Police has evolved.

Between the English system and that operating in New Zealand is the Victorian situation where having enacted a provision reducing the controls on Police the State has allowed the Courts through interpretation to weaken the position to such an extent that much of the common law originally thought inoperative now applies.

Mentioned in the introduction to this paper is the report the English Criminal Law Revision Committee on the rights of the accused and its critique by the English Criminal Bar Association. The Bar Association's main criticism of the report is its seeming intention of changing the law to secure more convictions. The critique agrees that it is vital that deliberate law breakers should be brought to justice but considers it equally important that essential safeguards for the innocent are established.

As stated earlier the report proposed that silence at the Police station could be made the subject of adverse comment at the trial. In the face of criticisms of this the Committee said that the accused would retain his right of silence because it would not become an offence to keep silent. The Bar Association rightly stated that this argument was unconvincing because

> "A person cannot be described as having a right of silence if in exercising it he may well provide evidence against himself of guilt of an offence of which he may be entirely innocent."

The Association furthermakes the point that when the report complains that hardened criminals take advantage of the present rule to refuse to answer any questions so do

thousands of other citizens, law abiding as well as offenders.

The critique then considers at length the other proposals of the Committee such as abolition of the cautions in their present form and the replacing of them with a warning to the suspect that failure to speak up might result in adverse inferences being drawn at his trial. Such proposals, the critique says, would make Police interrogation open ended and give unacceptable powers to the Police.

The report was obviously concerned that the way in which the law had developed was leading to a large number of hardened and sophisticated criminals obtainig acquittals in cases where confessions, if they could be obtained, would be heavily relied on in the absence of stronger evidence. However, if adopted the proposals would have led to an over-reaction and a system far too oppressive.

Finally this paper will deal in the American context with a new approach to this matter found in the book "The Limits of Criminal Sanction" by Herbert L. Packer. Packer's thesis is evolved by relating aspects of the criminal law to two models: the Crime Control Model and the Due Process Model. It is interesting to relate these models to the various jurisdictions. Of the two models Packer states:

> "The Crime Control Model tends to de-emphasise this adversary aspect of the process: The Due Process Model tends to make it central." (p. 157)

He goes on to say that the value system that underlies the Crime Control Model is based on the proposition that

the repression of criminal conduct is by far the most important function to be performed by the criminal process. Adopting this basis the English Criminal Law Revision Committee' proposals are the Crime Control Model at its best. The system underlying the Due Process Model on the other hand is likened to an obstacle course. Each of its successive stages is designed to present formidable impediments to carrying the accused any further along its process. Its idealogy is impressed on the formal structure of the law.

In relating the models to the confession situation Packer states that the Crime Control Model would operate on the following assumptions:

The Police cannot be expected to solve crimes by independent investigation alone and the best source of information is the suspect himself. Accordingly the police must have a reasonable opportunity to interrogate a suspect in private before he has a chance to fabricate a story or to decide that he will not co-operate. Psychologically the best time to achieve this is immediately after his arrest and he should not be allowed to summon his family or friends or more importantly his lawyer.

The police under this model should not be entitled to hold the suspect for interrogation indefinitely nor would they want to do so. The point of diminishing returns in interrogation is reached fairly soon. The length of time will be a matter for the circumstances of each case.

The suspect's family should know where he is but not communicate with him but in some cases such as where a

co-offender is still at large even the suspect's family should know where he is.

No hard and fast rules should be laid down and the rules should be so flexible that good faith mistakes by the Police should not be penalised.

As far as confessions themselves are concerned any trustworthy statement obtained from a suspect during interrogation should be admissible. If Police coercion is alleged then the onus is on the suspect to convince the trier that such coercion lead to an untrue admission being made.

The Due Process Model would, however, operate on different assumptions. The decision to arrest would need to be based on probable cause to suspect a crime had been committed by the person arrested. He is to be arrested to answer the case against him not so that the case against him can be developed.

He must be brought before the court without unnecessary delay. Once before the Court conditions of bail must be promptly set. He is to be entitled to Counsel as soon as he is arrested.

It is never proper for the Police to hold a suspect for interrogation or investigation. The Police may question him during the time after arrest and his appearance before the Court.

As soon as the suspect is arrested, he should be told by the Police that he is under no obligation to answer questions, that he will not suffer by refusing to answer questions, that he may answer questions to clear himself

but that his answers may be used in evidence against him and that he is entitled to Counsel.

Any confession will not be admissible if the Police failed to warn him of his rights, if he was questioned after the warnings were given unless he waived his rights, if the confession was obtained during a period of detention exceeding that necessary to bring him before the Court after his arrest and if the confession was obtained by force.

The rationale of such an exclusion is not that the confession is untrustworthy but that it offends against the rule that it is up to the State to prove its case without forcing the suspect to co-operate in the process.

Packer having set forth the two models then goes on to consider the Miranda and Mallory decisions which quite clearly come within the Due Process Model. Indications are, he states, that Miranda has not appreciably reduced the number of confessions made and if Miranda does not produce the intended effect the Court is likely to take the next step in the Due Process Model of flatly prohibiting the use in evidence of statements made by suspects to the Police.

Under New Zealand and Victorian law of course the law has developed towards the Crime Control Model (to the extent that section 20 applies) while in England the opposite is the case.

On the question of access to Counsel Packer again relates the issue to the two models. The Crime Control Model in this respect is based on the following assumptions:

The phase were interrogation takes place is investigative not judicial. The defendant's rights are sufficiently protected by the offer to see that his lawyer, if he has one, is notified that he is being held. There is no reason why the defendant should be given the right to see his lawyer during the interrogation period. The Police should have no interference at this stage. The Police do not arrest without probable cause and this is their only chance to enlist the co-operation of the one person most likely to know the truth. The lawyer will tell him to say nothing and the Police will be given a harder job and an innocent suspect won't be able to clear himself. The only assistance of a lawyer is therefore to a guilty suspect. If the police are not allowed to operate in this way the protection which the community enjoys against criminal activity will decline. Finally a lawyer's place is in Court - he should not enter a case until this stage.

The Due Process Model can be best shown by using Packer's exact description (page 203):

> "A hardened and sophisticated criminal knows enough to keep silent in the face of Police interrogation. He knows that self exculpatory statements are often incriminating. He knows that he does not have to talk and that he is not likely to realise any advantage by talking. An inexperienced person in the toils of the law knows none of this.

Unless the operative rules forbid it the situations of these two catagories of suspect are bound to be unequal.

Likewise, there is no moment in the criminal process when the disparity in resources between the State and the accused is greater than at the moment of arrest. There is every opportunity for over-reaching and abuse on the part of the Police. There is no limit to the extent to which these opportunities are taken advantage of except in the Police's own sense of self-restraint. Later correctives palliate but do not suffice. What actually takes place in the Police station is known only to the suspect and to the Police. It is not hard to predict whose word will be taken if a contradiction arises.

The only way to ensure that these two equally obnoxious forms of inequality do not have a decisively malign impact on the criminal process is to require at the time of arrest (1) that the suspect be immediately apprised of his right to remain silent and to have a lawyer; (2) that he promptly be given access to a lawyer, either his own or one appointed for him; or (3) that failing the presence of a lawyer to protect the suspect's interest, he not be subjected to Police interrogation."

The common law countries have no established rules of law on the right ot Counsel. To this extent the theory at least they perhaps tend towards the Crime Control Model. The Judges

Rules in their various forms however probably provide adequate protection and in practice the Due Process Model applies. In America of course the Escobedo and Miranda decisions leave no doubt that the Due Process Model operates.

Surprisingly the recent developments in New Zealand case law show that New Zealand in this respect has opted quite clearly in favour of the Due Process Model.

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