Confessions, Admissions and Declarations by Persons Accused of Crime Under Scots Law.

A historic and comparative study

by

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"It is remarkable that it is of very rare occurrence for evidence of a confession to be given when the proof of the prisoner's guilt is otherwise clear and satisfactory; but when it is not clear and satisfactory, the prisoner is not infrequently alleged to have been seized with the desire borne of penitence and remorse to supplement it with a confession; - a desire which vanishes as soon as he appears in a court of justice."

R v Thompson [1893] 2 QB 12 per Cave J.

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Chapter 6 The Admissibility of Evidence of Confessions in England - a Comparative Note

6.1 Introduction

As has been shown, Scots law has treated the admissibility of confessions and admissions almost entirely as a matter of discretion based on the notion of fairness. On the other hand, prior to PACE, English law approached the matter from two angles. In the first place there was a more or less firm exclusionary rule of considerable antiquity, [1] based on the concept of voluntariness and the absence of inducement. Later oppression was added as a further criterion leading to automatic exclusion. In the second place the judge might rule a confession inadmissible in exercise of his general judicial discretion, even though the confession was, as a matter of law, voluntary. To put it another way, where the Crown failed to prove that the confession was voluntary it was inadmissible as a matter of law, but even if the Crown overcame this test the confession might still be rejected by the judge on the ground of fairness to the accused. In the context of confessions this exclusionary discretion was often, although by no means exclusively, associated with breaches of the Judges Rules. As Lord Devlin has put it :

> "The prisoner is entitled to demand as of right the rejection of an involuntary confession. In the case of evidence obtained in breach of the Judges Rules he has no such right; the judge has a

> discretion to admit or reject the evidence as he sees fit; ... " [2]

The Judges Rules were intended to guide the police as to the basis on which the courts would exercise their discretion in relation to the questioning of suspects. They were rules of practice only and did not affect the overriding principle that an involuntary confession could never be admissible. The distinction has been put thus by Lord Goddard CJ:

> "The test of admissibility of a statement is whether it is a voluntary statement. There are certain rules, known as the Judges Rules which are not rules of law but rules of practice drawn up for the guidance of police officers; and if a statement has been made in circumstances not in accordance with the Rules, in law that statement is not made inadmissible if it is a voluntary statement, although in its discretion the court can always refuse to admit it if the court thinks there has been a breach of the Rules." [3]

Notes

1. Joy p5
2. *The Criminal Prosecution in England* p37
3. R v May (1952) 36 Cr App R 91 at 93

6.2 The Development of the Common Law Exclusionary Rule

The early history of confessions in England is unclear. English law has long distinguished between extra-judicial confessions (those made to officials and others before trial) and judicial confessions (those made at the trial). A full confession in open court was, from the earlest times, treated as equivalent to a finding of guilt following trial. Extra-judicial confessions are known to have played a part in the criminal process from as early as the first quarter of the thirteenth century. It is also known that the law excluded involuntary confessions even before the the historic decision in Warickshall (1783) 1 Leach CC 263 and it is likely that the requirement of voluntariness existed in respect of judicial confessions by the middle of the sixteenth century. [1]

Torture existed in England in much the same way as it did in Scotland. It seems to have reached a peak during the second half of the sixteenth century but, as in Scotland, it never became a routine part of criminal procedure and seems to have been principally (though not exclusively) associated with crimes of state. Torture was also more commonly used to secure information about accomplices than to extract confessions. The use of torture in England was not extensive and the researches of J.H. Langbein only uncovered 81 cases between 1540 and 1640 where it is definitely known that warrants for torture were issued. [2] It is clear that the Privy Council kept torture under close control and never allowed it to fall into the hands of regular law

enforcement officers [3] and as in Scotland torture could not be employed without special warrant. Torture in England never became institutionalised, largely because there was no need for it to become so. The jury standard of proof made it unnecessary to provide for extensive and refined evidence-gathering. An English jury could convict on whatever evidence persuaded it and could convict on less evidence than was required as a pre-condition for investigation under torture on the continent. Torture was not abolished in England, it simply died out. [4]

England experienced periodic outbreaks of brutal witch-hunting, notably around 1645, but Langbein takes care to exclude "coercion inflicted without authority" from his definition of torture and he also points out that because the witch finders lacked conciliar authority for their activities they were liable to civil and criminal legal actions, several of which are known to have taken place. [5]

According to Mirfield, it is possible that the notion that extra-judicial confessions should not be received unless voluntary began to grow up during the "century of torture" between 1540 and 1640 and most probably from 1600 onwards. The case of Felton (1628) 3 How. St. Tr. 371 has generally been taken as deciding that the use of torture was in all cases contrary to common law, although the correctness of this interpretation is not beyond doubt, but around the same time Coke, who had himself been a commissioner for torture, was arguing unequivocally that torture

was unlawful in all cases.[6] Mirfield suggests that the "voluntary" requirement for extra-judicial confessions arose from three factors: (1) the existing requirement for voluntariness in relation to judicial confessions; (2) the decision in Tonge (1662) 6 How. St. Tr. 225 holding that a confession before a Privy Councillor or Justice of the Peace "without torture" would remove the need for two witnesses to an overt act of treason required by statute; and (3) the view of the court in the same case that no promise of a pardon or threats should be made towards a witness in any case lest he "did not give the full evidence".

The first clear statement of an exclusionary rule in English law appeared, admittedly obiter, in Warickshall where the court stated

> "A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers; but a confession forced fron the mind by flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it, and therefore it is rejected."

Despite this obiter dictum, judicial confidence in confessions does not seem to have been generally high during this period, [7] although the rule that a person might be convicted on the basis solely of his confession and without corroboration of its contents dates from 1789. [8]

Mirfield follows Wigmore in referring to the years from 1800 to 1852 as the period of "sentimental irrationality". During this period the courts were keen to exclude confessions, seemingly concentrating solely on whether there had been a threat or promise and rarely asking whether the threat or promise would have been likely to induce a false confession. The law also tended to become rigid and unable to adapt to the circumstances of the individual case, leading to absurdities such as Croydon (1846) 2 Cox CC 67 where it was held that "you may as well tell me about it" was equivalent to "you had better tell me", it being settled law that any statement along the lines of the latter would lead to exclusion. [9] Undue attention was also paid to the propriety of the conduct of the person questioning the suspect, this also tending to produce absurdities and decisions which are impossible to support on any sort of objective criteria. [10]

Professor R.W. Baker has described this period in the following terms:

> "The early years of the nineteenth century saw a great swing away from the notions which had prevailed two hundred years before. The period of old toryism was superceded by a new spirit of

liberalism. Confessions were excluded upon proof of the most trivial inducement and it was not until the case of R. v Baldry in 1852 that some proportion was introduced into what we can only call liberalism run wild." ''

Three reasons have been suggested '2 for this situation: (1) accused persons being predominantly from the lower social classes might be thought likely, by judges, to have an attitude of subordination to those in authority over them, especially landowners and employers. Thus trivial inducements and meaningless threats might be effective to make their confessions unreliable; (2) at this time there was no formal system of criminal appeal and this may have predisposed judges to resolve doubts about admissibility in favour of the accused; (3) the accused had no general right to counsel's assistance before 1836 and he was generally incompetent to testify before 1898.

A similar explanation has been furnished by Lord Hailsham:

> "... at that time almost every serious crime was punishable by death or transportation. The law enforcement officers formed no disciplined police force and were not subject to effective control by the central government, watch committees or an inspectorate. There was no legal aid. There was no system of appeal. To crown it all the accused was unable to give evidence on his own behalf and

was therefore largely at the mercy of any evidence either perjured or oppressively obtained, that might be brought against him. The judiciary were therefore compelled to devise artificial rules designed to protect him against dangers now avoided by more rational means." [13]

Passing reference has been made to the leading case of Baldry (1852) 2 Den 430. Professor Baker describes this case as introducing some proportion to the admission of confessions, but it would be wrong to think that it resulted in a drastic change of approach by the courts. In Baldry a police constable had told the accused what he was charged with and had then cautioned him that "he need not say anything to criminate himself, what he did say would be taken down and used as evidence against him." Notwithstanding this warning, Baldry confessed to murder. Lord Campbell CJ considered that the policeman's words did not amount to a promise or threat to induce the prisoner to confess, but he thought it proper to reserve the question for the Court of Criminal Appeal who agreed that the confession had been rightly admitted and took the opportunity to overrule a number of earlier cases to the opposite effect. Parke B. put the matter clearly:

> "By the law of England in order to render a confession admissible in evidence it must be perfectly voluntary; and there is no doubt that any inducement in the nature of a promise or of a threat held out by a person in authority vitiates

a confession. The decisions to that effect have gone a long way; ... but I think there has been too much tenderness towards prisoners in this matter. I confess that I cannot look at the decisions without some shame when I consider what objections have prevailed to prevent the reception of confessions in evidence; and I agree ... that justice and common sense have, too frequently, been sacrificed at the shrine of mercy."

The cases which followed Baldry were largely concerned with whether the particular form of words used could be regarded as a threat or promise held out by a person in authority and if they could, the confession was excluded. By the close of the nineteenth century the exclusionary rule, although still theoretically based on the idea that confessions which followed threats or promises were of doubtful reliability, was being applied in this rigid and technical way and the courts were still stopping short of asking the next logical question namely whether the particular threat or promise made the particular confession unreliable in the particular circumstances.

Notes

1. Mirfield pp 42-43
2. Langbein *Torture and the Law of Proof* (Chicago, 1977) p91 et seq. The author restricts his consideration to "judicial torture", ie the use of physical coercion by officers of the state in order to gather evidence for judicial proceedings.
3. Langbein op cit p136
4. Langbein op cit pp138-139
5. Langbein op cit p210 note 49
6. Mirfield p45

7 Mirfield pp48-50
8. Wheeling (1789) 1 Leach CC 311 (n)
9. This point was put completely beyond doubt by Garner (1848) 1 Den 329.
10. eg Sexton (1823) quoted by Mirfield p51
11. *The Hearsay Rule* (London, Pitman, 1950) p54
12. Mirfield p 52, quoting Wigmore
13. DPP v Ping Lin [1976] AC 574 at 600

6.3 The Mature Exclusionary Rule

The classic statement of the common law exclusionary rule as developed by the English courts is in the judgment of Lord Sumner in the Privy Council case of Ibrahim v R [1914] AC 599. In this case a soldier in the Indian army was arrested and charged with the murder of an officer. The arrest took place immediately after the crime and some 10 to 15 minutes later the commanding officer asked Ibrahim "Why have you done such a senseless act?" The soldier immediately replied "Some three or four days he has been abusing me; without a doubt I killed him". It was argued that the trial judge ought to have excluded this evidence in exercise of his discretion although there was no evidence that the soldier had been subjected to any pressure of fear or hope. Lord Sumner's words have been much quoted:

> "It has long been established as a positive principle of English criminal law that no statement by an accused is admissible in evidence against him unless it is shewn 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."

Mirfield points out that Lord Sumner makes no mention of "threats" or "promises" and consistently makes use of the phrases "fear of prejudice" and "hope of advantage". His conclusion is

that his Lordship was restating the established rule in his own terminology rather than trying to change the law. ' In any event, this formulation was to become the basis of the exclusionary rule as operated by the English courts for the next seventy years.

The clearest statement of the mature exclusionary rule is found in principle (e) of the Judges Rules of 1964 which laid down:

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

The only departure from Lord Sumner's words is the addition of the phrase "or by oppression." This addition appears to derive from an obiter dictum of Lord Parker CJ in Callis v Gunn (1963) 48 Cr App R 36, a case which was not directly concerned with confessions but related to the taking of fingerprints. His Lordship pointed out that a much stronger rule applied to the admissibility of statements to the police and confessions than applied to other evidence and added:

> "There it 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."

The question of what amounted to "oppression" was considered in R v Priestley (1965) 51 Cr App R 1 where Sachs J. said that it

> "imports something which tends to sap and has sapped that free will which must exist before a confession is voluntary."

His Lordship also pointed out that the decision on whether there had been oppression in an individual case would depend on many elements:

> "They include such things as the length of time of any individual period of questioning, the length of time intervening between periods of questioning, whether the accused person had been given proper refreshment or not, and the characteristics of the person who makes the statement. What may be oppressive as regards a child, an invalid, or an old man, or somebody inexperienced in the ways of this world may turn out not to be oppressive when one finds that the accused person is of a tough character and an experienced man of the world."

The existence of the "oppression" head of the exclusionary rule was recognised by the Court of Appeal in R v Prager (1972) 56 Cr

App R 151. Their Lordships adopted the definition of oppression put forward by Sachs J. in Priestley and also a passage from an address by Lord MacDermott to the Bentham Club [2] when his Lordship defined "oppressive questioning" as:

> "... 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."

Professor Cross has pointed out [3] that a literal interpretation of Lord MacDermott's words could have unfortunate consequences since "if the rare case of a contrite man who makes a more or less spontaneous confession is excluded, every confession that was ever made was probably made in consequence of questioning but for which the maker would have stayed silent."

In a series of cases between Prager and the paseing of PACE, [4] the Court of Appeal set a very high threshhold before custodial interrogation became oppressive *per se*. Although the actual point at which oppressiveness arrived would depend on the circumstances of the case, the character of the suspect was of considerable relevance:

> "... serious and experienced criminals when they are apprehended must, and do, expect their interrogation by trained and experienced police

officers will be vigorous. Long and repeated questioning will not necessarily amount to oppression." [5]

The phrase "person in authority", which was certainly in use by the 1820s, [6] was never authoritatively defined but a definition of sorts was offered in Deokinanan v R [1969] 1 AC 20 when Viscount Dilhorne quoted with approval a statement by a Canadian judge that "A person in authority means, generally speaking, anyone who has authority or control over the accused or over the proceedings or the prosecution against him." The concept also extended to one who was acting in the presence and without the dissent of such a person.[7]

It also followed that if the inducement had come from one who was not a "person in authority" the confession would not necessarily be excluded. The test applied in such a situation was whether the promise or threat was of a description which might be presumed to have had such an effect on the mind of the defendant as to induce him to confess. [8]

The categories of "inducement" sufficient to render a confession involuntary have never been closed. [9] Some of the decisions, even comparatively recent, are quite absurd and offend against common sense. For example in R v Northam (1967) 52 Cr App R 97 the accused, before confessing, had asked the police if it would be possible for another offence to be taken into consideration.

One of the officers said that the police would have no objection to this course. This was held, by a rather reluctant Court of Appeal, to be a sufficient inducement to justify quashing the conviction. [10] Again in R v Zaveckas (1969) 54 Cr App R 202 a conviction was quashed because the accused asked the police "If I make a statement will I get bail now?" and an officer answerd "Yes". Other examples in a similar vein may be found. [11]

Obviously if violence were used or threatened any resulting confession would not be voluntary. Apart from this the inducement might take many forms. The threat or promise did not have to relate to the charge or contemplated charge against the defendant but it might relate to some other matter such as prosecution for another offence. [12] Likewise the threat or promise did not have to impinge on the defendant personally but might relate to his family, friends or possibly even a total stranger. The remoteness of the person concerned would go to the weight of the evidence that a threat had been made but if the threat were established the confession would be inadmissible. [13]

If the impression produced by the promise or threat was clearly shown to have been removed, for example by lapse of time or a subsequent caution by another person of superior rank to the person who had held out the inducement, a subsequent confession would be admissible. [14]

There had been a faint hint of a liberalisation of the rule in D.P.P. v Ping Lin [1976] AC 574 where the House of Lords held that the prosecution had to show as a matter of fact that the threat or promise had not induced the confession. In this case a drugs dealer had asked the police, "If I help the police will you help me?" and an officer replied, "I can make no deal with you but if you show the judge that you have helped the police to trace bigger people I am sure he will bear it in mind when he sentences you." The subsequent statement was held admissible.

Subsequently there was a much stronger hint in R v Rennie (1982) 74 Cr App R 207 when the Court of Appeal stated that the law was as laid down by Lord Sumner in Ibrahim, and it was unnecessary and undesireable to complicate matters by considerations of whether conduct was "improper" or constituted an "inducement." The sense and spirit of Lord Sumner's principle were more important than the particular wording in which it was expressed. Above all it was to be applied with common sense. The trial judge should also remind himself that "voluntary" in ordinary parlance meant "of one's own free will". Interestingly, this decision was criticised [15] as tending to uncertainty in the law. However PACE intervened before it became clear whether Rennie would in fact have led the courts to a major change of approach.

The legal burden of proving that a confession was voluntary was clearly placed on the prosecution by the decision in R. v Thomson [1893] 2 QB 12 where Cave J. reviewed a number of earlier

authorities and laid down the test:

> "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? If so, and the inducement has not clearly been removed before the statement was made, evidence of the statement is inadmissible."

In the 1960s it was made clear that the standard of proof required in this situation was beyond reasonable doubt.[16]

Notes

1. Mirfield pp59-60
2. Reproduced in 1968 Current Legal Problems p1. The passage quoted is at p10. See also chapter 9.2 infra
3. *Cross on Evidence* (5th edn) p544
4. R v Steel (1981) 73 Cr App R 173; R v Dodd (1981) 74 Cr App R 50; R v Gowan [1982] Crim LR 821; R v Mackintosh (1982) 76 Cr App R 177. See also Mirfield pp103-106.
5. R v Gowan supra quoted by Mirfield p105
6. Joy p5 et seq
7. Archbold §§15-32, 15-33. The concept of the "person in authority" and the issues raised are discussed in depth in Mirfield *Confessions - the "Person in Authority" Requirement* [1981] Crim LR 92
8. Archbold §15-44
9. See generally Archbold §15-34 et seq
10. It may only be the present writer's common sense which is offended. This decision was described as "unexceptionable" by D.D. Prentice in *Confessions - Controlling the Police* (1968) 31 MLR 693
11. See Mirfield pp115-117
12. Commissioners of Customs & Excise v Harz & Power (1967) 51 Cr App R 123
13. R v Middleton [1974] 2 All ER 1190 at 1194
14. Archbold §15-41, 15-42
15. J.C.Smith [1982] Crim LR 111; K.L.M. Smith (1982) 45 MLR 573 at 576.
16. Archbold §15-23

6.4 Exclusionary Discretion and the Judges Rules

So far what has been considered is the English common law exclusionary *rule* whereby involuntary confessions were rendered inadmissible in evidence *as a matter of law*. It is now proposed to consider the related but distinct issue of exclusionary discretion whereby a confession which is legally admissible on the test of voluntariness is nevertheless excluded by the judge in the interests of fairness.

The courts have long been opposed to anything in the nature of a cross-examination of a suspect by the police particularly if that suspect happens to be in custody. In Knight and Thayre (1905) 20 Cox CC 711 Channell J put it thus:

> "You are entitled to ask questions for your information, as to whether you will charge the man, but the moment you have decided to charge him and practically get him into custody, then, in as much as a judge can't ask a question or a magistrate, it is ridiculous to suppose that a policeman can."

Mirfield [1] subdivides exclusionary discretion into two parts which he terms the "unfairness discretion" and the "unreliability discretion" the former relating to unlawful or improper police conduct towards the accused and the latter arising from fear that the trier of fact will overestimate the probative value of the

confession or its admission will otherwise prejudicially affect the accused. It is clear that discretionary exclusion of confessions can be brought into play by factors other than breaches of the Judges Rules [2] but even on that basis the vast majority of cases do relate to the conduct and behaviour of the police and Mirfield's division of the discretion is not further pursued in this work.

The first clear sign of the courts excluding a confession as a matter of discretion rather than law appeared in Gavin (1885) 15 Cox CC 656. At this period the courts were beginning to concern themselves with police interrogation of suspects. Earlier cases had favoured the admission of prisoner's statements even though obtained by interrogation. [3] However towards the end of the century the view began to change and even before the beginning of the twentieth century it was apparent that the judges were concerned to protect suspects from being compelled or persuaded by policemen to incriminate themselves. From Gavin onwards the trend of the decisions was that once a suspect was taken into custody he should not be questioned although it would be necessary to wait for the 1964 Judges Rules before any clear rule emerged. [4] The unsatisfactory state of the law during this period is shown by the fact that even as late as 1960 it was possible for the question to be posed, "Do the [1912/1918 Judges] Rules *forbid* the police to question a person in custody, or do they merely advise them that, if they do question such persons, the answers may be inadmissible in evidence?" [5]

The first four Judges Rules were formulated in 1912 with a further five Rules following in 1918. The aim of the Rules was to regulate the legitimate methods of police inquiry and to provide guidance to the police on what was permissible. They had no direct effect on the common law exclusionary rule. The relevant 1912/1918 Rules provided 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 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 any question or any further question, as the case may be.
>
> 3. Persons in custody should not be questioned without the usual caution being first administered.
>
> 4. If the prisoner wished to volunteer any statement, the usual caution should be administered. ...
>
> ...
>
> 7. A prisoner making a voluntary statement must not be cross-examined, and and no questions should be put to him about it except for the purpose of

removing all ambiguity in what he actually said.

...

In 1930 a Home Office Circular was issued to make it clear that "Rule 3 was never intended to encourage or authorise the questioning or cross-examination of a person in custody after he has been cautioned, on the subject of the crime for which he is in custody, and long before this Rule was formulated, and since, it has been the practice for the Judge not to allow any answer to a question so improperly put to be given in evidence; ..."

The 1964 Judges Rules [6] made various changes and helped to clarify some doubtful areas. For the first time it was made clear by the new Rule 1 that a suspect might be questioned while in police custody, as long as he had not been charged with the offence in question or informed that he might be prosecuted for it. By the new Rule 2 a suspect was now to be cautioned when a policeman had "evidence which would afford reasonable grounds for suspecting that [he] ha[d] committed an offence" rather than when the policeman had made up his mind to charge him. It was also made clear by the new Rule 3(b) that once an accused had been charged or informed that he was to be prosecuted, it was only in an exceptional case that questions about the offence might be put to him.

The new Rules were published in an Appendix to Home Office Circular No. 31/1964 and in the Appendix they were preceded by a

preamble explaining that the judges control the conduct of trials and the admission of evidence, but they do not control, initiate or supervise police activities or conduct. It was stated that the Rules did not purport to deal with the many varieties of conduct which might render answers or statements involuntary and hence inadmissible, but they dealt merely with particular aspects of the matter. The preamble also set out five general principles which the Rules were stated not to affect. These included as principle (c) the entitlement of the suspect to communicate privately with a solicitor and as principle (d) a requirement that the police should charge the suspect or inform him that he is may be prosecuted as soon as they have enough evidence to prefer a charge. Principle (e) has been considered above in connection with the exclusionary rule.

The status of the Judges Rules and their relationship to the common law exclusionary rule was first subject to judicial consideration in R. v Voisin [1918] 1 KB 531. In this case the headless and handless torso of a woman had been found in a parcel which also contained a piece of paper with the singular phrase "Bladie Belgiam" written on it. Voisin was interviewed by the police and asked to account for his movements at the time when the murder was believed to have taken place. He was apparently detained in custody for inquiries but the police had not decided to charge him and indeed in the absence of the head of the victim identification was not surprisingly proving difficult. Voisin made a voluntary statement without being cautioned and then a

police officer, again without a caution, asked him whether he had any objection to writing the words "Bloody Belgian." Voisin replied "Not at all" and promptly signed his own death warrant by writing "Bladie Belgiam".

It is not entirely obvious from the report whether the Court of Appeal considered that there had been a breach of the Judges Rules but it was made clear that the Rules did not have the force of law and were "administrative directions the observance of which the police authorities should enforce upon their subordinates as tending to the fair administration of justice." The court concluded "It is important that they should do so, for statements obtained from prisoners, contrary to the spirit of these rules may be rejected as evidence by the judge presiding at the trial." This, in essence, was the approach which the courts were to adopt towards the Judges' Rules until they were swept away by PACE in 1984.

It became well settled that although a breach of the Rules themselves or of principles (a) to (d) of the preamble [7] did not of itself bring the exclusionary rule into play, it did trigger the court's discretion to exclude evidence.

The exercise of the exclusionary discretion was very much dependant on the facts and circumstances of the individual case. Initially it was used liberally, and where statements obtained in breach of the Rules were admitted at first instance, the

appellate courts not infrequently overturned the conviction. This attitude changed after the Second World War and from about 1950 onwards confessions obtained in breach of the Rules were almost uniformly admitted. [8]

At times the English courts seemed to be unaware of the fundamental distinction between exclusion by virtue of the exclusionary rule and exclusion by discretion. In the much-criticised decision in R v Prager (1972) 56 Cr App R 151 the Court of Appeal blurred the distinction to the point where it almost became invisible and virtually submerged breaches of the Judges Rules within the general test of voluntariness related to the exclusionary rule, Edmund-Davies LJ stating:

> "Their non-observance may, and at times does, lead to the exclusion of an alleged confession; but ultimately all turns on the judge's decision whether, breach or no breach, it is shown to have been made voluntarily."

Prager was not an isolated instance [9] and as Pattenden and Mirfield both point out [10] such an approach leaves the court without any discretion to protect an accused person who has been unfairly treated. If the prosecution prove the confession to have been voluntary it becomes, on this approach, admissible almost without further thought. A breach of the Judges Rules would only lead to exclusion if it were sufficiently serious to lead to either involuntariness or oppression.

Later decisions, notably R v Hudson (1980) 72 Cr App R 163 [11] reasserted the more "orthodox" view, but the problem was never satisfactorily resolved before the passing of PACE.

Another problem in relation to discretionary exclusion was the reluctance of the appellate courts to lay down any guidelines for the exercise of such discretion. [12] Pattenden suggests that the root of both problems, ie the confusion about the existence of a discretion to exclude a voluntary confession and the uncertainty surrounding its exercise, lay in the failure of the courts to agree about the object of the discretion. The courts never decided whether the discretion should be directed towards control of the police, the so-called disciplinary principle, or whether the point at issue was reliability.

Notes

1. p131. A similar point is made in Cross (6th edn) p171
2. eg R v Hudson (1980) 72 Cr App R 163 - detention in excess of period permitted by statute; R v Platt [1981] Crim LR 622 - failure to inform father of arrest of mentally subnormal suspect.
3. eg Thornton (1824) 1 Moody 27; Wild (1835) 1 Moody 452 although in this case those holding Wild in custody and interrogating him were not constables. See also Joy p34 et seq
4. See Brownlie *Police Questioning, Custody and Caution* [1960] Crim LR 298
5. Smith *Questioning by the Police; Some Further Points - I* [1960] Crim LR 347
6. [1964] 1 All ER 237
7. eg R v Lemsatef (1977) 64 Cr App R 242 (breach of principle (c)). See also Baldwin & McConville *Police Interrogation and the Right to See a Solicitor* [1979] Crim LR 145
8. Pattenden *The Judge, Discretion and the Criminal Trial* (Oxford, Clarendon, 1982) p99; also Mirfield p146
9. Mirfield p134-136
10. Mirfield pp133-134; Pattenden op cit note 8 supra, pp99-100
11. Discussed in detail in Mirfield *Confessions and Oppression* (1983) 3 OJLS 289
12. Mirfield p139

6.5 Proposals for Reform of the English Law

(i) Introduction

Increasing dissatisfaction with the state of certain aspects of English criminal law, which, in the case of confessions, had come to consist of the "jigsaw pieces of two centuries of police and legal history" led to two major reports in the space of less than ten years, the Criminal Law Revision Committee's Eleventh Report of 1972 [1] and the report of the Royal Commission on Criminal Procedure of 1981. [2]

These two bodies were different in almost all respects. The CLRC is a standing committee set up in 1959 to consider such aspects of the criminal law as the Home Secretary might from time to time refer to it and to make necessary recommendations. The RCCP was appointed in 1978 specifically to study and make recommendations on the process of pre-trial criminal procedure and owed its existence in great measure to the outcry which followed the *Confait* case.

The CLRC consisted largely of trained lawyers while lawyers were very much in a minority in the membership of the RCCP. The CLRC dealt with the admissibility of confessions in the context of a general review of the rules of criminal evidence while the RCCP looked at the issue from the perspective of police investigation of crime. The CLRC worked behind closed doors and although it solicited evidence it did no research. The RCCP commissioned

extensive and far reaching research studies. Not surprisingly they reached different conclusions and, unlike the position in regard to the right to silence, it was the views of the CLRC which were ultimately to prevail.

Notes
1. Cmnd 4991
2. Cmnd 8092

(11) The Views of the Criminal Law Revision Committee

The CLRC proposed to preserve the existing law in general with a relaxation of the strict rule that any threat or inducement made a confession inadmissible and with certain alterations in matters of detail. A majority of the committee recommended that there should be two grounds of exclusion. Firstly any confession obtained by oppression should be inadmissible. Secondly a confession would be excluded if it resulted from a threat or inducement (whether made by a person in authority or not) which was "of a sort likely, in the circumstances existing at the time, to render unreliable any confession which might be made by the accused in consequence thereof." [1]

A minority of the committee would have allowed all confessions to go before the jury leaving it to them to assess the question of reliability. [2] This is, of course, essentially the modern Scottish practice. However, the majority of the committee considered that there was a danger that when the evidence on

either side was evenly balanced, "the immediate effect on the jury of the evidence of a confession might be too great to be undone, even with the help of the summing up, by the evidence of the way in which the confession was obtained." Secondly the majority felt that to remove all restrictions on the admissibility of confessions, no matter how they were obtained might, as they delicately put it, "tempt the police to resort on occasions to at least small improprieties." [3]

The CLRC did not examine the issue of discretionary exclusion.

As previously discussed, [4] the reaction to the recommendation of the CLRC that the right to silence should be restricted was such that their entire report was shelved.

Notes
1. Report para. 65 and Draft Bill cl. 2
2. Report paras. 62-63
3. Report para. 64
4. supra chapter 3,7 (ii)

(iii) The *Confait* Case and the Fisher Inquiry

In November 1972 three youths, Ronald Leighton, Ahmet Salih and Colin Lattimore, were prosecuted for the murder of a transvestite prostitute called Maxwell Confait whose body was found in a burning house in Catford, South London. The only evidence against them consisted of confessions and the fact that they had been amusing themselves by starting some small fires in the

vicinity of Confait's house the day after his death. [1] Lattimore, the eldest at eighteen, was mentally retarded with a mental age of eight and an I.Q. of 66. He was also highly suggestible. Leighton, aged fifteen, was borderline subnormal with an I.Q. of 75. Salih by contrast was bright and reasonably intelligent but he had just celebrated his fourteenth birthday two weeks before his arrest and English was not his first language. Leighton was convicted of the murder, Lattimore of manslaughter on the grounds of diminished responsibility and all three were convicted of arson with intent to endanger life.

In July 1973 the Court of Appeal refused leave to appeal. However after a long campaign by the boys' families aided, and possibly encouraged, by media interest, the Home Secretary agreed to refer the case back to the Court of Appeal and in October 1975 the convictions were quashed. Although their Lordships decided that it was not necessary to embark on a detailed analysis of the boys' admissions and the circumstances in which they were made, they observed that they contained a number of very improbable matters and some striking omissions. [2]

Following this, an inquiry was set up under Sir Henry Fisher which reported in December 1977. [3] Sir Henry's findings must have been a grave disappointment to those who wanted to believe that three innocent youths had been "fitted up" by the police. He found that no police officer had deliberately falsified the record of oral answers given by the boys to police questioning [4],

that Leighton and Salih could have been present at and taken part in the killing of Confait and that the confessions could not have been made unless at least one of the three had been involved in the murder and arson. [5] On the balance of probabilities Sir Henry found (a) that Lattimore's confession to the arson was true, but that he was persuaded by Leighton and Salih to confess falsely to having taken part in the killing; and (b) that the confessions of Leighton and Salih to having taken part in the arson were true; that their answers and statements as to the killing were falsified to the extent necessary to incriminate Lattimore; but that both Leighton and Salih were involved in the killing. [6]

However, Sir Henry found that there had been several breaches of the Judges Rules and Administrative Directions, including the failure to inform the boys of the rights and facilities available to them, particularly legal advice, and in Lattimore's case, prompting and questioning during the taking of a written statement. [7] In addition there had been an improper delay in charging the boys, even though the police had sufficient evidence, because they wanted to question Leighton further. The questioning of Lattimore had been unfair and oppressive because *inter alia* the police knew he was mentally retarded and had nonetheless questioned him (in a manner found to be in itself unfair and oppressive) in the absence of a parent or guardian. [8]

Sir Henry found evidence of ignorance and misunderstanding of certain of the Judges Rules and Administrative Directions on the part of both the police and the legal profession and he made various suggestions which would have led to them being strengthened, particularly the right of the suspect to legal advice. [9] He also advocated tape recording of police interviews, pointing out that if the proceedings involving the three boys had been recorded his Inquiry might have been unnecessary.

When he turned to consider the question of enforcing compliance with the Judges Rules, Sir Henry considered that any sanction for breach of the Rules should be "certain and regularly applied" and at that time it was neither. [10] He was implicitly critical of the decision in Prager and pointed out that it was not even certain that a breach of the Rules which fell short of rendering a confession involuntary was enough to entitle a judge to exclude the confession as a matter of discretion.

Sir Henry stopped short of recommending that all confessions should be corroborated, but he did suggest that it should be made a rule of law that no person should be convicted on the evidence of a confession obtained in one of four specific situations unless that evidence was supported by other independent evidence. The four situations were:

(a) a confession obtained, in response to questioning by the police, by means of a breach of the Judges Rules or Administrative Directions, whether or not the effect of the

breach was to make the confession involuntary;

(b) a confession by a child or young person in response to questioning by the police without the presence of a parent, guardian or other person not a police officer;

(c) a confession made by a mentally handicapped person (whether or not known to be so at the time) in response to questioning by the police without the presence of a parent, guardian or other person not a police officer; and

(d) an oral confession made in a police station (whether the maker was in custody or not) of which a tape recording was not available. ''

Point (d) could, of course, only take effect if tape recording were universally available in police stations.

Mirfield comments that the reason for recommending introduction of a supporting evidence requirement would seem to be that the presence of such evidence will increase confidence in the reliability of the confession. If this is so, he argues, the recommendations in the report are not entirely satisfactory. While it is easy to imagine circumstances in which the presence of breaches of rules about questioning will cast doubt on the reliability of the confession, it does not follow that *any* breach of *any* such rule will cast doubt upon reliability. [12]

This is undoubtedly so, but surely a partial requirement for supporting evidence is better than none at all, particularly where the requirement is targetted towards the protection of

identifiably vulnerable groups and the suppression of police malpractice?

Although the Fisher Report was only concerned with the circumstances of one rather sordid case, its main value was in highlighting the grossly unsatisfactory state of the law and the urgent need for reform, for which it provided a considerable impetus.

Notes

1. For full details of this case see Price and Caplan *The Confait Confessions* (London, 1977). See also Irving and McKenzie *Police Interrogation; The Effect of the Police and Criminal Evidence Act 1984* (London, 1989) p219 et seq where the authors review the case on the assumption that PACE had been in force.
2. Price and Caplan op cit p107
3. Report of an Inquiry by the Hon. Sir Henry Fisher into the Circumstances Leading to the Trial of three Persons on Charges Arising out of the Death of Maxwell Confait and the Fire at 27 Doggett Road, London SE6, December 13 1977 HC 90 (hereinafter "Fisher Report")
4. Fisher Report para 2.3
5. Fisher Report para 2.4 (d) and (e)
6. Fisher Report para 2.5
7. Fisher Report para 2.11
8. Fisher Report para 2.13
9. Fisher Report paras 2.16-2.28
10. Fisher Report para 2.26
11. ibid
12. Mirfield pp203-204

(iv) <u>The Royal Commission on Criminal Procedure</u>

The RCCP accepted that there could be no adequate substitute for police questioning in the investigation and prosecution of crime. Their proposals were considerably more radical than those of the CLRC, but they were made along with various other recommendations

for improving the accuracy of the record of the interrogation and for safeguarding the rights of the suspect.

Although the RCCP has been criticised for dealing with the law of evidence in a way which was "vestigial in the extreme", [1] it cannot be denied that many of the points made in its report were very valid. The notion of voluntariness and the application of the exclusionary rule was considered to cause much difficulty to the police and courts. The oppression concept as expressed in Prager was criticised on the basis that it required a police officer under the confusion and pressures of an investigation to make an assessment of the character, susceptibilities and mental state of the suspect whom he is interviewing and then try to adopt his questioning to that assessment, only to find months later that the judge takes a different view. As one of their own researchers had observed, "If any person is subject to a rule he should know when he is breaking it. This cannot be said of the rules governing the conduct of interviews with respect to voluntariness or oppression." [2]

The Commission also pointed out that the legal and psychological concepts of "voluntariness" did not match since the very facts of custody and questioning in custody were in themselves coercive. [3]

In order to ensure that suspects' statements were as reliable as possible, there should be "workable and enforceable guidelines for the police, criteria that the courts can apply without a feat

of imagination that sometimes defies belief, and a clear and enforceable statement of the rights and safeguards for the suspect in custody." [4] The safeguards were to be embodied in a code of practice and were to include a right not to be held incommunicado, a right to legal advice, and a right to be fairly interviewed and properly cared for while in custody. Additional rights to special protection were proposed for vulnerable people. Subject to these requirements being met, the RCCP recommended that it should be left to the jury to assess the reliability of confession evidence upon the facts presented to them. [5] The criterion of "voluntariness" was to be removed.

The RCCP were against the idea of automatic exclusion of evidence as a sanction for a breach of the code of practice. Such a breach was to be dealt with as a matter of police discipline. It was to be left to the defence and the judge to warn the jury of the potential unreliability of a confession obtained in breach of the code. [6] However any confession obtained by violence, threats of violence, torture or inhuman or degrading treatment would automatically be excluded. [7]

Notes

1. Cross (6th edition) p542
2. Report paras 4.70-4.72
3. Report para 4.73. See also RCCP Research Studies Nos 1 and 2
4. Report para 4.75
5. ibid
6. Report para 4.133
7. Report para 4.132

6.6 The Police and Criminal Evidence Act 1984

The proposal by the RCCP for the unfettered admissibility of all confessions (other than those obtained by violence etc) did not find favour and the legislation which followed is an amalgamation of the proposals of both bodies, but with those of the CLRC forming the real basis of the modern law of confessions. This is now to be found primarily in Part VIII of PACE and also in the Code of Practice issued under Section 66 for the Detention Treatment and Questioning of Persons in Custody by Police Officers. Although a breach of the provisions of the Code does not of itself render the person responsible liable to criminal or civil proceedings, but only to disciplinary action, the provisions of the Code are admissible in evidence in any proceedings and any relevant provision is to be taken into account in determining any question before the Court. [1] Thus the court is entitled to have regard to such matters as the length of the questioning, breaks for rest and refreshment etc.

Section 82(1) defines a "confession" as including "any statement wholly or partly adverse to the person who made it, whether made to a person in authority or not and whether made in words or otherwise."

By Section 76(1) it is provided that a confession made by an accused may be given in evidence against him in so far as it is relevant and not excluded under Section 76(2). This latter

subsection sets out the test of admissibility, which is clearly based on the proposals of the CLRC:

> "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 may have been obtained -
>
> (a) by oppression of the person who made it; or
>
> (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."

"Oppression" is defined by Section 76(8) as including "torture, inhuman or degrading treatment, and the use or threat of violence (whether or not amounting to torture)." [2] This definition, which is in part based on Article 3 of the European Convention on Human Rights, is not exhaustive and what amounts to oppression will depend on the circumstances of the individual case. The pre-PACE law will presumably continue to be relevant in deciding whether certain forms of conduct have been oppressive. However

in R v Fulling [1987] 2 All ER 65 it was made clear that a narrower view of what constituted oppression was now to be taken.

In this case the female defendant had initially been interrogated without success, but confessed when told that her lover had been having an affair with another woman who was at that time being held in the next cell. According to Ms Fulling she was so upset by this revelation that she confessed in order to get out of the police station and away from her rival. Her confession was challenged on the basis of oppression, but the trial judge admitted it and his decision was upheld on appeal.

The Court of Appeal criticised the common law definition of oppression as laid down in Prager as being artificially wide. Section 76(2)(b) (ie the potential unreliability test) would, their Lordships stated, now cover some of the circumstances which would previously have been dealt with under oppression. Their Lordships also laid down that "oppression" should receive its dictionary meaning, viz: "exercise of power in a burdensome, harsh or wrongful manner; unjust or cruel treatment of suspects, inferiors etc.; the imposition of unreasonable or unjust burdens." The Court also quoted with approval one of the dictionary illustrations: "There is not a word in or language which expresses more detestable wickedness than oppression," and went on to observe that, "It is hard to envisage any circumstances in which such oppression would not entail some

impropriety on the part of the interrogator." This approach has been criticised, [3] but for the moment it will have to serve.

Fulling was followed in R v Davison [1988] Crim LR 442 where there had been a whole series of breaches of both the Code and the Act itself, including unlawful detention and an improper denial of access to a solicitor. Judge Coombe held that the police had been exercising their authority in a wrongful manner and this was capable of amounting to oppression.

Although it remains to be seen what degree of police misconduct is necessary to qualify as oppression, the view has been expressed that it would be unfortunate if every breach of the detention rules were to result in an automatic inference of oppression. [4] Clearly breaches will tend towards a cumulative effect, and judges will have to ask themselves whether a number of breaches (all to the advantage of the interrogator) suggest inadvertence or intention.

Oppression apart, the law now emphasises reliability although the test is not whether the confession is actually unreliable but whether the circumstances are likely to render it unreliable. The "person in authority" requirement has been swept away and there is no requirement that the "thing said or done" must be said or done by a policeman, nor is it necessary that it should be said or done with the intention of inducing a confession. It has however been held [5] that the subsection is only applicable to

a thing said or done by a person other than the defendant himself.

The potential unreliability test as laid down in Section 76(2)(b) is clearly of wider scope than the common-law test of voluntariness and the limits of the subsection have yet to be explored. However it has been argued [6] that the phrase "anything said or done" in Section 76(2)(b) is unlikely to be used in respect of ordinary, proper questioning. Since few confessions are entirely spontaneous, being generally induced by police questioning at least to a point, this view would seem to be reasonable.

The two heads, oppression and unreliability, are not mutually exclusive and there appears to be nothing to prevent the defence from challenging a confession on both grounds. [7]

Under Section 76(3) the court may take the point of admissibility *ex proprio motu* and in that event the prosecution are again required to prove the absence of oppression or factors leading to unreliability beyond reasonable doubt. Section 76(4) provides that where a confession is excluded that does not affect the admissibility of any facts discovered as a result of the confession. A confession excluded under Section 76(2) may also be admissible under 76(4) as evidence that the accused "speaks, writes or expresses himself in a particular way" but for no other purpose. [8]

Section 77 makes special additional provision for confessions by mentally handicapped persons. Where such a confession has been made in the absence of an independent adult the judge must warn the jury that there is special need for caution before convicting in reliance on the confession. This provision will only come into play if the confession has managed to pass the oppression and unreliability tests. »

Section 78(1), which applies to all prosecution evidence and not merely to confessions, provides:

> "In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

Thus a confession which has passed the oppression and unreliability tests may nevertheless be excluded under Section 78(1) on grounds of fairness.

Finally, Section 82(3) provides:

> "Nothing in this Part of this Act shall prejudice any power of a court to exclude evidence (whether

by preventing questions from being put or otherwise) at its discretion."

It can thus be seen that there are now three separate sections of PACE, 76(2), 78(1) and 82(3), which could lead to confession evidence being excluded. In addition Section 76(2) contains the two tests of oppression and potential unreliability. The precise relationship between these provisions, which is by no means clear, has exercised some English writers but has not as yet been the subject of express judicial decision. It has been argued unsuccessfully [10] that as Section 76 provided an exhaustive code on confessions, Section 78 must have been intended to apply to non-confession evidence only. However as DI Birch has pointed out, in the course of an exhaustive survey of the recent major decisions,[11] if Section 76 were repealed tomorrow, it would still be possible to exclude all the evidence which it excludes by invoking Section 78. As far as Section 82(3) is concerned, it has been suggested [12] that Sections 76 and 78 can only come into play *before* the evidence in question is given and thereafter exclusion would have to be under Section 82(3).

Zander has extracted no fewer than fourteen propositions from the seventy or so cases on Section 78 up to July 1990. [13] The most important are:

(a) [Proposition 1] The admissibility of confessions can be challenged under Section 78 as well as Section 76 (or 82(3));

(b) [Proposition 3] Unfairness to the defendant is not the sole

criterion for exercise of the discretion. The judge should consider the interests of the prosecution as well as the defence.

(c) [Propositions 6 and 7] Evidence will not be excluded as a way of penalising the police. Obviously police misconduct can be the basis of exclusion but wilful wrongdoing by the police is not a requirement for the operation of Section 78, although most cases where evidence has been excluded have invloved breaches of the Act or the Codes

(d) [Propositions 10] If the suspect has previous convictions and experience of police stations the court's view of breaches of the rules by the police may be less severe.

One should not make too much of Proposition 3. Since Section 78 confers a discretion on the judge it is self evident (at least to this writer) that the exercise of such a discretion requires the balancing of competing interests. English law is still a long way from the Scottish test of bilateral fairness. Zander bases his proposition on three cases. Firstly R v O'Loughlin and Another (1987) 85 Cr App R 157 which is a first instance decision with nothing to do with confessions. The question for the court was whether depositions were admissible as evidence for the prosecution in the absence of three witnesses, two of whom were known to be afraid to come to court and the third had simply vanished. The prosecution had to satisfy the judge beyond reasonable doubt that the witnesses had been "kept out of the way by the procurement of the accused" within the meaning of Section 13(3) of the Criminal Justice Act 1925 and this they failed to

do, although it was not an unreasonable inference from the circumstances.

Kenneth Jones J. considered that Section 78 required him "to balance matters having regard, on the one hand, to the interests of the defendant; on the other hand to the interests of the public as represented by the prosecution." In the circumstances of the particular case he considered that, "I must take into account in exercising my discretion also the interests of the Crown, or put another way, I must take account in measuring any unfairness to the defendant of the defendant's own activities, or if not his own activities the activities of others acting on his behalf." This is self-evident. It would have been a remarkable exercise of judicial discretion which failed to countenance the possibility of the defendant profiting from his own efforts, direct or indirect, to keep the witnesses out of the way. It hardly marks a major departure in English law.

The other two cases on which Zander relies do both concern confessions, but both are briefly reported. In R v Smith [1987] Crim LR 579 the view of the court was that "The expression 'fairness of the proceedings' is not easy to interpret. It seems that the Court should act as a balance between the prosecution and defence, bearing in mind that it is in the public interest that persons who commit offences of this sort should be brought to justice." In the particular circumstances the court still

excluded evidence of an interview which had taken place after the accused had been wrongly denied access to a solicitor.

Finally in R v Hughes [1988] Crim LR 519 the report is even briefer. Once again the issue was access to legal advice. In upholding the decision of the trial judge to admit evidence of damaging admissions made in the absence of a solicitor the Court of Appeal observed that "The effect of the evidence on the defence was not the sole consideration. [The trial judge] had to balance the interests of the prosecution and the interests of the defence in deciding what the interests of justice were."

Recent cases have shown the English courts holding that where there has been more than one interview, irregularities in the first will be liable to "taint" the subsequent interview(s) leading to the possibility of exclusion of any confession which might be obtained. In R v Ismail [1990] Crim LR there had clearly been oppression in the first interview and it was held that to admit the second would be "to condone the flouting of the provisions designed to protect against confessions which were not genuine".

In R v McGovern [1991] Crim LR 124 the report is less than ideally clear but it appears that the defendant, who was of low mental capacity was interviewed twice, firstly without a solicitor and subsequently in the presence of one. In addition the fact of the earlier interview and the wrongful denial of

access to legal advice was concealed from the solicitor when she eventually did gain access to the accused. A confession was apparently made at the first interview and later repeated. As the court noted "when an accused person has made a series of admissions ... at a first interview, the very fact that these admissions have been made is likely to have an effect on the person in the course of a second interview." Accordingly the first interview having been in breach of Section 58, the court considered that the subsequent one must be similarly tainted.

One slight oddity about McGovern is that the police would appear to have had good grounds, had they so chosen, to invoke the exception provided by subsections 58(6) and (8) under which delay in permitting access to legal advice may be justified in the case of a serious arrestable offence if the exercise of the right to legal advice will *inter alia* lead to interference with or harm to evidence connected with a serious arrestable offence or interference with or physical injury to other persons. However the police failed to follow the correct procedure of obtaining the authorisation of a senior officer for the delay and the Crown conceded that the first interview was unlawful.

Finally it should be noted that where the subsequent interview can be held not to be tainted by the earlier one, it will be admissible. [14]

Notes,
1. PACE Section 67(8), (10) and (11).

2. See Mirfield pp107-110
3. AAS Zuckerman *The Principles of Criminal Evidence* (Oxford, Clarendon, 1989) p333
4. DJ Birch [1988] Crim LR 444-445; Zander p191
5. R v Goldenberg [1988] Crim LR 678, criticised by Zander (p192) as "too restrictive."
6. D.Birch *The Pace Hots Up: Confessions and Confusions Under the 1984 Act* [1989] Crim LR 95.
7. It seems surprising that the defence in Fulling nailed their colours solely to the mast of oppression. The circumstances must surely have suggested at least potential unreliability.
8. cf R v Voisin [1918] 1 KB 531
9. Section 77 is discussed more fully in the context of sufficiency infra chapter 7.4 (iii)
10. R v Mason [1987] 3 All ER 481 In this case the suspect and his solicitor were lied to by the police who falsely claimed to have fingerprint evidence. The most remarkable feature of the case is the fact that the trial judge did not exclude the confession
11. op cit note 6 supra
12. R v Sat-Bhambra [1988] Crim LR 453
13. p202
14. R v Gilland and Barrett [1991] Crim LR 280

6.7 Legal Advice During Police Questioning

(1) Scotland

There are major differences in Scottish and English law, particularly since PACE, in the question of access to legal advice for persons in police custody.

Although tape recording is gradually being introduced, it has not been made a criterion of admissibility and it may generally be said that, subject to specific statutory provision, a detainee or suspect in the hands of the Scottish police even though he is not being interviewed on tape has no right to legal advice before he is charged.

In Scotland the normal position in solemn procedure is governed by Section 19 of the 1975 Act which, broadly stated, entitles a person who has been arrested to have intimation sent to a solicitor and to have a private interview with the solicitor before judicial examination. In summary procedure Section 305 makes similar provision and in both cases the prisoner is entitled to be told of his right of access to legal advice. A person detained under Section 2 of the 1980 Act is also entitled to have intimation sent to a solicitor and to be told of his right. [1]

However, these general provisions do not provide any right for a suspect actually to see the solicitor before he has been charged.

The only case known to the writer where a person in the hands of the Scottish police has a specific right of access to legal advice is that of a person arrested or detained under the Prevention of Terrorism (Temporary Provisions) Act 1989 which is clearly framed on the basis of English practice. [2]

In the case of an ordinary detainee the Thomson Committee had specifically recommended that access to a solicitor should be a matter of police discretion. [3] Otherwise they took the view that a solicitor should not be permitted to intervene in police investigations before charge:

> "The purpose of the interrogation is to obtain from the suspect such information as he may possess regarding the offence, and this purpose might be defeated by the participation of his solicitor." [4]

It is also important to remember that the Thomson Committee made its recommendations on the basis that there should be a reliable record of police interrogation and in particular that the admissibility of a statement made before arrest in answer to questioning in a police station should depend on the statement having been tape-recorded. [5]

There is a surprising lack of Scottish case law specifically on the issue of legal advice to persons in custody and such as exists is largely unsatisfactory. [6] Judicial references to non-existent "rights" are unhelpful. Lord Anderson was simply

incorrect when he asserted that:

> "A person who is accused is entitled, from the moment of apprehension, to have the advice of a skilled law agent, who will advise him whether or not he ought to make a statement and what statement he ought to make." [7]

In modern practice once the accused has been *charged*, if he wishes to make a voluntary statement, he must, at that stage, be offered the services of a solicitor [8] but otherwise his only right is (and has been since the passing of the Criminal Procedure (Scotland) Act 1887) to have intimation sent to a solicitor and to an interview with the solicitor prior to appearance in court.

There has never been a Scottish case in which a statement has been excluded solely because of the absence of legal advice. The closest Scottish law has come to excluding a confession because the accused had been wrongly denied access to legal advice was Law v McNicol 1965 JC 32 where the accused's solicitor had been contacted but was unable to come to the police station immediately and the police had cautioned and charged the accused who had then made a statement before his arrival. However there was also an unjustified threat to keep the accused in custody over a public holiday and this was an important factor in the court holding the statement to have been unfairly obtained.

What it really comes to is that currently under Scottish law the police are under no legally enforceable obligation to allow access to legal advice but a statement obtained in the absence of such advice may well be liable to exclusion on the grounds of unfairness.

The problems inherent in this situation are, to an extent, offset by the very limited periods during which such a person can be detained in Scotland by comparison with England. A suspect may only be detained for six hours and a person arrested must be brought before a court on the next lawful day. Apart from the possibility of "voluntary" attendance, there is no escape route to allow the Scottish police to extend these periods.

Nevertheless it is clearly unsatisfactory that the law on such an important point is in such an ambiguous condition and depends on legislation more than a century old and conceived on the basis of the old form of judicial examination:

> "At a time when questioning by the police was frowned upon, and the judicial examination would have been the first attempt at ascertaining the accused's version of events, it might have been sufficient protection that the accused be forewarned by his solicitor of the perils of examination. Nowadays, though, the most important part of the questioning will normally have ocurred, and any incriminating statements been

made, before the examination and often without legal assistance. In these circumstances Section 19 smacks of 'shutting the stable door after the horse has bolted.'" [9]

At the moment the situation is fair to no-one. Opinions may differ as to an appropriate solution but it is clear that the *status quo* should not be allowed to continue. In the writer's view, provided there is an accurate record (ie a tape or video recording), and provided also that there are no legislative changes to the maximum periods for which persons may be held by the police, the Thomson Committee's proposal that there should be no right for a solicitor to intervene in police proceedings is correct and should become the basis for the law. It appears to the writer that the denial of legal advice for a short period is the most practical compromise between the needs of investigation of crime and the rights of the individual.

Notes

1. 1980 Act Section 3(1)(b)
2. 1980 Act Sections 3A and 3C inserted by the Law Reform (Miscellaneous Provisions) Act 1985. See also Forbes v H.M. Advocate 1990 SCCR 69
3. Report para 5.08
4. Report para 7.16
5. Report para 7.13c
6. eg H.M. Advocate v Aitken 1926 JC 83; H.M. Advocate v Cunningham 1939 JC 61; H.M. Advocate v Fox 1947 JC 30. See also Cheyne v McGregor 1941 JC 17 and Ferguson v Brown 1942 JC 113
7. H.M. Advocate v Aitken 1926 JC 83 at p86
8. cf Thomson Committee paras 7.16 and 7.19. While there has been no research done on the point, the writer's personal observations suggest that very few accused do in fact take up the offer.
9. K.D. Ewing and W.Finnie *Civil Liberties In Scotland: Cases and Materials* (Edinburgh, 1982) p93

(ii) <u>England</u>

By contrast with the very limited periods possible in Scotland, the modern English law allows detention without charge for up to twenty four hours ' and this may be extended to a maximum of thirty six hours by the police themselves. ² Detention beyond thirty six hours requires the authority of a magistrate's court ³ but if this is granted, the accused person will be returned to the police, and not remanded to prison. The maximum possible period of detention is ninety six hours.

Prior to PACE, principle (c) of the preamble to the 1964 Judges Rules and Administrative Directions provided:

> "... every person at any stage of an investigation should be able to communicate and to consult privately with a solicitor. This is so even if he is in custody provided that in such a case no unreasonable delay or hinderance is caused to the processes of investigation or the administration of justice by his doing so."

This was reinforced by an Administrative Direction which provided:

> "A person in custody should be allowed to speak on the telephone to his solicitor or to his friends provided that no hinderance is reasonably likely to be caused to the processes of investigation or to the administration of justice by his doing so."

However the courts, with a few notable exceptions, [4] were no more inclined to exclude confessions obtained in breach of the entitlement to legal advice than they were to exclude evidence obtained in breach of any other aspect of the Judges Rules. [5]

In 1971 Lord Widgery, the then Lord Chief Justice, was quoted in the press as having said to the American Bar Association:

> "Any rule requiring the presence of the suspect's lawyer during interrogation is quite unacceptable. It would no doubt be an excellent thing for an independent third party to be present so that he could later testify to the court as to what had taken place, but the accused's lawyer is not an independent party." [6]

To this the riposte has been made that the solicitor is not meant to be independent, he is the bona fide adviser of his client and the protector of his interests. [7] Battle lines in this argument tended to be drawn along familiar lines. On the one side the police would invariably complain that a suspect's solicitor would impede the progress of legitimate police inquiries. There was, in England, a deep seated mistrust by the police of lawyers and a perception, usually based on generalisation from the particular, that in many cases they were at least as bad as their clients. [8] On the other side there was widespread suspicion and ignorance of what went on in police stations.

Research by Zander, [9] Baldwin and McConville [10] and Softley [11] showed how unsatisfactory the situation was with Baldwin and McConville finding fewer than one defendant in ten being interviewed in the presence of a solicitor despite the terms of the Judges Rules. Admittedly many defendants did not ask for legal advice, but this often arose from ignorance or a conviction that the request would be refused rather than a conscious decision not to exercise a known right. [12] Most disturbing was the number of defendants who had (or claimed to have had) requests for legal advice refused point blank by the police. In Baldwin and McConville's survey this amounted to 84 defendants out of a total of 109 who had requested to be allowed to consult a solicitor.

Although the RCCP expressed a measure of scepticism about research relying on defendant based samples, it did emphasise the need to ensure a "completely effective" right to legal advice. [13]

Section 58 of PACE [14] broadly endorses the RCCP's proposals and now provides by subsection (1) that a person who is in police detention shall be entitled, if he so requests, to consult a solicitor privately at any time. The police are required by the Code of Practice to inform the suspect of his rights both orally and by written notice.

The police are only entitled to delay compliance with the defendant's request if he is in custody for a "serious arrestable

offence" and the circumstances fall within subsection (8) ie they have reasonable grounds for believing that compliance would (a) lead to interference with or harm to evidence connected with a serious arrestable offence or interference with or physical injury to other persons or (b) lead to the alerting of other persons suspected of having committed such an offence but not yet arrested for it or (c) hinder the recovery of any property obtained as a result of such an offence. Only an officer of the rank of superintendent or over can authorise delay and then only for a maximum of thirty six hours. After this period the right to legal advice becomes absolute.

Since Section 58 came into force, the Court of Appeal initially took a fairly robust line against the denial of legal advice although it has left open the possibility of a retreat at a later stage. [15] In R v Samuel [1988] 2 All ER 135 the defendant was arrested on suspicion of armed robbery, clearly a "serious arrestable offence", and questioned by the police on four occasions while he was in custody. In the course of the second interview he asked to see a solicitor. This was refused apparently on the grounds that other suspects might be warned and that the recovery of outstanding stolen money might be hindered, and the refusal was later repeated. The police made no efforts to ascertain the identity of the solicitor whom Samuel wished to contact; he was in fact a Mr Warner, described by the Court of Appeal as "a highly respected member of his profession". Despite several attempts, Mr Warner only obtained access to his client

after he had confessed. Evidence of the confession was admitted at the trial but on appeal it was held that the trial judge ought to have excluded it under Section 78.

The Court took the view that the police must be virtually certain that a solicitor, if contacted, will thereafter either commit a criminal offence or unwittingly pass on a coded message to other criminals. Only in the remote event of the police being able to produce evidence as to the corruption of a particular solicitor would a police officer be able to assert a reasonable belief that a solicitor would commit a criminal offence. They went on to hold that a belief that a solicitor would inadvertently alert other criminals could only reasonably be held by the police if the suspect was a particularly resourceful and sophisticated criminal or the solicitor was particularly inexperienced or naive. In this case the Court concluded that the real reason for delaying legal advice was to allow the police a final opportunity to question Samuel in the absence of his solicitor. Mr Warner had stated in evidence that he would probably on this occasion have advised the defendant to refuse to answer further questions and the Code of Practice expressly disallows denial of access to a solicitor on the ground that the solicitor will advise the suspect to remain silent.

Samuel accordingly has had the effect of narrowing greatly the interpretation of Section 58(8) and preventing the police from making a general unsubstantiated allegation that it was thought

that others might be alerted if a solicitor was contacted. In effect the police have to be in the position of being able to prove that the particular solicitor requested by the suspect was corrupt.

An almost identical set of circumstances came before a differently constituted Court of Appeal in R v Alladice [1988] Crim LR 608 and a different result followed. While the Court held itself to be bound by the restrictive interpretation of Section 58(8) in Samuel, it held that the evidence of Alladice's confession was rightly admitted since the presence of the solicitor would have added nothing to his knowledge of his rights and would have made no difference during the final questioning, Alladice having apparently stated that he only wanted a solicitor to be present to keep a check on police conduct. Interestingly, the court observed that it was time that comment upon a defendant's silence when interviewed should be permitted at his trial together with the necessary alterations to the words of the caution.[16]

However, as Helen Fenwick has observed,[17] it must be open to question whether the suspect is the best person to evaluate the effect of having legal advice and certain factors in Alladice, such as the defendant's relative youth and the fact that the admissions he made formed the basis of the case against him, cast doubt on the supposition that the presence of a solicitor would have had no effect on the interview.

The police clearly regard access to legal advice under Section 58 as an obstruction, and there was outrage at the decision in Samuel. [18] It would therefore not be surprising if they were to attempt to circumvent the law and either deny suspects access to legal advice or persuade them not to exercise their right. Two recent research studies have reached differing conclusions on the extent to which the police comply with the letter and spirit of the law.

Irving and McKenzie in their study in Brighton [19] found that that the police were initially punctilious in observing the requirements of PACE in relation to legal advice, although this later began to wear off slightly but even so they only found one case where access to advice had been unduly delayed. [20]

The proportion of suspects receiving legal advice in Brighton rose from 1% in 1985 to 11% in 1986 and 27% in 1987. Most interestingly the 1987 research established that "far from interfering with the process of criminal investigation, most solicitors are anxious to reach a fully informed conclusion about the police case and to that end they tend to advise clients to cooperate with interviews where there appears to be a reasonable case to answer." [21] In addition there was no evidence that the presence of solicitors had an adverse effect on the number of admissions made by suspects.

Irving and McKenzie also suggested that solicitors would tend to advise their clients not to answer questions where the evidence against them was weak, or was not fully disclosed by the police. In such cases the police might come to believe that the failure of the case was "caused" by the solicitor, rather that the lack of evidence or the lack of adequate disclosure. Such a perception could lead to a vicious circle with the police becoming less cooperative and disclosing less in subsequent cases unless positive moves were made to break the vicious circle. However the majority of solicitors in Brighton were found to collaborate successfully with investigating officers in administering PACE and such antagonism as there was tended to develop more out of "personal animosities, perceived misconduct, and a variety of miscommunication." [22]

In a considerably more widely based study involving ten police stations [23] Sanders and Bridges found a very different picture from Irving and McKenzie's description of amicable cooperation. They found that while the police now rarely refuse suspects access to legal advice overtly, many dubious practices and ploys are used to ensure that the suspect is either unaware of his right to advice or dissuaded from exercising it. These include telling the suspect his rights too quickly, incomprehensibly or incompletely, implying that contacting a solicitor will result in release from custody being delayed and failing to inform the suspect that legal advice is available free of charge.

"Informal" interviewing is also a problem and one on which the courts have yet to take a clear position. [24]

The crux of the matter is the fact that the suspect is dependent on the police for information about his rights. The police are being asked to safeguard the rights of those with whom they have an adversarial relationship and hence to place obstacles in their own path. This, say Sanders and Bridges, is irrational and doomed to failure.

If they are accurate, these findings are alarming. [25] Since PACE police malpractice has probably not been reduced but has been made less overt and hence more difficult to detect and control. ("If it isn't in the custody record it didn't happen.") In giving the false impression of complete police compliance with the law, unduly great faith in the police will now be encouraged. In the opinion of Sanders and Bridges, the Code of Practice is systematically disregarded and the disregard appears to be endorsed or even instigated at a high level of command, ie by precisely those senior officers who should be responsible for its enforcement through the discipline code. They suggest that unrestrained access to legal advice depends on "the removal of the police as gatekeepers." The right to legal advice does not have any remedy and, in the absence of a remedy which would cause the police to suffer, there is no incentive for them to safeguard the suspect's right. Sanders and Bridges suggest that in order for the right to legal advice to be invested with more than

symbolic value, it should be backed up by criminal liability, or at the very least liability in tort on the part of the police.

If Sanders and Bridges are correct, PACE would appear to have led to a situation worse than that which existed before. The writer would submit that even in its present unsatisfactory state Scots law is preferable. Scots law ensures that the suspect is removed from the hands of the police and brought under the protection of the court at the earliest possible moment. In this situation there is much less need for legal advice. It is submitted that English law is fundamentally illogical in permitting the police to detain a suspect for up to ninety six hours and question him repeatedly during that period, but at the same time expecting them to inform him of a right which, if exercised, would be likely to prolong the inquiry or possibly frustrate it altogether.

Notes

1. PACE Section 41(1)
2. ibid Section 42
3. ibid Section 43. On this and the Sections referred to in the two preceding notes, see generally Zander pp82-88
4. eg McKenna J. in R v Allan [1977] Crim LR 163
5. Baldwin and McConville *Police Interrogation and the Right to see a Solicitor* [1979] Crim LR 145
6. The Times July 17 1971
7. New Law Journal July 22 1971 p631
8. See, as only one of many examples, Sir Robert Mark *In the Office of Constable* (Fontana, 1979) p161 et seq
9. *Access to a Solicitor in the Police Station* [1972] Crim LR 342
10. op. cit. note 5 supra
11. Police Interrogation: An Observational Study in Four Police Stations RCCP Research Study No.4
12. op cit note 5 supra
13. Report para 4.86
14. For a comprehensive discussion see Zander pp105-123
15. See H Fenwick *Access to Legal Advice in Police Custody: A Fundamental Right?*

(1989) 52 MLR 104

16. op cit note 15 supra p109
17. See also R v Dunford [1991] Crim LR 370
18. *A Shocking Verdict* Police February 1988 p10
19. *Police Interrogation: The Effects of the Police and Criminal Evidence Act 1984* (London, Police Foundation 1989)
20. p159
21. p160
22. p163
23. *Access to Legal Advice and Police Malpractice* [1990] Crim LR 494
24. Compare R v Absolam The Times 9 July 1988 - defendant arrested on unconnected matter, asked to turn out his pockets by officer who then, guessing, said "And now the drugs". Drugs produced to surprise of police and defendant questioned about them before being informed of right to solicitor. No record of interview. Held inadmissible. R v Maguire (1989) 153 JP 645- juvenile arrested near scene of crime questioned without presence of appropriate adult and confessed. Held the police had questioned him not with a view to eliciting a confession but to allow him an opportunity to explain his conduct. Confession therefore admissible.
25. It was suggested to the writer by two English police officers who were familiar with the post-PACE research projects that Sanders and Bridges may have set out to prove a particular point of view.

6.8 Confirmation by Subsequent Fact

It may happen that in the course of making a confession which is later held to be inadmissible, an accused brings to light evidence which is relevant to the case and which the prosecution wish to tender. For example he might say during the course of a confession that he threw the murder weapon into a particular field or that stolen property is in his house and the object is searched for and found. It may, of course, be that the object has some evidential value independent of the confession, for example the accused's fingerprints might be found on the weapon or the stolen property might be in a locked room for which only the accused holds the key. However where the confession is inadmissible two basic questions arise. (1) How is the law to treat such evidence when it is discovered as a consequence of an inadmissible confession? and (2) Should the confession or some part of it also be admitted if it is verified by the subsequently discovered evidence?

There is an almost complete lack of authority on these questions, particularly the former, in Scotland, but prior to PACE the situation was precisely the opposite in England with an excess of authorities, many of which were mutually contradictory. [1] There would, on the basis of the English cases, appear to be five possible answers to the questions posed above: (a) to admit the fact discovered but nothing more; (b) to admit the fact discovered, and that its discovery was in consequence of

something the accused said; (c) to admit the fact discovered together with as much of the confession as relates strictly to it; (d) to admit the fact discovered and the entire confession; and (e) to exclude the whole confession and all facts discovered in consequence of it. [2]

It is possible to find English authority to support any of these five propositions and before PACE, the law in England was simply a mess and in sore need of reform. [3] The position has now been settled by Section 76(4) of PACE:

> (4) The fact that a confession is wholly or partly excluded in pursuance of this section shall not affect the admissibility in evidence -
>
> (a) of any facts discovered as a result of the confession; or
>
> (b) where the confession is relevant as showing that the accused speaks, writes or expresses himself in a particular way, of so much of the confession as is necessary to show that he does so.

Section 76(4)(a) effectively restates the historic position of English law following the decision in the old case of R. v Warickshall (1783) 1 Leach 263. [4] In that case a female prisoner, in the course of an improperly induced confession, said that the stolen goods were in her lodgings. A subsequent search revealed that this was indeed so, and the goods were actually

found in her bedding. Although the confession was excluded, the fact of the finding of the stolen goods was admitted. Section 76(4)(b) is obviously intended to cover the sort of situation which arose in R v Voisin [1918] 1KB 531. [5]

In Scotland, although Alison favoured the Warickshall rule, [6] the only decision bearing on the point is Chalmers [7] and it is less than ideally clear, particularly in relation to the second question. It will be remembered that following an interrogation, subsequently found to have been unfair, Chalmers had taken the police to a cornfield where he pointed out where he had disposed of the deceased's purse, which was duly recovered. The evidence of the accused's actings in the cornfield was admitted by the trial judge, in the absence of authority to the contrary. However, his decision was overturned on appeal. Lord Cooper referred to the "episode of the cornfield" and dealt with it simply on the basis that the crucial evidential point was the accuysed's knowledge of the whereabouts of the purse:

> "The significance of the episode is plain, for it showed that the appellant knew where the purse was. If the police had simply produced, and proved the finding of, the purse, that evidence would have carried them little or no distance in this case towards implicating the appellant."

Since the accused's actings in the field were "part and parcel of the same transaction" as the unfair interrogation, evidence of

them was inadmissible and there was accordingly nothing to link the accused to the purse. The finding of the purse on its own was irrelevant and hence the case collapsed.

Two basic propositions can be derived from Chalmers. Firstly, although the point was not specifically argued, the discovery of a subsequent fact does not, in Scots law, render an otherwise inadmissible confession admissible. This much at least is clear. Secondly, and more doubtfully, the evidence of the finding of the purse would have been admissible *quantum valeat* (which in this case was, of course, nil). At the very least Lord Cooper was not prepared in the circumstances of Chalmers to hold that the finding was inadmissible. However the point certainly cannot be regarded as being beyond doubt.

Given that Scots law is unsettled on the issue of the admissibility of a fact discovered in consequence of an inadmissible confession, it is appropriate to consider the arguments that might be advanced. One of the main reasons for the unsatisfactory state of the pre-PACE law in England was the failure of the courts to decide the policy behind the exclusion of improperly obtained confessions. This is not so much of an issue in Scotland since the sole criterion is fairness to the accused, and improperly obtained evidence will be excluded because it has been improperly obtained and not because it is unreliable. Similarly the courts have not, in general, applied the so-called disciplinary principle and there are few instances in Scots law of the

courts expressly excluding evidence in order to discourage improper police practices. However, even though the courts may not overtly apply the disciplinary principle, the fact that a case has collapsed because improperly obtained evidence has been excluded is bound to become known to the police and it is reasonable to assume that lessons will be learned. In other words the exclusion of evidence will be likely to have an effect on police behaviour whatever the court's intention may be.

Accordingly it might be argued that logic and the need to discourage improper police actions must lead to the conclusion that where the confession is inadmissible, evidence of a consequently discovered fact ought also to be inadmissible. The exclusion of an improperly obtained confession in order to discourage improper police behaviour is inconsistent with the admission of evidence discovered in consequence of the confession. Although initially attractive, it is submitted that this argument is unsound since the existence of the fact is a matter independent of the confession.

The point may be made clearer by considering the possibility that, in the course of an inadmissible confession, A admits to having pawned the stolen property in the shop run by B. B is seen by the police, remembers A pawning the property, which is recovered, and in due course he is cited as a witness against A. An argument that the prosecution should not be allowed to call B as a witness against A because his involvement was discovered as

the result of an inadmissible confession is self-evidently unsustainable [e] and in the hypothetical example, B's evidence linking A with the property would clearly be admissible. Since B is merely a link in the chain of evidence between A and the property, there is, it is submitted, no difference in principle between the hypothetical example and the situation where the inadmissible confession leads simply to the discovery of the property itself without B's intervention, the link to A being provided by, say, fingerprints.

On the other hand, if unreliability is considered to be the reason for the exclusion of an improperly obtained confession, an argument can be made that while there may be a risk that the confession is unreliable, no such risk attaches to the subsequently discovered fact. It has already been pointed out that this is not the basis on which Scots law operates, but such an argument would tend towards the conclusion that at least so much of the confession as is verified (and hence proved reliable) by the finding of the fact should be admitted.

The Thomson Committee dealt with the issue briefly under reference to Chalmers:

> "The view that the discovery of the article renders any part of the statement admissible has been rejected in Scotland. We accept this. Scots law excludes evidence on the ground that it has been improperly obtained without consideration of

its reliability. To allow evidence of a statement to be led because it can be shown to be true might encourage police irregularity. On the other hand, it does not follow that evidence of the discovery of articles should be excluded merely because the information supplied by an accused which led to their discovery, is inadmissible.

We take the view that there is nothing improper in the police asking questions of an accused person after charge, for example regarding the whereabouts of a missing child or stolen property. Indeed the police have a duty to ask such questions and the public expect them to do so. Although the answers which they receive will not be admissible in evidence, the court may allow evidence of recovery, provided:

(a) the prosecution does not disclosed in evidence the source of the information; and

(b) the information was not obtained by methods which the court decides are unfair. "

Unless the Thomson Committee were intending to restrict the admissibility of recovery solely to the post-charge questioning situation, the difficulty with this approach is that it is circular. Apart from post-charge questioning, where any resulting statement is inadmissible no matter how "fair" the

questioning, it is illogical to say that the evidence is admissible unless it was obtained by methods which were unfair, since the only basis on which Scots law now excludes confessions is that they were unfairly obtained. If the confession is excluded because it has been unfairly obtained, *ex hypothesi* the subsequent fact is also inadmissible. This is clearly not in accordance with Lord Cooper's opinion in Chalmers nor, it is submitted, is it consistent with logic.

It is submitted that the basis on which Scots law should deal with this matter is as suggested by Sheriff Macphail. [10] He argues convincingly that the issue should be assimilated to the broader question of illegal searches and seizures, with the issue becoming one of judicial discretion:

> "If the facts were discovered as a result of circumstances particularly unfair to the accused or an exceptionally serious illegality, such as a confession extracted by brutality, the judge would be entitled to exclude the evidence. That would then be a particular application of the general discretion of the court to admit or exclude evidence illegally or irregularly obtained."

Notes

1. A. Gottlieb *Confirmation by Subsequent Facts* (1956) 72 LQR 209. Given the radical reform effected by PACE there is nothing to be gained in considering the cases individually. The writer prays in aid Mirfield's view to the same effect - p127
2. Macphail §21.02 which appears to be based on Gottlieb op cit
3. See Cross p479 for discussion of the proposals which led to the reform in PACE

4. See also Joy pp81-88
5. The "Bladie Belgian" case
6. Alsion ii 584
7. 1954 JC 66 discussed supra
8. See R v Lockhart (1785) 1 Leach CC 386. It is difficult to see how, in practical terms, the defence could get such a point before the court.
9. Paras 7.26, 7.27
10. Macphail §21.04

6.9 Procedural Aspects - The *Voire Dire* and the Trial-within-a-trial

(1) The Present Law

One of the characteristic features of procedure in England and other jurisdictions whose legal systems are essentially English is the use of the trial-within-a-trial or *voire dire* to determine the admissibility of disputed confessions.[1] Although Lord Justice-General Cooper and Lord Justice-Clerk Thomson introduced it into Scotland, [2] this foreign procedure has not really flourished in the hostile northern climate. Nevertheless it retains a toe-hold in Scotland and indeed one Working Group recommended its extension to disputed identification parade evidence although fortunately no steps have been taken to implement the proposal. [3]

This section examines in general outline the body of jurisprudence which has built up in England and some of the problems which have been raised before considering the arguments which have been stated both for and against the procedure.

In a jury trial the question of the admissibility of a confession is normally a matter for the trial judge although the matter may exceptionally arise before the examining justices in the course of committal proceedings. [4] Different issues arise in summary proceedings and these are considered later.

Where the defence intend to challenge the admissibility of a confession, they will inform the prosecution who will not mention the confession in their opening speech. Thereafter in normal course the trial will proceed until the point is reached at which the prosecution wish to adduce evidence of the confession when the objection will normally be made. [4] Occasionally it may be more convenient for the judge to deal with the issue of admissibility at an earlier stage, for example prior to opening to the jury where prosecuting counsel would be unable to explain his case without referring to the confession. [5]

It may be remarked in passing that the avoidance of complications of this nature is one of the reasons for preferring the Scottish procedure under which there are no opening speeches. If for some reason it were desired to challenge a confession in advance of trial in a Scottish court it would presumably be necessary to apply for a preliminary diet under Section 76(1)(c) of the 1975 Act although it is difficult to envisage such a situation arising as a practical issue.

Returning to English procedure, at whatever stage the matter is raised, the judge will conduct a trial on the *voire dire* to decide the question of admissibility. This will normally be done in the absence of the jury, but only at the request or with the consent of the defence.

No clear procedural rules appear to have been laid down for the trial-within-a-trial and the normal rules of admissibility of evidence would not appear to apply. After some initial uncertainty the defendant is, in modern practice, invariably regarded as a competent witness on his own behalf at the trial-within-a-trial, and older cases to the opposite effect can now be regarded as wrongly decided. [6] If the defendant does give evidence he is required to do so on oath [7] and is subject to cross-examination. The permitted extent of cross-examination is more limited than it would be at a normal trial, and prosecuting counsel may not cross-examine about matters not relevant to the issue before the judge. [8]

There is, at present, a conflict of authority on whether the defendant may, in the course of the trial-within-a-trial, be questioned as to the truth of the challenged statement. In R v Hammond (1941) 28 Cr App R 84 the defendant in a murder case had been subjected to what appears from the report to have been a fairly mild cross-examination in the course of which he was asked whether his confession, which he alleged had been beaten out of him, was true. He admitted that it was true and later, still in the course of the trial-within-a-trial, also admitted to killing the victim. The Court of Appeal held that the question of whether the statement was true was "... a perfectly natural question to put and was relevant to the issue whether the story which the appellant was then attacked and ill-used by the police was true or false." Humphreys J made an important, and, it is

submitted, self-evident, point when he observed:

> "If a man says 'I was forced to tell the story, I was made to say this, that and the other,' it must be relevant to know whether he was made to tell the truth or whether he was made to say a number of thing which were untrue."

Hammond was subject to criticism, and, it is submitted, misunderstanding, but nevertheless it became an accepted part of English procedure that the defendant could in appropriate cases be questioned as to the truth of the statement during the trial-within-a-trial.

However in Wong Kam-Ming v R [1980] AC 247 a majority of the Privy Council held that Hammond was wrongly decided with regard to the law of Hong Kong and in that country a defendant should not be questioned on the *voire dire* as to the truth or otherwise of the statement. The sole object of the *voire dire* was to decide on the voluntariness of the alleged confession in accordance with long-established principles. If the accused denies the truth of the confession or part of it, this takes thing no further as far as his credibility is concerned. However if he admits the truth of the statement that suggests that he tends to tell the truth which in turn suggests that he is also telling the truth about police malpractice. " Lord Hailsham of St. Marylebone dissented on this point and argued that it was not possible to say *a priori* that in no circumstances is truth or

falsity relevant to either the admissibility of the disputed statement or the credibility of prosecution or defence witnesses.

The law has not advanced from this position since 1980 with Hammond still technically "un-overruled" in English law but with Wong Kam-Ming, strictly only a persuasive authority and weakened by a powerful dissent, now being accepted as the authoritative statement of the law. It is not clear how, if at all, PACE has affected this "unedifying conflict"[10] although Section 76(2) makes it clear (if that were in fact necessary) that the truth of the statement is not relevant to admissibility. "

At the conclusion of the trial-within-a-trial, the judge will rule on the admissibility of the disputed statement. Thereafter the jury will return and, unless the exclusion of the statement leads to the collapse of the prosecution, the trial will proceed. If the statement is excluded the jury will learn nothing of the matter (although they will doubtless have their suspicions) and if the judge rules in favour of admission the evidence will be led again in their presence.

Whether or not the statement has been excluded, the prosecution is not permitted to lead as part of its case evidence of what the defendant said on the *voire dire*. However when the judge has ruled in favour of admission and the accused gives evidence at the main trial, he may be cross-examined on any discrepancies

between his present evidence and what he said on the *voir dire*. [12]

At common law the use of the *voire dire* procedure was not compulsory and the defence might prefer, for tactical reasons, to have the evidence led once only before the jury with only a single cross-examination. In that event it was open to defence counsel to submit, when all the evidence has been heard, that the judge should direct the jury to disregard the confession evidence. [13] It is not clear whether this option still survives Section 76 of PACE and the view of the Court of Appeal in R v Sat-Bhambra [1988] Crim LR 453 that the trial judge has no power to exclude a confession under Section 76 once it has been given in evidence although it has been stated that such a procedure is still available in a summary trial. [14]

If the judge rules in favour of admissibility, defence counsel may cross-examine prosecution witnesses in front of the jury as to the circumstances in which the confession was obtained. [15] There may be rare occasions where, the trial judge having ruled in favour of admissibility, further evidence emerges which causes him to revise his opinion, he is entitled to reconsider his earlier ruling. [16]

It may happen that the issue of admissibility is only raised for the first time while the accused is giving evidence and in that situation the judge may, in the exercise of his discretion,

require relevant prosecution witnesses to be recalled for further cross-examination. [17]

When one turns to summary procedure, the position becomes, at least to Scottish eyes, somewhat surreal. Since the justices (or the stipendiary magistrate) are the judges of both fact and law and in effect act as both judge and jury it would seem patently unrealstic and wholly artificial to expect them to follow the *voire dire* procedure which is based entirely on the notion that the admissibility of disputed evidence is a matter for the trial judge alone. The position at common law was unclear although it would appear that certain justices did try to follow a form of *voire dire* procedure. [18]

It is surprising that it was necessary to wait until as late as 1982 for an authoritative judicial pronouncement and when this finally came in E. (An Infant) v Chief Constable of Kent [1982] Crim LR 682 it was stated that the procedure was only appropriate in cases tried before a judge and jury. Incidental matters, said the Divisional Court, should be decided as separate issues and not as trials-within-trials and there was no need for evidence to be repeated after the issue of admissibility had been determined. It was quite impossible to lay down rules as to when justices should announce their decision on admissibility. Each case was different and it was for the justices to ensure that what was done was fair to both sides.

Once again, however, PACE has intervened and it now appears to be the law that justices *should* hold a trial within a trial but only for the purpose of determining an issue under Section 76(2) which, it will be remembered, requires that before a challenged confession can be given in evidence the prosecution must prove beyond reasonable doubt that it was not obtained by oppression or in consequence of anything said or done which was likely to render it unreliable.[19] This now presumably means that the justices must hear the evidence, rule on admissibility, and, if they rule in favour, hear the evidence all over again.

Notes

1. Chalmers v H.M. Advocate 1954 JC 66
2. *Identification Procedure under Scottish Criminal Law* (1978, Cmnd 7096) para 4.01
3. R v Oxford City Justices *ex parte* Berry [1987] 3 WLR 643
4. Ajodha v The State [1982] AC 204
5. R v Hammond (1941) 28 Cr App R 84.
6. Archbold §15-28
7. There is a special form of oath for the *voire dire* - Archbold p1094 n1
8. loc cit note 6 supra
9. For criticism of this decision see P. Murphy *Truth on the Voire Dire; A Challenge to Wong Kam-Ming* [1979] Crim LR 364
10. Cross p168
11. The original PACE Bill contained a provision which would have overruled the majority in Wong Kam-Ming and given statutory authority to Hammond, but this was later dropped. See Zander p189 note 26.
12. loc cit note 6 supra
13. See P Rowe *The Voire Dire and The Jury* [1986] Crim LR 226
14. R v Liverpool Juvenile Court *ex parte* R [1988] QB 1
15. R v Murray [1951] 1 KB 391
16. R v Watson [1980] 2 All Er 293
17. Ajodha note 4 supra.
18. CF Parker *Confessions In Magistrates Courts* [1977] Crim LR 14
19. R v Liverpool Juvenile Court note 12 supra. However the procedure is not appropriate to decide the issue of discretionary exclusion under Section 78 - Vel v Owen [1987] Crim LR 496

(ii) The Arguments

(a) England

English lawyers seem to be devoted to the concept of the *voire dire* and there is very little English criticism of it. Any perceived departure from orthodoxy is liable to provoke strong adverse comments. [1] Such criticism as has been directed at the procedure has been muted, even from normally outspoken commentators such as Professor Cross, who contents himself with the observation that "Trials within the trial are time wasting in cases tried by jury and something of an unreality in cases tried before magistrates because the question of admissibility has to be determined by the same tribunal as that which pronounces on liability." [2] His conclusion, however, is that the abolition of the *voire dire* would sometimes entail the disclosure to the jury of the terms of an inadmissible confession which it would be difficult for them to disregard, leading to the need for the judge to discharge the jury and order a new trial.

In their otherwise iconoclastic Eleventh Report, the Criminal Law Revision Committee (by a majority) declined to interfere with it, although they did say that they "should have been glad to find a way of getting rid of the need to hold a trial-within-a-trial if this were possible without causing injustice to the accused." [3] The committee acknowledged "undeniably strong arguments based on logic, simplicity and convenience in favour of allowing all confessions to go before the jury ... leaving it to them to

consider whether to give less weight, or no weight at all, to the confession because of the way in which it was obtained." [4] and referred with approval to dicta of Parke B. and Lord Campbell C.J. in Baldry [5], both of whom suggested that it might be better to let all confessions go before the jury.

According to the committee the chief argument in favour of adopting this course is that, since the object of the trial is to get at the truth, and since a confession may be true even if obtained by improper means, a confession should never be inadmissible merely because of the means by which it was obtained for the result may be that a dangerous murderer may have to go free. There were obvious advantages of simplicity and convenience, particularly the ending of the trial-within-a-trial.

A minority of the committee favoured the adoption of this course and would have gone so far as to discontinue the involuntariness test. However the majority while acknowledging the advantages considered that such a course was too risky for two reasons. Firstly the effect on the jury of an induced confession might be too great to be undone by the evidence of the way in which it was obtained. Secondly, the removal of all restrictions on admissibility on account of improper methods would "encourage the police to resort on occasions to at least small improprieties". [6]

So the most radical report on criminal evidence this century failed to take the opportunity to rid English procedure of the

voire dire and it is difficult to see another opportunity presenting itself in the future particularly in view of the influential opinions expressed in favour of the procedure, summed up thus by Lord Hailsham:

> "Any civilised system of criminal jurisprudence must accord to the judiciary some means of excluding confessions or admissions obtained by improper methods ... It is therefore of very great importance that the courts should continue to insist that before extra-judicial statements can be admitted in evidence the prosecution must be made to prove beyond reasonable doubt that the statement was not obtained in a manner which should be reprobated and was therefore in the truest sense voluntary." [7]

The provision in Section 76(2) of PACE-that the prosecution must prove to the court beyond reasonable doubt that a confession was not obtained by oppression or in consequence of anything likely to render it unreliable has now, in effect, made the *voire dire* procedure a statutory requirement.

Notes

1. eg L.H. Hoffman *What happened to the Voir Dire* (1967) 83 LQR 338
2. Cross (5th edn) p73, a passage omitted from subsequent editions.
3. Para 54
4. Para 62
5. (1852) 2 Den 430 discussed supra vol, 2 p14
6. Paras 63 - 64
7. Wong Kam-Ming v R [1980] AC 247 at 261. The passage was also quoted with approval by Lord Fraser of Tullybelton in R v Brophy [1982] AC 476

(b) Scotland

The most comprehensive discussion of the trial-within-a-trial in Scotland is in Macphail. [1] The learned author points out that although the procedure in Scotland "somewhat resembles" the English practice, and may have been suggested by a consideration of it, it may also be seen as a development of the Scottish practice of hearing argument on an objection to the admissibility of a confession in the absence of the jury before the critical evidence was led. Such a procedure was unsatisfactory, often requiring to be based on disputed hypotheses as to the testimony which the witness would be likely to give.

Sheriff Macphail sets out eight points for consideration, which are overwhelmingly against the trial-within-a-trial as a feature of Scottish procedure:

(1) The procedure leads to the repetition and unchallengeable reconstruction of evidence. This is based on the views of Lord Justice-General Clyde in Thompson v H.M. Advocate 1968 JC 61.

(2) The procedure appears to contravene the ancient rule * that the whole evidence must be taken in the presence of the jury.

(3) The procedure does not accurately reflect any principle that all questions of admissibility must be determined by the judge alone. If the judge holds, after a trial-within-a-trial that the confession is, or may be, admissible, he is still required, on

the basis of Chalmers, to direct the jury to disregard it unless they are satisfied that it was made voluntarily. Thus, as Sheriff Macphail points out, the jury have to decide the question of admissibility for themselves and cannot be concerned solely with the probative value of the statement.

(4) If a relevant consideration is that a confession which was not made voluntarily is likely to be unreliable, the procedure appears to contravene the principle that the reliability of evidence is essentially a matter for the tribunal of fact.

(5) The procedure is anomalous because it is not generally applied in situations where an objection to admissibility of evidence other than a confession is taken and there is a dispute as to the preliminary facts.

(6) There is a practical danger that the jury will think they have been asked to withdraw because statements prejudicial to the accused are about to be made. Difficult considerations arise if the judge, having decided in favour of admission then has to change his mind because of further evidence led before the jury. In such a situation it would be difficult for the jury, however strongly directed, to exclude the confession from their minds.

(7) There are unresolved questions as to the burden and standard of proof at a trial-within-a-trial.

(8) In view of Murphy v H.M. Advocate 1975 SLT(N) 17 and Balloch v H.M. Advocate 1977 JC 23 the occasions when a judge will exclude evidence after a trial-within-a-trial will be few and the procedure will simply lengthen the trial without any advantage to the administration of justice.

Sheriff Macphail admits that dispensing with the trial-within-a-trial could involve the disclosure to the jury of a confession which the judge might ultimately hold to be inadmissible and in such circumstances it might be difficult for the jury to disregard the confession notwithstanding the judge's direction that they should do so. This, of course, is the crux of the whole matter and has been the main reason for the reluctance to interfere with the procedure in England. He suggests that this difficulty would not arise if the Crown sought to adduce challengeable confessions only in cases where the confession was essential for conviction. In such a case, if the judge finds the confession to have been inadmissible, he will simply direct the jury to return a verdict of not guilty. He considers that the "traditional fairness of the Crown Office in refraining from adducing evidence likely to be held inadmissible, would go far to mitigate any risks in the procedure adumbrated in Thompson".

While Sheriff Macphail's faith in the fairness of Scottish prosecutors is touching, and, the writer would suggest, well founded, it is respectfully submitted that this suggestion overlooks the practical reality that the Crown often do not know

in advance that a confession is to be challenged, particularly in cases where either no judicial examination has been held or the accused has declined to answer questions. [3] It may be perfectly obvious to the prosecutor that a confession has been unfairly obtained and in that situation, clearly it should not be led. However the defence are under no obligation to disclose a challenge to a confession in advance, challenges are frequently made for the first time at the trial and spurious allegations of unfairness are matters of routine. Sheriff Macphail's suggestion puts an unfair burden on the prosecutor. It is submitted that it would be wrong to expect the prosecutor to refrain from leading a confession which although not essential to conviction would materially bolster the prospects of a dangerous criminal going to prison simply in order to avoid the hypothetical possibility of the jury not following the judge's directions.

Scots law will require to decide unequivocally whether or not the jury can be trusted to follow the judge's directions. If it can, the trial-within-a-trial is superfluous. If it cannot, the implications are grave and much wider than the issues being discussed in this thesis.

At the end of the day, it is submitted that the most telling argument against the trial-within-a-trial is the simple fact that in the modern state of Scottish law it is largely pointless. As Sheriff Macphail wrote in 1976, "The procedure has been in

existence for over 20 years, and the number of cases in which it has resulted in evidence being excluded is very few indeed."

Notes,

1. 20,37 et seq
2. Act 1687 c57, now repealed,
3. The Thomson Committee recommended that there should be no trial-within-a-trial where the challenge was first made at the trial but their recommendations proceeded on the basis that judicial examination would be the norm,

Chapter 7 The Evidential Sufficiency of Confessions in Scottish Law

7.1 Introduction

It was an ancient rule of Scots law that the testimony of a single witness was insufficient:

> "Probatioun allanerlie be ane witness, is not sufficient of the law; *Quoniam in ore duorum aut trium stat omne verbum*' '

Hume describes the requirement for corroboration in the following terms:

> "No matter how trivial the offence, and how high soever the credit and character of the witness, still our law is averse to rely on his single word, in any inquiry which may affect the person, liberty or fame of his neighbour; and rather than run the risk of such an error, a risk which does not hold when there is a concurrence of testimonies, it is willing that the guilty should escape." 2

The requirement of corroboration in the law acknowledges the risk posed by the human fallibility of the fact-finding process, a risk which, it has been pointed out, may in fact be double - the fallibility of the witness himself and the fallibilty of the tribunal which holds the witness to be credible. 3

Lord Cameron, one of Scotland's longest-serving judges, frankly acknowledged the same point when he wrote:

> "Nothing is more easy than to err in the assessment of the credibility or accuracy of witnesses, even after subjection to skilled cross-examination, and the experience of years confirms that view." [4]

Although substantial inroads have been made into this principle in civil matters, it remains one of the most characteristic features of Scottish criminal law that crucial facts should be corroborated:

> "No person can be convicted of a crime or statutory offence, except where the legislature otherwise directs, unless there is evidence of at least two witnesses implicating the person accused with the commission of the crime or offence with which he is charged." [5]

The reference to "two witnesses" in this celebrated quotation is perhaps slightly misleading and the less well known exposition in Renton and Brown [6] is, it is submitted, more accurate and hence preferable:

> "The basic requirement is that the offence be brought home to the accused by evidence from at least two sources. The question is not whether each of the several circumstances points by itself

to guilt of the charge libelled, but whether taken together they are capable of supporting the inference of guilt beyond reasonable doubt."

With the sole exception of a recorded plea of guilty, this principle applies to confessions as much as to any other type of evidence. In the case of a confession, the corroboration must come from an independent source and a confession is not corroborated by being heard by two or more people. It is also now clear that a confession is not corroborated by being repeated even in different terms and to different witnesses. [7] Conversely, if the requisite corroboration is available, it is not necessary that the confession itself should be spoken to by more than one witness. [8]

This chapter explores the issue of corroboration of confessions, firstly in terms of the general principles and thereafter specifically in relation to the issue of the "special knowledge" confession. It will be argued that this latter doctrine has resulted in the situation whereby the need for a confession to be corroborated (in the generally understood sense of that word) has effectively been removed and this is doubly dangerous since it has taken place against a background of continuing lip-service to the conventional view of the law and since it has not been accompanied by any effective safeguard for the accused such compulsory tape-recording of police interviews.

Notes.

1. Balfour *Practicks* 373
2. Hume ii 383
3. Anon *Corroboration of Evidence in Scottish Criminal Law* 1958 SLT (News)137
4. Hammond v Western SMT, 1968 unreported, quoted in Macphail §23.02
5. Morton v H.M. Advocate 1938 JC 50 per L J-C Aitchison p55
6. para 18-52
7. It is surprising that this point which was first raised, but not decided, in Banaghan v H.M. Advocate (1883) 1 White 565 should have remained undecided for a century until Bainbridge v Scott 1988 SLT 871
8. Innes v H.M. Advocate 1955 SLT(N) 69

7.2 Judicial Confessions

(1) Plea of Guilty

In modern practice a formal, recorded plea of guilty which is accepted by the prosecution is conclusive evidence of the accused's guilt and the judge will proceed to sentence without any further consideration of the sufficiency of the evidence against the accused. However it was not always so. In the eighteenth century, even though the prisoner pleaded guilty on the reading of the indictment and the plea was entered on record in the presence of the full assize, this would not authorise the judge to award sentence. The charge had to be remitted to a jury who had to return a verdict. The prisoner might retract his confession before the jury and they might acquit him if they saw fit. [1] This procedure was abolished, and the modern procedure introduced, by the Act 9 Geo. IV c. 29 Section 14.

Mention should be made of the one known modern Scottish example of a false plea of guilty, [2] the extraordinary case of Boyle v H.M. Advocate 1976 SLT 126 where an innocent accused pled guilty with legal advice to a serious charge of assault and robbery and was sentenced to nine years imprisonment. Boyle, who was a deserter from the forces, was being escorted into military custody when he produced from his pocket a newspaper cutting about the robbery and told his military escort that he had committed the crime. They immediately returned him to police custody and he then proceeded to make to the police a "detailed

and circumstantial confession" to the charge to which he later pled guilty.

Insofar as a motive for Boyle's behaviour could be discovered, it would appear that he considered conditions in a civil prison would be better than those in a military one and he did not expect too lengthy a sentence. The nine years must have been an unpleasant surprise and he belatedly sought to have the conviction quashed. The report is largely concerned with the procedural issues, and it should be noted that the Crown, who conceded that Boyle was wholly innocent, accepted that there had indeed been a miscarriage of justice, but it is clear that at the original hearing the Crown had acted in good faith and on the assumption that they had a sufficiency of evidence, something which Lord Cameron attributed to "errors in investigation and information which provided the prosecution with material which at the time appeared to corroborate the applicant's own detailed and circumstantial admission and confession."

Although Boyle is a unique case in Scotland, and can hardly be regarded as a major precedent, it is nevertheless of considerable importance in that it shows, albeit in an extreme way, the dangers of blind reliance on the evidence of a confession.

Although it may not be directly relevant to the present issue, this is also an appropriate point to note the bizarre case of an accused who pled guilty to various charges of incest and other

related offences with a girl believed by all concerned, including the accused and the girl herself to be his daughter. He was later charged with other offences relating to the same girl but by this time science had moved on and the evidence was subjected to D.N.A. testing which established conclusively that he could not have been the girl's father. The earlier conviction was quashed of consent. However, it is submitted that this is not truly an example of a false confession but is rather a confession tendered under essential error which, in these particular circumstances, could not reasonably have been guarded against.

Notes
1. Hume ii 320; Burnett p576. See also chapter 5,2 (i) supra
2. The examples given by Dickson pp263-265 §§380-384 all relate to other jurisdicitions
3. Glasgow Herald 6 October 1990

(ii) Judicial Declaration

Generally the legal effect of a confession in a judicial declaration is similar to that of an extra-judicial confession. [1] Although obviously a matter of considerable weight, a confession in a judicial declaration has never been regarded as conclusive evidence and requires to be corroborated by evidence from another source. [2] The mere proof of the commission of the crime is insufficient to provide corroboration, there must be some evidence connecting the accused with the crime. [3]

It is a question of facts and circumstances in each case what additional evidence will be sufficient to provide corroboration

but a merely suspicious circumstance, such as hiding from apprehension, is not enough. [4]

Dickson observes that prisoners are "every day convicted upon confessions in their declarations, corroborated by circumstances which throw considerable suspicion upon them but which would not of themselves prove the prosecutor's case." Dickson considers this just and comments that "a false confession in a declaration is very rare and unlikely, indeed, not many degrees less so than a false plea of guilty." [5] However he also warns against the possibility of the statement not having been taken down in the prisoner's precise words, its precise meaning thus being mis-conceived, and he observes that an intentional mis-statement is not impossible. [6]

The question of sufficiency has not yet arisen in connection with the 1980 Act procedures but it is thought that the courts will apply the general principles of corroboration of extra judicial confessions.

Notes.

1. Walkers p29
2. Hume ii 324; Alison ii 578; Dickson §339. Archibald Duncan and Charles Mackenzie (1831) Bells Notes 239; Banaghan v H.M. Advocate (1888) 1 White 565.
3. Dunlop and Others (1823) Alison ii 578-579 and authorities in previous note.
4. Macdonald p334. Ann Duff and Janet Falconer (1831) Bells Notes 239; James Douglas (1834) Bells Notes 240; John Buchanan (1837) Bells Notes 240.
5. Dickson §339. A false plea of guilty can happen - Boyle v H.M. Advocate supra vol, 2 p152
6. Dickson §376

(iii) The Evidence of the Accused

In Drysdale v Adair 1947 SLT(N) 63 an accused on trial for assault admitted in evidence that he had struck a blow but explained that it had been done in self defence. The Sheriff-Substitute took the accused's admission as corroboration of the fact of the assault, but rejected the evidence of self-defence and convicted. On appeal the High Court held that corroboration might be obtained from the evidence of the accused without his entire evidence being believed.

The report of Drysdale v Adair is extremely brief. However, a much fuller report is available of McArthur v Stewart 1955 SLT 434 in which case the High Court held that where, in the course of giving evidence at his trial, the accused admits a crucial fact which was only spoken to by one Crown witness, his evidence will provide the necessary corroboration. [1] The possibility of a prosecutor taking up a case without sufficient evidence in the hope of securing an admission from the accused was deplored (rightly) by Lord Carmont.

This point is probably less likely to arise in practice today in view of the provisions of Sections 140A and 345A of the 1975 Act (as amended by the 1980 Act) which allow for the making of a submission of "no case to answer."

The view has been expressed [2] that an admission of guilt by the accused in the witness box is conclusive, but there are no cases.

Renton and Brown [3] state that an admission on oath in the witness box must be corroborated by evidence from another source. In modern practice the question is not likely to be of much practical importance since the Crown will, of course, have had to lead at least sufficient evidence to overcome a "no case to answer" submission before the question of the accused going into the witness box will arise.

It is thought that an admission of guilt in judicial proceedings other than the accused's own trial would be treated on the same basis as an extrajudicial confession and hence would require corroboration in accordance with the normal principles.

Notes

1. This point also arose, inconclusively, in Miln v Whaley 1975 SLT(N) 75
2. Lord Cameron *Scottish Practice in Relation to Admissions and Confessions by Persons Suspected or Accused of Crime* 1975 SLT 265.

7.3 Extra-judicial Confessions

(1) The General Principles

(a) The Views of Dickson and Other Writers

It has long been the law in Scotland, unlike England, that an extra-judicial confession is not of itself full proof of guilt and must be corroborated by other evidence, either direct or circumstantial, throwing suspicion on the prisoner. ' It is impossible, given the infinite variety of forms which such confessions can take, to lay down with any precision the amount of corroborative evidence required. There are many situations where the matter is self-evident; thus a clear confession

supported by the recovery of a sum of money in the possession of the previously destitute accused, [2] or the finding of the accused standing over the body of his victim with the murder weapon lying nearby. [3] In these and many other situations there can be little doubt about the sufficiency of the evidence. Equally, where all that is proved is the confession and the commission of the crime, this is insufficient, since proof of the crime merely establishes that it was committed by someone and does not corroborate the accused's confession that he committed it. [4]

However, cases are often less straightforward than this, particularly where the confession is not supported by real evidence, and as Dickson puts it, "it must lie with the jury in each case to say whether, looking to the terms of the confession, the channel through which it comes, and the corroborating evidence, they are satisfied that the prisoner is guilty." [5]

Dickson [6] offers some pointers to the assessment of the probative value of oral admissions and confessions, to which, it is submitted, modern courts should pay more heed than sometimes appears to be given.

The jury ought always to be satisfied of the opportunity for observation, the accuracy and memory and the veracity of the witness before they attach any weight to his evidence. Dickson quotes with approval the following dictum of Baron Parke:

"It very frequently happens not only that the

witness has misunderstood what the party has said, but that by unintentionally altering a few of the expressions really used, he gives an effect to the statement completely at variance with what the party really did say." [7]

Only part of the statement may have been heard, and important qualifications unnoticed or forgotten. The accused and the witness may have attached different meanings to an ambiguous or inaccurate expression. [8] Dickson also stresses the need for the the witness to repeat the accused's words verbatim rather than his own inference from them and cites an unreported case [9] in which the accused was indicted for theft of a shawl. A police officer deponed that the accused "confessed" but under cross-examination conceded that all she had said was that she "had taken the shawl". The accused was acquitted on the basis that she lacked theftuous intent.

Dickson is unequivocal in his views on the danger of fabricated confessions. Given recent events in England the passage is worth quoting in full for its prophetic ring:

"Evidence of oral admissions is also easily fabricated, and the chance of detecting its untruth is small; for when all a witness speaks to is an independent statement, his falsehood is almost beyond the reach of cross examination, and is seldom contradictory to the proved circum-

stances attending the crime. Peculiar caution is always necessary when the person repeating the supposed confession is an officer engaged in the pursuit of criminals for such persons are apt to be biassed witnesses, and to attribute a guilty meaning to ambiguous, and even to harmless acts and words, of persons whom they apprehend." [10]

However, Dickson goes on to lay the foundation for the modern view of confessions when he observes:

"Extra-judicial confessions ... (if distinctly proved), are usually entitled to much weight, and strong corroborative evidence will not be required to complete the proof of guilt. The peculiar value of confessional evidence lies in its furnishing the best proof of the intention which constitutes the essence of most crimes." [11]

No subsequent writer has treated the subject of the probative value of confessions in as much depth as Dickson and he views still retain the highest authority. However, the third edition of Renton and Brown contains the succinct and apposite comment:

"It may also be suggested that suspicion must always attach to a statement in the absence of which the accused would have had a reasonable chance of being acquitted." [12]

Notes

1. Hume ii 333; Dickson §352; Walkers p29.
2. John Buchanan (1837) Bells Notes 240
3. Nicholas Crosbie (1719) Hume ii 333
4. Connolly v H.M. Advocate 1958 SLT 79, per Lord Patrick at p81, Lord Mackintosh ibid
5. Dickson §352
6. Dickson §377 et seq
7. Earle v Picken 1833 5 Car & Pa 542
8. In one case from the writer's experience as a prosecutor, the police claimed that the accused, on being informed of the charge against him, said "Sure, I did that," which they claimed was an unequivocal confession. However, the accused claimed, quite credibly, that he had said the words in a tone of sarcasm and intending them as a denial.
9. Dow, Perth Spring Circuit 1850
10. Dickson §378
11. Dickson §379
12. p413

(b) The Cases

It is surprising how little case law there was on sufficiency until comparatively recently. [1] The clearest, and still the most authoritative, case on the point is Connolly v H.M. Advocate 1958 SLT 79. [2] Although Connolly contains elements of what would today be regarded as a special knowledge confession, that issue would have to wait until Manuel v H.M. Advocate 1958 JC 41 for full consideration from the High Court and Connolly is primarily an authority on general principles.

The circumstances in Connolly were straightforward. The accused was seen by some civilians to be sitting in a car, late at night, apparently just hanging around. The civilians were suspicious and reported the matter to the police. The accused was taken to the police station (on what basis is not clear) and the police returned to the car and stood by it until two men, White and Thomson, came round the corner from a street called Rosefield Avenue. On seeing the police White made off and Thomson spoke to the officers for a few moments before also taking to his heels. Later the same night a quantity of stolen goods was found in a house in Rosefield Avenue. In the police station Connolly made a statement, described as "circumstantial and detailed", describing how he and Thomson had broken into a shop and transported the stolen property to the house in Rosefield Avenue. He was convicted after trial and appealed. The High Court, Lord

Justice-Clerk Thomson, Lord Partick and Lord Mackintosh, rejected the appeal.

Lord Thomson set out the general principles of the law in what remains their classic statement:

> "It is a fundamental rule of our criminal law that no one can be convicted on the evidence of one witness and that there must be testimony incriminating the accused derived from two separate sources. It is consistent with that rule, though whether it is derived from it is not certain, that no accused can be convicted on his own confession alone. A confession of guilt - short of a formal plea of guilty - is not enough. There must be evidence from some other source which incriminates the accused. If all that the Crown can produce is evidence - however complete and exhaustive - that a crime has been committed together with evidence, however credible, that the accused confessed to having committed it, the Crown must fail. There must be something incriminatory of the accused spoken to by someone other than the accused.

While it is necessary that there should be evidence from two independent sources, the weight to be attached to each source may vary. If one

source is unimpeachable, the standard required of the other may be lower than if the first source carries less weight. It is the conjunction of the testimonies which is important."

His Lordship side-stepped the question of the special knowledge issue and stated that he found corroboration in the circumstances, viz the presence of the accused in the car, alone for an hour in the vicinity of the place where the stolen goods were found at a time which would fit in with the theft and the conduct of White and Thomson when they saw the police. According to his Lordship, while this was not very strong evidence, when it was put alongside the confession, the two in combination were "irresistable."

Lords Patrick and Mackintosh both delivered judgments but neither adds much to the Lord Justice-Clerk's statement of the law. Lord Mackintosh did, however, make it clear that "the corroborating evidence does not require to be so strong as would suffice to prove the case without the confession."

Lord Justice-Clerk Thomson again presided over the High Court when their Lordships dealt with Sinclair v Clark 1963 SLT 307. This road traffic case marks the first appearance of the High Court's frequently repeated view that the corroborative evidence need only "afford a sufficient independent check of [an] unequivocal admission" in order to satisfy the requirements of

the law. Lord Thomson's judgment is also of interest in that it shows, quite overtly, his Lordship calling in question the requirement for a confession to be corroborated at all:

> "There is a rule in our law - a somewhat archaic rule - the merit of which under modern conditions is not always obvious, at all events where the admission is beyond suspicion - that short of a solemn plea of guilt, an admission of guilt by an accused is not conclusive against him unless it is corroborated by something beyond the actual admission. One reason for this rule is to ensure that there is nothing phoney or quixotic about the confession. What is required in the way of independent evidence in order to elide such a risk must depend on the facts of the case, and in particular the nature and character of the confession and the circumstances under which it is made."

Insofar as "phoney and quixotic" means anything at all, it appears that his Lordship was considering the possibility of a confession by a person who had not committed the crime, a false confessor. The importance of the requirement for corroboration as a protection for the accused against a fabricated confession does not appear to have occurred to his Lordship. Admittedly it was to be some years before "verballing" by the police became a

perceived problem, but his Lordship's obiter comments show how far the pendulum had swung since Dickson's time.

Subsequent to Sinclair v Clark there has been a series of road traffic cases concerning corroboration of the accused's admission of driving in which the High Court have repeatedly stated their view that very little is required to corroborate an "unequivocal admission." [3]

Sinclair v Clark has also been cited many times outwith the context of road traffic law, notably in Hartley v H.M. Advocate 1979 SLT 26 [4] where the accused's confession was clearly unequivocal and was held to require very little corroboration. Although Connolly was not cited in Hartley, it is noteworthy that in the latter case Lord Grieve, who of the three judges considers the question of sufficiency most fully, referred to the requirement of corroboration being met by "something [which] must point to the accused as the perpetrator of the crime to which he has confessed", a considerably lower standard than Lord Justice-Clerk Thomson's statement in Connolly that there had to be evidence from two sources which *incriminated* the accused.

In Lord Dunpark's opinion confession evidence has a special status:

> "The standard of corroboration of an unequivocal confession of guilt is, in my opinion, different from the standard to be applied when seeking

corroboration of a Crown eye-witness at a criminal trial or of the evidence of a pursuer or defender in a civil case. The reason for the different standard is that, unlike such other evidence the confession of guilt by an accused person is prejudicial to his own interets and may, therefore, initially be assumed to be true. Accordingly, one is not then looking for extrinsic evidence which is consistent with his confession of guilt. If therefore, a jury is satisfied that a confession of guilt was freely made and unequivocal in its terms, corroboration of that confession may be found in evidence from another source or sources which point to the truth of the confession."

Tudhope v Dalgleish 1986 SCCR 559 differs from Sinclair v Clark and its successors in that the admission was not "unequivocal". In this case the accused was charged with a number of road traffic offences relating to an accident in which her car had allegedly collided with a parked vehicle and made off from the scene. When the police arrived at the accused's house, apparently fairly soon after the accident, they found that her car was parked outside showing signs of recent accident damage (although nothing that could be related to the parked vehicle) and with the engine still warm. Under Section 168 of the Road Traffic Act 1972 police asked the accused who had been driving the car when

it was involved in a road traffic accident, to which she replied, "I was driving it a short time ago".

The Sheriff acquitted on the basis that the Crown had failed to set up either an accident involving the accused or an admission by her and on appeal his decision was upheld, the High Court observing " ... the respondent was ... asked who had been driving the vehicle when it was involved in a road traffic accident, her reply was not that she had been driving when an accident had occurred but that she had been driving the vehicle a short time ago. In our opinion that statement cannot be regarded as a clear and unequivocal statement to the effect that she was the driver at the relevant time."

In Aiton v H.M. Advocate 1987 SCCR 252 [6] the accused was indicted for murder following a stabbing in a nightclub. The case against him was heavily dependent on two statements which it was alleged he had made and which amounted to implied admissions. These were firstly a remark to police officers, the day after he had been cautioned and charged, "Ach, look I gave the knife to a man. It's destroyed." and secondly a statement to a civilian witness shortly after the incident to the effect that he (Aiton) had "chibbed some guy". There was other circumstantial evidence against him, particularly from a witness, Hart, who spoke to seeing Aiton stab somebody, although he could not identify the victim, but the statements were the mainstay of the prosecution case. In no sense could either of these statements be classified

as an "unequivocal admission" of the murder with which he was charged but nevertheless the Crown case was presented on the basis that they were the starting point of the evidence and the question was whether there was enough to corroborate them, rather than the possibly more obvious question of whether the statements could corroborate Hart's eyewitness account. The conviction was upheld on appeal.

In Crowe v MacPhail 1987 SLT (N) 316 the point in issue was whether the Crown had demonstrated that the accused had knowledge and control, and hence possession, of a piece of cannabis found in his prison cell. The cannabis was found in the ashtray appropriate to the accused's bed and when cautioned and charged by the police with possessing cannabis he replied "It wasn't exactly in my possession. It was under my ashtray. There is a difference." He was convicted after trial and the conviction was upheld on appeal.

Sinclair v Tudhope 1987 SCCR 690 is one of the very few cases where the High Court have overturned a conviction based on confession evidence, although in this case the Crown failed on the basis that they had not proved that the crime libelled had occurred. The accused was found by police officers in Miller Street, Glasgow concealing something in the front of his anorak and looking about in a suspicious manner. He was stopped and found to be in possession of three diaries. Under caution he said "Aye, O.K. I stole them out of Nash's at Miller Street."

The only evidence to connect the diaries to Nash's was evidence that they were similar to ones stocked there. There was no evidence that any theft of diaries, let alone the actual ones recovered had taken place. In the circumstances it is hardly surprising that the conviction was quashed, although the High Court did comment on how near the Crown had come to success and implied that things might have been different if the accused had been seen to come out of Nash's or if there had been evidence that the diaries were unlikely to have been obtained anywhere other than in Nash's.

Sinclair v Clark was again considered in Greenshields v H.M. Advocate 1989 SCCR 637 the main importance of which lies in the fact that it is the first case to deal in any real depth with the question of an unclear and equivocal confession. "

Greenshields was indicted for a grisly murder which also involved the dismembering and burning of the victim's body. He was cautioned and charged with murder and with attempting to pervert the course of justice by dismembering the body. He replied "You don't think I did it myself do you; but I'm telling you nothing about it until I see my lawyer." At his trial the Crown relied on this statement as a confession to murder and sought corroboration in the finding of blood stains, certain other comments by the accused and evidence of his behaviour when interviewed by the police. However the statement to the police was critical in providing a sufficiency of evidence. One factor which

complicated the issue was the point, ably argued by defence counsel, that the reply could have related to either murder or attempting to pervert the course of justice or to both ⁷ and it could have been consistent with the accused admitting that he assisted in the disposal of the body but no more.

While the appeal court agreed that the statement could not be regarded as a clear and unequivocal admission, the crucial question was whether the jury were entitled to regard it as an implied or equivocal admission of murder. The Lord Justice-Clerk put it thus:

> "It is not only clear and unequivocal admissions which have evidential value. It has often been said that if there is a clear and unequivocal admission of guilt, then very little evidence in corroboration of such an admission is required. That is not to say, however, that something less than a clear and unequivocal admission is of no value. The first question must have been for the jury to determine whether the reply consistuted an admission at all, and if so an admission of what. If the reply was capable of being treated as an admission, then the amount of evidence needed to corroborate that admission would depend on the circumstances of the case. ... On the assumption that the reply was made, it was for the jury to determine whether the reply which the appellant

made related to the attempt to pervert the course of justice only or whether it was a reply to the principal charge which was undoubtedly a charge of murder."

Although the trial had proceeded, and the trial judge had directed the jury, on the basis that if the jury accepted the police evidence it was open to them to interpret it as an implied admission and then seek corroboration in the rest of the evidence, the Lord Justice-Clerk was of the view that this was not the only way, or even the best way, in which the case could have been presented. In his Lordship's view, the case was really one of circumstantial evidence with the alleged reply as a critical ingredient:

> "[O]nce it is recognised that there was never any question of the reply being treated as an unequivocal or clear admission, and that the jury were left to determine whether they were satisfied that it constituted an implied admission, the sole question in the case became one of sufficiency of evidence. I regard the case as a classic one of circumstantial evidence; each of the matters relied upon individually may establish very little, but in conjunction with one another, the facts were in my opinion clearly sufficient to entitle the jury to convict the appellant of this charge."

The appeal court did not say that the trial judge was wrong, and thus there would appear to be two possible approaches to an equivocal admission. Firstly the jury could be directed to look at the statement on its own, decide whether it is to be interpreted as a confession, and if so to what, and thereafter to seek corroboration in the other evidence. The problem with this approach, as Sheriff Gordon points out in his commentary, is the difficulty of separating the question of sufficiency of evidence from the question of weight of evidence since the corroboration needed for an equivocal confession is presumably greater than that required for an uneqivocal one. The alternative approach, favoured by the Lord Justice-Clerk, is for the jury to regard the evidence as a whole and simply treat the reply as one source of evidence, an approach which certainly has the merit of simplicity, and, it is submitted, the further merit of removing from the confession the special status which is so often inappropriately attached to it.

In summary therefore, the law is settled in the case of the uneqivocal confession. However, although Greenshields has been the first case to address the question of the equivocal confession, the possibility of the two different approaches means that it cannot at this stage be regarded as settling the law and it will be necessary to await further decisions before it becomes possible to identify any trends. ■

Finally in McGougan v H.M. Advocate 1991 SCCR 49, a case of child sex abuse, it was held of consent by the crown that the accused's demeanour and reactions when confronted both by the child's parents and the police could not be founded on as providing corroboration of his admissions, the logic of this presumably being that the reaction emanated from the same source as the admissions.

Notes

1. The most important of the earlier cases are summarised in Macdonald p334
2. Although this case was reported in 1958 it was actually decided in 1955.
3. The other cases in the series are Torrance v Thaw 1970 JC 58; Lodhi v Skeen (1978) SCCR Suppl. 197; Miln v Fitzgerald (1978) SCCR Suppl. 205; McDonald v Smith (1978) SCCR Suppl. 219; MacNab v Culligan (1978) SCCR Suppl. 222 and Lockhart v Crockett 1986 SCCR 685. None of them contribute anything material to the development of the law and they are not discussed individually. See also Sinclair v Macleod 1964 JC 19 where in special circumstances a conviction was overturned despite an unequivocal admission in response to a police requirement.
4. Discussed in relation to admissibility at vol. 1 p418 supra. See also Keane v Horn (1978) SCCR Suppl 225
5. Discussed in relation to admissibility at vol. 1 p449 supra
6. The statement in Tudhope v Dalgleish was, in effect, held not to amount to a confession at all.
7. In the writer's experience it is by no means uncommon for the police further to confuse an already complicated issue by an unnecessary proliferation of charges.
8. In Beattie v Scott 1990 SCCR 296 the defence conceded that the confession was unequivocal and the point therefore did not arise.

(ii) Circumstances Peculiarly Within the Knowledge of the Accused

In relation to matters such as driving without a licence or insurance or operating an unlicensed television set and the like, it is sufficient for conviction for the Crown, in the absence of contrary evidence, to lead evidence of an uncorroborated admission by the accused that he was unlicensed or uninsured. [1] In such cases it is sufficient for the Crown to demonstrate *prima facie* the absence of entitlement to carry on the activity in question, the possession of a licence or an insurance certificate being facts peculiarly within the accused's knowledge.

Notes

1. Milne v Whaley 1975 SLT(N) 75 approving John v Humphreys [1955] 1 WLR 325 and Davey v Towle [1973] RTR 328; Irving v Tudhope 1987 SCCR 505

(iii) "Special Knowledge"

(a) Introduction - The Views of Allison

The discussion so far has shown how little additional evidence is required to corroborate an unequivocal confession. Nevertheless, although the amount of evidence is slight, it must still come from outwith the terms of the confession itself. Parallel to the development of the general principles, the courts have developed the concept of what has colloquially become known as the "special knowledge" confession, the basis of which is that the confession itself contains information which could only be known to the perpetrator of the crime.

The first writer to articulate this principle was Alison who wrote:

> "Confessions ... come with most effect when they are connected, as is very frequently the case, with some articles of real evidence, which put it beyond a doubt that the statement given is in the main true. Thus, if a person is apprehended on a charge of theft, and he tells the officer who seized him, that if he will go to such a place, and look under such a bush, he will find the stolen goods; or he is charged with murder or assault, and he says he threw the bloody weapon inte such a pool, in such a river, and it is there searched for and found; without doubt, these are such strong confirmations of the truth of the confession, as renders it of itself sufficient, if the *corpus* is established *aliunde*, to convict the prisoner. '

It will be argued that the way in which the Scottish courts have interpreted this statement of the law has caused it to become separated from its base to the point where Alison would have difficulty recognising his own principle but before doing so it is pertinent to highlight some of the main elements which make up the principle as Alison saw it.

Firstly, "real evidence" has been defined by Dickson as "evidence derived from things" [2] and is used by the Walkers "to include both a thing, which may be a human being, any features of the thing which are significant, and the inferences to be drawn from the existence of the thing or from its significant features." [3] It is submitted that it is clear from the context that when Alison articulated the principle has was thinking solely in terms of the finding of physical, corporeal objects which had evidential value in themselves.

Secondly, it is submitted that it is implicit in Alison's statement, that the finding of the real evidence should come about as the result of the confession, in other words that the details in the confession should be unknown to anyone other than the criminal.

Thirdly, the *corpus* must be established *aliunde*. In other words there must be full legal proof of the commission of the crime. There is a surprising absence of authority on this point, but it is submitted that this requires the crucial facts of the crime to be corroborated. Thus, to take the typical example of theft by housebreaking, if the accused's confession contains "special knowledge" in relation to the modus operandi of the housebreaking and the property stolen this can be corroborated by the evidence of the householder. However if the confession only mentions the modus and is silent as to the property taken, the householder's evidence as to what was stolen must receive corroboration from

another source [4] otherwise the court would only be entitled to convict of housebreaking with intent to steal. [5]

Notes
1. Alison ii 580
2. Dickson §1815
3. Walkers p440 §416
4. eg recovery or the evidence of a second witness who can speak to the presence of the stolen property in the house before the crime
5. This point is not uncommonly overlooked in practice.

(b) The First Cases

As already mentioned, the question of "special knowledge" arose in Connolly but the High Court found it unnecessary to decide it. Thus the first judicial consideration of Alison's principle came in Manuel v H.M. Advocate 1958 JC 41. This case has already been discussed at length in the context of admissibility. [1] The application of Alison's principle to the circumstances of this case has been described as a "vivid example of what appears to be sound common sense," [2] a sentiment with which the writer wholeheartedly concurs. It will be remembered that as the result of Manuel's confessions to the police, the grave of Isobel Cooke was uncovered and one of her shoes was found. Later as the result of a separate confession two guns were recovered from the River Clyde. It would have been impossible for anyone other than the perpetrator of the crimes concerned to have known where these items of real evidence were to be found. Lord Justice-General Clyde quoted the passage from Alison with approval and commented that it "might have been written for this case".

Following Manuel the principle was next applied in Allan v Hamilton 1972 SLT (N) 2 where the accused in addition to making an unequivocal admission took the police to the post office where he had cashed a quantity of stolen savings stamps. The stamps were duly recovered from the postmaster who knew the accused and could identify him as having cashed the stamps earlier that day. The most important point about the case, however, is that there .

was no evidence other than the accused's confession that the stamps had been stolen since their rightful owner was unable to give evidence for medical reasons. *Prima facie* this would appear to offend against Alison's statement that the *corpus* must be established *aliunde*. Nevertheless the accused was convicted. On appeal the defence argued that the Crown had failed to prove the commission of a crime. The Crown argued that the accused's confession was corroborated by his possession of the stamps. It is a matter of regret that the report is brief, and indeed that the High Court did not issue written opinions and in the absence of further information it is impossible to say whether this case still represents a sound statement of the law. It is certainly difficult to see any distinction in principle between Allan v Hamilton as it is reported and Sinclair v Tudhope [9] where, it will be remembered, the accused was arrested in possession of diaries which he admitted to having stolen from a particular shop but where the High Court upheld a defence argument that there was no proof of a crime having been committed.

An attempt to turn a simple admission of guilt into a special knowledge confession failed in Walker v Smith 1975 SLT (N) 85. In this case an unsuccessful attempt had been made to break into a school. Three panes of glass had been broken in a door and one of the two bolts securing it had been withdrawn, the other still being in place. When the accused was seen by the police he said "Aye you're quite right. It was me. Nobody else was there." When cautioned and charged he replied "I didnae get in because I

was disturbed." Walker was convicted after trial, the Sheriff taking the view that the partial unbolting of the door showed that the would-be housebreaker was disturbed. Since there was no evidence from the janitor or anyone else that they had disturbed the accused, the High Court had little difficulty in overturning the conviction and pointing out that the condition of the door was "utterly neutral".

Notes
1. Supra chapter 5,3 ix
2. D. Brookens *Guildford: A Warning* 1989 JLSS 448
3. Supra 7,3 (1) (b)

(c) Smith v H.M. Advocate and Its Successors

The case which can, in many ways, be regarded as the beginning of the modern view of special knowledge confessions, and which put paid to any notion that the details in the confession should only be known to the accused, is Smith v H.M. Advocate (1978) SCCR Suppl. 203 . In this case, which is a fairly routine example of its type, the accused was indicted on twenty one charges of housebreaking and convicted of fourteen. The incriminating evidence against him consisted solely of statements allegedly made to the police.

The accused was taken to the police station to assist with enquiries into a series of housebreakings and there, in the time honoured manner, announced "I want to get the whole thing off my chest". He was then cautioned and went on to say "Look, I've done about 20 or 30 houses with that man. I can show you some of

them." There was some dubiety as to whether he was allowed to look at a list of reported housebreakings held by the police, but thereafter he took officers on a guided tour of the houses which he claimed to have broken into and in each case gave an account in "more or less detail" as to how the job had been done and as to some of the things which had been taken away.

The most remarkable feature of this case is the brevity, almost approaching perfunctoriness, with which the High Court dealt with the issues raised. There is no consideration of authority or principle and, in particular, no consideration of the fact that the "knowledge" displayed by Smith was available to the police and that some of this might have been passed on when Smith was allowed to look at the crime reports:

> "It is perfectly clear that a confession can receive corroboration if there is not only proof of the commission of the crime to which it relates but proof aliunde of the truth of the contents of the confession, eg if the confession was made at the time when only the thief or the houbebreaker could have known what happened in the various episodes. This is eminently a case in which proof of the contents of the confession was ample or at least sufficient. The fact of the matter is that the confessions were made in circumstances in which the accused had not been charged with any particular crime, They were made at a time when

all that the applicant knew was that the police were making enquiries into a series of house-breakings in that area. The particular house-breakings were not identified to the applicant nor did he have at that time any particulars of the articles stolen in the crimes. ... Now whether or not ... and it is open to question and was a matter before the jury, he was allowed to glance at the list of reported housebreakings kept in the police office, what it certainly true is that thereafter he took the police in a police car and guided them to the houses ... . Now in these circumstances, having regard to the way in which this transaction developed there is not the slightest doubt that the evidence of the house-holders confirming the truth of the contents of the confession, implicating the appellant as the perpetrator of housebreakings which he himself identified to the police, was sufficient to set up the truth of his confessions.

This is hardly satisfactory. Although the report is brief and includes no details of the evidence or the arguments, it appears that the accused only made the general admissions quoted above before he got to the police station. Thereafter it appears that he might have been shown the police list of reported house-breakings before he went out in the police car, which was when

the real special knowledge admissions were allegedly made. Surely the possibility of the accused having been influenced (to put it no higher) by the behaviour of the police merits more than the comment that it was "a matter before the jury"?

Regrettably this decision set the trend for the following cases. Once again in Wilson v McAughey 1982 SCCR 398 the opinion is brief and lacking in any real consideration of precedent, the Sheriff's note being appreciably longer, although at least Connolly and Manuel do receive an honourable mention. In McAughey the accused was charged with vandalising a mechanical shovel by starting its engine and driving it into the River Clyde. The machine, which had been parked and secured on dry land, was found submerged in the River Clyde with a broken window and a flat piece of metal in the ignition. When cautioned and charged he replied "How did you know it was me? I smashed the window of the digger. I put a piece of wire into the keyhole. When I turned it, it started up and started moving. I didn't know how to stop it. I jumped out before it went into the water. I stood and watched it go under the water."

The Sheriff relied on Connolly and Manuel to conclude that there was insufficient corroboration and acquitted the accused on a defence submission of no case to answer. The Crown had proposed an adjustment to the draft stated case "that the perpetrator alone could have known that the windows were sufficiently large through which to climb into the cab; that the machine could not

be started with a piece of wire rather than an ignition key; that the machine went under the water - not towards, but under the water and that the machine was parked near a 'coup' or 'rubbish tip'" but the Sheriff refused to accept it because these factors were not exclusively and solely within the knowledge of the accused. On appeal the High Court overturned the acquittal:

> "The law in the situation here could be summarised in the phrase that the respondent could not have been able to make the statement which he did if he had not been present at the time when the offence libelled had been committed."

Their Lordships considered that the finding of the broken window, the method of starting, the fact that the machine trundled into the water and the fact that it went under the water all corroborated the accused's incriminating statement, because had he not been present he would not have been able to make reference to these "very significant factors". '

The main point of interest in Wilson v McAughey is the dictum that the confession is corroborated if the accused could not have made it if he "had not been present at the time when the offence ... had been committed". It is to be hoped that this is no more than a slip of the judicial tongue ² since it is a clearly established rule of law that mere presence at the scene of a crime does not, in the absence of special duty, result in responsibility for that crime. ³ It is one thing to say that the accused

could only have made the statement if he had committed the offence but it is quite another thing to say that a statement is sufficient to convict an accused if it merely indicates his presence at the scene. [4]

In McAvoy v H.M. Advocate 1983 SLT 16 special knowledge was only one of several issues raised and the case rather stands apart from the main canon of cases on special knowledge. However, Lord Hunter made an important observation on the weight of evidence when he said:

> "I would only add that it is not, in my opinion, necessarily fatal to the ratio of [Connolly and Manuel] that persons other than the accused had become aware of the facts and circumstances used as corroboration before the confession itself had been made. This however does not mean to say that passage of time between the date of the crime and the date of a detailed confession is of no moment, since such a delay might in some circumstances make it more likely that an accused person had acquired his knowledge of detail not as a perpetrator of the crime or offence but as a recipient of information from other sources."

Notes

1. The writer hopes he will not be thought too cynical if he observes that it would be a remarkable mechanical shovel which did not submerge when driven into the River Clyde off Port Glasgow.
2. It was, however, repeated in Smith v McPherson, 1983, unreported, Crown Office Appeal Circular AS/83

3. Gane and Stoddart p70
4. Sheriff Macphail (S23.30B) diplomatically observes that dicta of this nature "should not be taken out of context".

(d) Statements Partially Consistent and Partially Inconsistent

Gilmour v H.M. Advocate 1982 SCCR 590 has already been discussed in the context of admissibility. ' However it is also important as the first authority on the question of a statement containing admissions which are partly consistent and partly inconsistent with the facts. Gilmour, who was charged with rape and murder, had made two confessions to the police admitting killing the victim, but which differed from the known facts in several important details. One of the senior police officers involved in the case was of the view that the first statement, which embraced the drawing of a sketch of the locus, contained so many discrepancies that it did not form a basis for cautioning and charging Gilmour and he ordered his release from custody. The second statement was essentially a repetition of the first made to different police officers. The discrepancies were undoubtedly substantial and were, naturally, fully exploited by defence counsel, and the trial judge himself observed that the corroborative sources were few. Regrettably the report does not specify fully what the discrepancies were and the trial judge did not go into them in detail, but even some of the matters which the trial judge regarded as points of similarity contained much that was in fact inconsistent, particularly Gilmour's claim to have hit the victim several times on the head with a branch which was inconsistent with the medical evidence.

After rehearsing the points of similarity, the trial judge directed the jury:

> "Now these ladies and gentlemen are the details which you might think corroborate the statement, if you ever reach the stage of accepting it as a voluntary statement and believing it to be true. And as for the discrepancies, you must consider whether these discrepancies and the discrepancies in what he said [in the first statement] were due to the statement being fabricated, that is made up, or whether they are due to the fact that the accused was the murderer but that he was in such a state of panic, having been caught unawares by a young girl who found him masturbating by the side of the path, that he didn't know how far from the path they ended up, he didn't know how far they had travelled, and he didn't know what he used to strangle the girl."

On appeal, the trial judge's decision to rehearse the points of indentity and not the points of discrepancy was criticised by defence counsel. However the High Court did not agree:

> "In our opinion that was not a valid criticism. It is not the function of the judge to rehearse every piece of evidence in his charge to the jury which in our procedure does not call for a review of all the evidence."

Their Lordships then set out how the trial court should approach the matter:

> "When looking for points of corroboration attention has to be focussed on those parts of the evidence which are said to provide that corroboration. If there is an absence of a point or points which have a significance then the jury can take these into account when deciding whether or not the points of proffered corroboration should be accepted, and, if accepted, what waight should be attached to them. ... Once [the statements] were accepted, the crucial question was whether the points of identity were sufficiently satisfactory in the jury's mind to constitute the required corroboration. It was to these matters that the judge gave detailed and individual attention. In our opinion that was a line to take which in the circumstances cannot be faulted.

The High Court went on to make it clear that there was no question of anything as crude as numerical superiority entering into consideration:

> "The argument seemed to be that as there were more points of discrepancy than there were of identity the jury could not reasonable proceed on the points of identity. Counsel started off by talking of balance ... but eventually conceded

that this was not the proper approach. Manifestly it is not a matter of a numerical mathematical equation or balance. Where a statement contains points of identity and points of discrepancy, then, as previously indicated, it is for the jury to decide whether they are going to accept and proceed upon the points of identity, and if they do so the only question then is whether these points are sufficient in law to constitute corroboration of the admission of guilt. In the instant case the points of identity, if accepted, were clearly sufficient in law, and the judge very properly left the issue to the jury. The verdict indicates how the jury responded."

Thus the position is that where there are both consistencies and inconsistencies between the confession and facts, the jury have to decide whether they are satisfied that the confession is sufficiently corroborated. This presumes, of course, that the consistencies are in themselves sufficient to provide corroboration, although, if they are not, the case will presumably fall on a submission of no case to answer and never reach the jury.

Notes
1. supra chapter 5.3 (xv)

(e) Annan v Bain and Hamill - An Unfortunate Decision?

The case of Annan v Bain and Hamill 1986 SCCR 60 shows just how little is required to justify the application of the "special knowledge" tag to a confession. The circumstances were straightforward. A white Ford Capri motor vehicle was stolen in Livingstone and some twelve hours later some civilians saw it in Glasgow in suspicious circumstances. The civilians attempted to detain the occupants of the car while the police were coming but the driver made off and was apparently never traced. Bain and Hamill, who had only been passangers, also left the car shortly before the arrival of the police, but they were detained a short time later less than half a mile away. On detention, Bain stated under caution "It's a fair cop, we stole the white car." Hamill replied "We tried but got caught, fair enough". After they were identified by the civilians they were cautioned and charged with stealing the car, Bain replying "We stole it" and Hamill replying "He's right".

In the Sheriff Court it does not appear to have occurred either to the pleaders or the Sheriff himself that the alleged admissions to the police could be construed as containing "special knowledge". The Crown presented the case on the basis that the admissions were corroborated by the recent possession of the stolen vehicle. The defence argued that there was nothing to corroborate the admissions since there was no evidence that Bain and Hamill had been present when the vehicle was stolen, and

under reference to Hipson v Tudhope, [1] no inference of guilt could be drawn from the fact that they were only present in the vehicle as passangers. Although he was well aware that very little by way of corroboration of the incriminating admissions would be required to justify a conviction, Sheriff Macphail took the view that the evidence relied on by the Crown did not corroborate the admissions because it did not point to the guilt of the accused. Accordingly he upheld a submission of no case to answer. The prosecutor appealed.

The High Court overturned the Sheriff and in so doing said:

> "Now with respect to the Sheriff, he has wholly misconceived what the evidence was. In the first place the Sheriff was exercised to discover whether there was corroboration for the confession of Bain that he was a party to the theft and whether there was corroboration for the confession of Hamill that he was a party to the theft. What he did not observe was that in the presence of the other they both volunteered the information that they together had stolen the white car. The confession accordingly contained within it know-ledge of theft which could only be held by the thieves because at that stage nothing had been said to them to indicate that the police were in the least bit interested in the theft of a car or, if they were, that the car was a white one, [2] so

that at the very outset, apart from the fact of the confessions ... demonstrated knowledge of the particular theft which was amply established, *the statement by Hamill that he and Bain committed the theft corroborated Bain's confession that he had been a party to the theft, and by the same token the statement of Bain that he and Hamill had carried out the theft corroborated Hamill's admission.* " In addition to that evidence, which was quite sufficient, there was evidence to demonstrate that the confessions were true. That evidence is amply provided by proof of the theft itself coupled with proof which linked and associated the two men with the motor car before the police became interested in the affair at all."

Once again this case demonstrates the cursory approach of the High Court to matters of this nature, with no consideration of authority or principle, and the addition in this case of the extraordinary statement, placed in italics, that the confessions of two accused can be mutually corroborative. This is, as Sheriff Gordon points out in his commentary, contrary to both principle and authority. As evidence against Hamill, Bain's statement is hearsay and thus inadmissible. What is admissible evidence against Hamill is his reaction to Bain's statement, which in this case was explicit assent. [4] The lack of

intellectual rigour shown in this case is, to put it no higher, unfortunate.

That having been said, it must be conceded that, if one accepts that the reference to the "white car" amounts to special knowledge, [5] Sheriff Macphail was wrong to uphold the submission of no case to answer. Indeed on this basis the case contains more than a bare sufficiency of evidence, since there was eyewitness identification of the accused as having been present at the stolen vehicle. However, it is submitted that one of the most significant factors in this unfortunate case is the fact that until the High Court raised the question of special knowledge it had not ocurred to anyone, and in particular it had not occurred to Sheriff Macphail whose ability as a legal scholar is well known.

Notes

1. 1983 SCCR 247
2. If this is factually accurate one is left wondering what the police *did* say to Bain and Hamill when they detained them. Logically there must have been a conversation of some sort. Section 2(4) of the 1980 Act requires a constable at the time when he detains a person to "inform the person of his suspicion, of the general nature of the offence which he suspects has been or is being committed and of the reason for the detention."
3. Author's italics
4. This point is fully discussed under "Implied Confessions and Admissions" at chapter 5.5 supra
5. Sheriff Gordon does not. See his commentary at p63

(f) Confessions Containing Details Widely Known

The cases previously discussed show how far and how rapidly the concept of "special knowledge" had departed from the Alisonian notion that the information contained in the confession should only be known to the perpetrator of the crime. However, in all

the cases to date the information given, although not exclusively within the knowledge of the perpetrator, could be described as being of limited circulation, in the sense that, apart from the perpetrator, it was only known to the police and a few individuals directly affected by the crimes. As already mentioned, McAvoy v H.M. Advocate had contained a broad hint from Lord Hunter as to the view which would be likely to be taken when the High Court required to decide the issue of a confession containing information which was widely known.

The opportunity came in what became known in Glasgow as the "Bluebell Woods Murder" - Wilson and Murray v H.M. Advocate 1987 SCCR 217. This case related to the attempted rape and brutal murder of the half-sister of the accused Murray whose body, naked apart from socks, had been found by a group of children at the bottom of a steep slope below a footpath. There were no immediate suspects and police inquiries, although intensive, were initially unsuccessful. Many people, including the two accused, were interviewed, house-to-house inquiries were made and at one point the assistance of the local radio station, Radio Clyde, was obtained. In the course of the broadcast it was disclosed that the victim had been strangled with her own brassiere.

The murder had taken place on 22nd May 1986 and on 15th June Murray was taken to Drumchapel police office in connection with an unrelated matter. Quite by coincidence, around the time that Murray was taken to Drumchapel, Wilson went voluntarily to

Clydebank police station to discuss his earlier statement. (The police knew that he and Murray had been in the area around the material time). Both of them, quite independently, and in separate police stations then proceeded to make confessions each of which was, according to the Lord Justice-General, "a detailed confession of guilt of the murder which, subject to quite insignificant differences of detail, was identical [with the other]."

The story which emerged was that the accused had been in the woods engaging in a homosexual act together when the victim happened on the scene and saw what was going on. They were terrified that she would report the matter to her parents, and, as the Lord Justice General put it, "proceeded to make sure that she would be unable to do that." The details of the statements tallied closely with what had been found at the scene of the crime particularly in regard to the position of the deceased's anorak and Murray also drew a sketch of the position of the body. Apart from the confessions there was no incriminating evidence against either accused and, as Sheriff Gordon points out in his commentary, some of the most striking details of the confessions were not capable of being corroborated by independent evidence of their accuracy. The trial judge, Lord Robertson, charged the jury as follows:

> "[I]n order to corroborate a so-called self-corroborating confession ' it is not necessary to prove that only the perpetrator of the crime could

have known all the details in the confession. It is for the jury to decide if the only reasonable explanation of the accused's knowledge of these details is that he was the perpetrator. Now it is sufficient to provide the necessary corroboration that the accused gave evidence in his confession of knowledge of details which otherwise he had no reason to be aware of. The question therefore for the jury is really this: do these confessions ... convince you that, quite apart from the account given by the accused, they must have been there at the perpetration of the crime in order to give that account? ... [I]t is entirely for you to say whether you think, if these statements are accepted as having been given, could these accused have given these statements unless they had been there and had known what the details of the crime were. That is the test and you will have to apply your minds to that if you get to that stage."

On appeal, defence counsel conceded that Lord Robertson's direction to the jury could not be criticised, but it was argued that having regard to the widespread knowledge of the details of the murder the case should not have been allowed to go to the jury. In dismissing the appeal the Lord Justice-General quoted with approval Lord Hunter's dictum in McAvoy and went on:

"In our opinion the trial judge would not have

been entitled in this case to sustain a motion that there was no case to answer. There was in law quite sufficient evidence capable of providing corroboration of these remarkable, almost identical confessions made by each appellant in separate police stations ... . Each provided an identical and powerful motive for the dreadful crime, and was redolent of having been made by someone who had been present when the crime was committed. The evidence of the coincidence between the details of the killing which each confession disclosed, and what was found after the event, was sufficient in law for corroborative purposes if the jury were prepared to find that the accurate knowledge of the crime revealed in the statements of each appellant (sic) was his own knowledge as one of the perpetrators. It was not for the trial judge to evaluate the weight which should be given to the circumstance that by 15th June 1986 many people knew or had heard of many of the details of the crime. That was essentially a matter for the jury to consider under the proper directions which were given and that, indeed, is precisely what Lord Hunter had in mind when he said what he did in McAvoy."

Wilson moved Sheriff Gordon to review the changes in the law since Alison's time [2] and to warn against the inherent dangers of the way the law was developing. He pointed out that Alison's rule was probably limited to cases where the accused told the police things they didn't know and where corroboration was found in the fact that the police subsequently went looking for an item of real evidence which they found where the accused said it was. "A limitation to such cases or at least to knowledge of facts unknown to the police," argues Sheriff Gordon, "would operate as a safeguard against the possibility of the police, consciously or otherwise, putting words into a suspect's mouth, and such a restriction might have been expected in a legal system as suspicious of confessions to the police as was the Scots system in the 1950s." However, he points out that there is a parallel between the modern view of the sufficiency of confession evidence, ie that it is essentially a matter for the jury, and the modern view of the admissibility of such evidence ie that it is for the jury to decide the issue of fairness.

Sheriff Gordon goes on to make the point, so often overlooked by journalists and others who might be though to know better, [3] that it is "a little misleading to say that a person cannot be convicted of a crime in Scotland on the basis only of a confession made by him to the police. He can be virtually so convicted, providing only that the confession is sufficiently detailed to satisfy a jury that it is reliable, and provided that the fact that the crime was committed by someone is independently proved.

... A jury are entitled to treat a circumstantial confession as corroborated by proof of the correctness of the circumstances it contains, whether or not these circumstances were previously known to the police or indeed were common knowledge, and even if it contains other circumstances which are proved to be false." After commenting that the amount of evidence required to corroborate a confession is less that that required to corroborate an independent witness, Sheriff Gordon concludes, "A system which was once very suspicious of confessions is now coming close to the ancient view that a confession is 'the queen of proofs'".

Notes

1. The writer has consciously eschewed the use of this expression which is theoretically (if not factually) inept.
2. Commentary to the report at p223
3. Mirfield (p204) appears to be about to fall into this trap, but at p206 he observes, *under* reference to Hartley v H.M. Advocate that there "seems to be a tendency in the Scottish cases to diminish the weight required for the supporting evidence almost to vanishing point." At least English academics seem to be realising the true situation - see eg R. Pattenden *Should Confessions be Corroborated?* (1991) 107 LQR 317 - even if it still eludes the Sunday Post which, as late as 1st December 1991, produced a truly awful piece claiming that the Guildford Four, Birmingham Six and Tottenham Three "couldn't have been convicted" in Scotland.

(g) The Cases Since Wilson v H.M. Advocate

Wilson was followed by MacDonald v H.M. Advocate 1987 SCCR 581 in which the accused was charged with armed robbery at restaurant premises in Glasgow known as "Dino's". This case has already been mentioned in the context of admissibility. It appears that under caution the accused said to the police, "I can tell you right now, we did Dino's". Thereafter, having been cautioned and charged he replied "I've already told you that I did that one with Kenny and Bruce. Marie and Kenny's mum waited in the car." MacDonald was tried along with two accused, Kenneth Ross and Bruce Murray, who were both convicted of the charge relating to Dino's. On appeal it was argued that the alleged admissions did not disclose special knowledge. The High Court disagreed and the Lord Justice-Clerk said:

> "In these circumstances I am of the opinion that the jury were entitled to conclude that the appellant's reply to caution and charge showed that he was aware of the involvement of his co-accused in the crime, and thus had special knowledge. In my opinion such special knowledge could amount to sufficient corroboration."

One wonders what the position would be in a similar case if the jury acquitted the co-accused but convicted the maker of the confession. Presumably the conviction would have to be quashed since the facts necessary for the proof of the special knowledge

would not have been established. ' Even more intriguingly, what would happen if one co-accused were convicted and one acquitted? Would the High Court attempt to apply the ratio of Gilmour? The answers to these questions must, at this stage, remain speculative.

In the instant case the first admission (and indeed the second one also) was quite unequivocal and this undoubtedly influenced the decision. Nonetheless it is submitted, with respect, that MacDonald strains the concept of "special knowledge" to breaking point. The statement contains no information whatever about the commission of the crime. If it had contained some verifiable information anout the parts played by the co-accused, the position would clearly have been different, but the bald naming of them is, it is submitted, no more special than a simple confession to the crime.

In Bainbridge v Scott 1988 SLT 871 the accused was charged with two charges of vandalising motor vehicles, a motor car on 21 January 1987, and a motor van on 29 January 1987. The damage had been caused by the application of paint stripper to the bodywork. Bainbridge was seen by the police on 14 February 1987 and interviewed under caution. They told him that there were two vehicles involved, that they had both been parked outside the same restaurant and that paint stripper had caused the damage. The accused replied "Aye, I damaged the car and the van. I don't like them. I got a bottle of paint stripper from Pricefighters

in Denny. I did the car first and went back and did the van later. I put the paint stripper in the bucket in the house. I just threw the stuff over the motors and ran away."

The issue for the High Court was confused by the fact that the Sheriff had been persuaded, wrongly, to treat a second confession to the owner of the vehicles as corroborative of the confession to the police. [2] However, when they came to consider the issue of special knowledge, the High Court had no doubt:

> "The appellant had special knowledge that a car had been damaged and that later a van had been damaged. The question for us is whether proof of the accuracy of the appellant's knowledge of the sequence of events and of the nature of the vehicles concerned is sufficient to provide the corroboration which the confession required. ... The Sheriff plainly took the view that the only reasonable explanation for the appellant's special knowledge which we have identified is that he was the perpetrator of the two acts of vandalism which led to his conviction. ... [W]e reject the proposition that there was insufficient evidence on which the conviction can be supported."

The situation in Moran v H.M. Advocate 1990 SCCR 40 was unusual in that the statement made by the accused was not an admission that he himself had committed the murder, but a claim that

another man called Morrison had done so and had then told the accused about it. The accused's statement revealed a considerable amount of circumstantial detail, which he claimed to have obtained from Morrison. Unfortunately for the accused, Morrison turned out to have been in custody on the date of the murder and the Crown successfully founded on the accused's statement as displaying special knowledge of the commission of the crime.

McAvoy and Wilson were considered in Woodland v Hamilton 1990 SCCR 166. In this case Woodland was charged along with a man called Halliday with breaking into a house and stealing a number of items including a video recorder. When interviewed under caution by the police he said "Aye, Johnny Halliday told me you got him and that he said he told the truth so I'll be honest and tell you. The video went to Kevin Boyle. The suitcase was dumped. It's the only housebreaking I've ever done." There was second admission following caution and charge but it was a simple confession. The Sheriff found as a fact that the police had not mentioned Boyle's name to the accused before he made this statement. At the trial Boyle admitted having been in possession of the video but denied that he had obtained it from the accused. The Sheriff was clearly less than impressed with his evidence but convicted Woodland on the basis that his admission was corroborated by the fact that Boyle was the resetter of the video recorder. Halliday was acquitted.

An unusually constituted High Court rather surprisingly overturned the conviction. Their Lordships accepted that the test to be applied was whether the only reasonable explanation of the accused's knowledge was the fact that he was the perpetrator. However the reference to Boyle as the resetter came after a sentence in which the accused said he had been in conversation with Halliday and that Halliday had given him at least some information:

> "It is therefore possible that the appellant may have obtained the name of Boyle from Halliday. Had there been evidence from Halliday to the effect that he had given no such information to the appellant then it might well be said that the only reasonable explanation of the appellant's knowledge was that he was the perpetrator. As it is however the appellant could have become aware of Boyle's involvement even though he himself was not the perpetrator of the crime. This is particularly so having regard to the lapse of nearly eleven months between the date of the crime and the date of the confession."

Woodland v Hamilton can probably be treated as a decision on its own facts.

Any hope that Woodland marked the beginning of a reappraisal of the application of the "special knowledge" rule was dashed by

Hutchison v Valentine 1990 SCCR 569. This case is certainly the most extreme example to date of the application of the rule and involves circumstances which, it is submitted, make a mockery of the idea that a confession requires any corroboration at all, at least if the word "corroboration" is used in its normal accepted sense.

Hutchison was charged with breaking into a hotel room and stealing a television set which had been recovered abandoned in a car park. He was interviewed under caution by the police and advised by them that a room in the particular hotel had been broken into. He then said "I done it on my ain. I canna really mind where aboot in the hotel I got it. I was drunk. I dumped it."

The Sheriff held that the confession was unequivocal and there was just sufficient other evidence to corroborate it although he did not address specifically the issue of special knowledge.

On appeal the High Court upheld the conviction but on the basis that the reference to "it" showed that the accused was aware that only one object was involved and the reference to "dumping" was consistent with the recovery of the television in the car park:

> "The proper starting point in a case of this kind is the confession. It contains within it certain elements which require to be contrasted with what the appellant was told when he was interviewed by the police officers. According to the finding the

information which he was given was simply that a room had been broken into in the hotel the previous night or the following morning. In reply to that information he stated that he had done it, and he also made remarks which indicated that he was aware that a single piece of property had been taken from the room. We take that from the reference to being unable to remember where in the hotel he got "it" and to dumping "it". There is also the point in the confession that whatever had been taken from the room had been abandoned at some point by the thief. It is a reasonable inference therefore from what was said that the appellant, unlike somebody who was not aware of any of the details of the crime, knew perfectly well that what the police officers were talking about was a housebreaking which had resulted in a single piece of property being taken from the room and being left somewhere by the thief rather than carried away by him for his own purposes to some other place. ...

It was said that the reference to "dumping" the article is so generic and lacking in information that it was not capable of being corroborated by the finding of the television receiver in the car parking area. We disagree with this submission,

because we think that, on a reasonable construction of the word "dumping" together with the information we have about the recovery of the television and the place where it was recovered, there is a consistency between the facts and the confession."

Sheriff Gordon, no enthusiast for the special knowledge confession, refrains from comment on this case, but the writer submits that it is wrongly decided and it is to be hoped that it will be reconsidered by a fuller bench at the first available opportunity. It must be doubted whether a "confession" made by an accused who was, on his own admission, so drunk that he was unable properly to remember what he did, containing nothing by way of significant detail and uncorroborated by any independent evidence is a proper basis on which to find a case proved beyond reasonable doubt. As recently as 1977, the Thomson Committee commented

> "The greatest safeguard against a miscarriage of justice is - and should continue to be - the rule of law that the Crown must prove its case beyond reasonable doubt on corroborated evidence" [3]

It is submitted that Hutchison v Valentine offends against this rule of law and this is especially to be regretted since it was decided in the period following the release of the "Guildford

Four" when the dangers of relying uncritically on uncorroborated confessions should have been particularly apparent.

As one experienced solicitor, puts it:

> "It is easy to see the attraction of the law as now applied. To follow the narrow view, as in Manuel, would undoubtedly mean that more "thin" cases would be thrown out "on a technicality" owing to lack of corroboration, but the plus side would be that the kind of abomination which occurred in the Guildford case would be more difficult to sustain. Effectively the broadening of the class of self-corroborating admissions can result, in real terms, in there being no corroboration at all, particularly if corroboration is to be found in apparent knowledge by the accused of matters which are also within the knowledge of police officers under pressure to solve crimes and bring villains to justice. If those police officers are ready to help the process along by fabricating confessions based of their (as opposed to the accused's) knowledge of events, then the accused is in a very dangerous position, his conviction or acquittal depending not upon questions of legal argument but upon factors entirely within the province of the jury - fifteen men and women capable of being lied to and

misled by any witness prepared, for whatever reason, to undertake that course." [4]

The writer wishes to make it clear that he is not suggesting that the police in Hutchison v Valentine (or any of the other cases presently under discussion) fabricated or touched up the alleged confessions, but the common thread running through all the cases is an uncritical acceptance of police veracity and objectivity and English and Northern Irish experience has shown what can happen when the trust reposed in the police is abused.

While Scotland has had its share of well-publicised miscarriages of justice, none of them have so far been proved to involve confessions, although it is currently being claimed that at least one individual is presently languishing in prison as the result of just such a miscarriage. [4**] However the issue in that particular case has at least as much to do with the fact that a witness who provided corroboration of the confession has now retracted his evidence as it has to do with the confession itself.

Nevertheless there is no reason to suppose that this absence of confession-based scandal is anything other than fortuitous and on the present state of the law only the most naive could believe that Timothy Evans or the "Guildford Four" would be acquitted if they were tried in Scotland today. Their only real hope would be

the increasing reluctance of juries to convict on evidence coming solely from police officers. [5]

Notes

1. cf Woodland v Hamilton 1990 SCCR 166 discussed at vol. 2 p152
2. See vol. 2 p48 supra
3. Third Report (Cmnd 7005) para 1.09
4. D. Brookens *Guildford: A Warning* 1989 JLSS 448
4a A. Grosskurth *Scotland's Pitfalls* (1991) Legal Action 7. Some of the factual errors in this article are laughable
5. See article by Murray Ritchie in The Glasgow Herald June 25 1990. Glanville Williams and Adrian Zuckerman have noted the same position in England, particularly with regard to "verbals" - see respectively [1979] Crim LR 6 at 14 and *The Principles of Criminal Evidence* p36

7.4 The English Position - A Comparative Note

(i) General

Although it has been said [1] that in English law "corroboration" is not a technical term and simply means "confirmation" or "support," English law tends to use the term in a somewhat narrower sense than Scots law. Corroboration in the English sense must emanate from a source independent of the witness to be corroborated and must implicate the accused in a material particular, and, as Cross points out, it follows that not all evidence which might, as a matter of common sense, be thought to confirm or support the testimony of a witness will necessarily satisfy such a requirement. [2]

The general rule of English law is that the court may act on the uncorroborated testimony of one witness, and such requirements as there are concerning a plurality of witnesses, or some other confirmation of individual testimony, are exceptional. [3] However it does not follow that an English court *must* act upon the evidence of one witness even if it is unshaken in cross-examination or in no other way discredited.

There are a few insignificant statutory cases where either actual corroboration is required, or the judge must warn the jury of the dangers of convicting in its absence [4] but generally in no case is corroboration positively necessary as a matter of law. Equally, in no case is a judge precluded from warning the jury

that it is unsafe to act on certain evidence unless it is corroborated, since he has a general discretion to comment on the evidence and the reliability of the witnesses. At common law there are two classes of cases, namely where the Crown case rests on the evidence of accomplices and on the evidence of the complainant in a sexual assault, [5] where the judge must give the jury a "full" warning on the danger of acting on uncorroborated evidence.

However, the rules relating to warnings to juries "have degenerated into a web of technicalities which often impede justice" [6] and a "shambles" [7] and a conviction may be quashed where there is in fact ample corroborative evidence but the judge has not given the jury a warning in appropriate terms. [8] Conversely, as long as the necessary warning is given, a conviction based on uncorroborated evidence will not be quashed merely on the ground that there is only one source of evidence.

Given the excessive technicality with which the law is now burdened it is hardly surprising that there is a conspicuous lack of enthusiasm in England for any extension of the present rules of corroboration into new areas. [9] Certain of the existing requirements, notably those relating to sexual offences, are the subject of criticism and are likely to be modified, if not removed altogether and, a recent Working Paper by the Law Commission [10] looks set to lead the way for the removal of most of the existing corroboration requirements.

Apart from the relatively insignificant case of Section 77 of PACE, there has never been any rule in England requiring either that a confession should be corroborated or that a judge should warn a jury of the danger of convicting in a case depending solely on the evidence of an uncorroborated confession. It has been settled law at least since 1789 that a person may be convicted on the basis solely of his confession and without corroboration of its contents '' and despite occasional calls in the press, both legal and lay, for change, no body of any real influence has sought to alter this position.

In one case, Sykes (1913) 8 Cr App R 233, which incidentally has some points of resemblance to Wilson and Murray v H.M. Advocate, it was asserted that the need to convict on uncorroborated confessions would seldom arise. In this case, the Commissioner had directed the jury in the following terms:

> "A man may be convicted on his own confession alone; there is no law against it. The law is that if a man makes a full and voluntary confession which is direct and positive, and is properly proved, a jury may, if they think fit, convict him of any crime upon it. But seldom, if ever, the necessity arises, because confessions can always be tested and examined, first by the police, and then by you and us in court, and the first question you ask when you are examining the confession of a man is, is there anything outside

it to show it was true? is it corroborated? are the statements made in it of fact so far as we can test them true? was the prisoner a man who had the opportunity of committing the murder? is his confession possible? is it consistent with other facts which have been ascertained and which have been, as in this case, proved before us?"

This direction was approved by the Court of Criminal Appeal and Ridley J added:

"It was said that the murder was the talk of the countryside, and it might well be that a man under the influence of insanity or a morbid desire for notoriety would accused himself of such a crime. I agree that this is so, but it was a question for the jury, and they ought to see whether it was properly corroborated by facts, and so they were directed. We think that this point of the case was quite sufficiently left to the jury and the Court thinks that there is no reason for giving leave to appeal."

A similar point was made by the then Director of Public Prosecutions, Sir Norman Skelhorn when giving evidence about the prosecution process to the Fisher Inquiry:

"Well if there was any indication that [the police had not looked for supporting evidence], and if

the indications were that they had and it was not obtainable, then I would have thought that in such a case it was very probable that there would be no prosecution."

And later:

> "On the other hand, one can get, of course, even such a confession in circumstances in which one says 'Well I think it's safe'. I mean, one element to start with, is that is this a confession made when the police go to him, or is this a case of a man who comes along and says 'I think I should tell you I killed someone or other at such and such a place,' and so on. '[12] Well that is a starting point. It makes a fairly big difference when one is looking at it. So that I would not make a sort of too great a generalisation on it , but certainly one would look with very great care at a completely not only uncorroborated confession, but a confession with absolutely nothing to support it at all, in saying 'Well it is still right and safe to go on on this confession just as it stands." [13]

Thus the English position seems to be that although, with one partial exception, the law does not positively require a confession to be corroborated (in the narrower English sense), it

is unlikely, although by no means impossible, that a prosecution will be mounted solely on the basis of an uncorroborated confession. In such a case it is open to the trial judge to warn the jury about the dangers of such evidence and to direct them that they should seek confirmation in other evidence.

Notes
1. DPP v Hester [1973] AC 296
2. Cross p242
3. Cross p224
4. The only example relevant to the present discussion is Section 77 of PACE which is discused *infra*. This requires a warning to the jury of a need for special care rather than an actual corroboration warning.
5. The evidence of children was effectively removed from this requirement by Section 34 of the Criminal Justice Act 1988.
6. AAS Zuckerman *The Principles of Criminal Evidence* p155
7. DJ Birch *Corroboration in Criminal Trials; A Review of the Proposals of the Law Commission's Working Paper* [1990] Crim LR 667 at 669
8. Zuckerman op cit note 6 supra p173
9. Zuckerman op cit note 6 supra p173 et seq
10. Working Paper No.115. See Birch op cit note 7 supra.
11. Wheeling 1789 Salisbury Summer Assizes referred to in 1 Leach 311 note
12. It hardly needs to be said that in Scotland such a confession would almost certainly be treated as showing "special knowledge"
13. Fisher Report para 23.1

(ii) Supporting Evidence in Respect of Confessions

(b) The Fisher Report

There has been occasional discussion in England of the desirability of a formal requirement for supporting evidence for confessions, the main examples being the Fisher Report and the RCCP. As previously discussed, [1] Sir Henry Fisher recommended that in four situations no person should be convicted on the evidence of a confession unless it was supported by other independent evidence. These situations all involved the police and were (1) a confession obtained in breach of the Judges Rules,

(2) a confession by a child or young person who had been questioned without the presence of a parent or guardian, (3) a confession by a mentally handicapped person who had been questioned without the presence of a parent or guardian and (4) an oral confession in a police station of which a tape recording was not available.

Fisher also expressed the opinion that the police should always look for evidence to support a confession. Interestingly he preferred to use the term "supporting evidence" rather than "corroboration", the English use of the latter term being somewhat narrower than what he had in mind. In Sir Henry's view, "supporting evidence" would include evidence which would constitute corroboration under English law, ie independent testimony which affects the prisoner by tending to connect him with the crime. However, he also envisaged "supporting evidence" including any evidence which tends to show that the confession is true, whether or not it emanates from the confessor "or even from the confession itself". [2] Although he referred with approval to Scottish law, it is interesting to note that this most eminent English legal scholar did not regard a special knowledge confession as being corroborated in the English sense. Mirfield comments [3] that it seems unlikely that Sir Henry Fisher intended English law to differ from the Connolly/Manuel view in Scotland. Mirfield argues that although Fisher does not specify the precise width of the definition of "supporting evidence," it should be defined to require that some *incriminating* fact be supported.

Sir Henry also expressed the view that where the prosecution was based on a confession the police report should always include a reference to the steps taken to obtain supporting evidence, any supporting evidence found, in appropriate cases the fact that no supporting evidence was found, and any evidence tending to contradict the confession, whether or not that evidence was admissible in court.

Notes
1. Supra chapter 6.5 (ii)
2. Fisher Report para 23.3
3. p205

(b) <u>The Royal Commission on Criminal Procedure</u>

The RCCP unequivocally rejected the notion that confessions should be supported by other evidence:

> "However we do not accept the suggestion that a person should never be convicted upon his confession alone uncorroborated by any other evidence. To do so would, unless the criteria for prosecution were changed, mean that those who were willing to confess and to plead guilty could not even be charged unless or until other evidence of their guilt had been secured. That has such considerable implications for the resource and organisational aspects of the pre-trial procedure and the right of the accused to a speedy disposal as to be altogether too drastic a way of removing the risk of false confessions. People do confess

to offences and are convicted, sometimes on a plea of guilty, where there is no other material evidence. We do not consider that it would be in the interests of justice to introduce rules of evidence which would have the effect of precluding this. But where the evidence against the accused is his own confession, all concerned with the prosecution, the police, the prosecuting agency, and the court, should, as a matter of practice, seek every means of checking the validity of that confession." [1]

To this, and to Sir Henry Fisher's suggestions, it can be objected that police officers prepared to fabricate or touch up a confession in the first place are hardly likely to trouble themselves to search for evidence which might prove the confession false, and the circumstances of the *Confait* case showed how easy it was for major discrepancies in evidence to be overlooked by the prosecuting authorities due to a combination of overwork (on the part of the DPP's staff) and simple failure to understand the implications of the situation (on the part of prosecuting counsel). [2]

However, the RCCP did recommend something very close to a corroboration warning where a confession had been obtained in breach of the proposed code of practice on questioning of suspects:

"But since reliability is the primary purpose of the code of practice for interviewing suspects, the reliability of confessions obtained in its breach must be open to question, and it would not, therefore, be right for statement evidence obtained in breach of the code to be accepted uncritically and without comment by the criminal courts. ... The judge should point out to the jury or the magistrates be advised of the dangers involved in acting upon a statement whose reliability can be affected by breach of the code. They should be informed that under pressure a person may make an incriminating statement that is not true, that the code has been introduced to control police behaviour and minimise the risk of an untrue statement being made and that if they are satisfied that a breach of the code has occurred it can be dangerous to act upon any statement made; accordingly they should look for independent support for it before relying upon it. The effect of that warning would be that where a breach of the code has occurred, senior officers, and those responsible for advising on the prosecution, will need to consider the availability of other evidence before deciding whether it is proper to permit the prosecution to proceed." [3]

Notes
1, Report para 4,74
2, Fisher Report paras 2,29, 2,39, 2,40 and 2,52
3, Report para 4,133

(c) The Law Commission

For the sake of completeness, reference is made to the Law Commission's Working Paper on Corroboration in Criminal Trials. [1] This paper does not address itself to the undesireability of convicting solely on uncorroborated confession evidence. The reason, which one commentator finds unconvincing, [2] is that there is no common ground between the problems posed by confession evidence and those addressed by the present corroboration rules, which are formulated to deal with unreliable prosecution witnesses. As the same commentator observes, "To this it might be objected that half the problem with confession evidence is exactly one of credibility of prosecution witnesses, in so far as police officers may invent or enhance statements, and the other half is the closely related difficulty of whether to believe what the accused said when he was undre extreme psychological pressure in the police station, or to prefer what he now says in court." [3]

It would appear that English law will require to await the result of the May inquiry [4] for the next major pronouncement on this issue.

Notes
1, No, 115 (HMSO 1990)
2, DJ Birch *Corroboration in Criminal Trials; a Review of the Proposals of the Law Commission's Working Paper* [1990] Crim LR 667
3, Birch op cit note 2 supra,
4, Into the convictions of the Guildford Four and the Maguire Seven

(iii) The Exception - Section 77 of PACE '

The Judges' Rules and Administative Directions had contained in Directions 4 and 4A special provisions for the interrogation of children and young persons. The essence of Direction 4 was that a child or young person should be interviewed in the presence of a parent or other non-police adult "as far as practicable." As a result of the *Confait* case Direction 4A was added in 1976 and made similar provision for the interviewing of persons believed by the interviewing officers to be mentally handicapped. In addition the police were required to take particular care in putting questions to such persons and in accepting answers from them as reliable. The police were also required to seek verification of the facts admitted and to obtain corroboration of them.

The RCCP, whose appointment was, in no small measure, due to the circumstances of the *Confait* case, considered the issue of the additional protection required by juveniles and the mentally handicapped. [2] They recommended that the police should give especial attention to testing the reliability of statements made by persons in these categories. [3] A minority of the Commission had considered that any breach of the rules for the special protection of these vulnerable groups should lead to automatic exclusion of the confession. The majority, however, disagreed, finding such an approach inconsistent with the Commission's general opposition to a firm exclusionary rule. Protection was

to be achieved by on the spot supervision and the use of the police disciplinary code. However there was a unanimous recommendation that the jury or the magistrates should have their attention drawn specifically to the possible unreliability of evidence obtained from a juvenile or a mentally handicapped person in the absence (justified or not) of an adult. [4]

The only legislation [5] which followed an this recommendation is Section 77 of PACE, a late government addition to the Bill, which makes a unique provision for a special warning [6] in the case of a confession made by a "mentally handicapped" accused outwith the presence of an "independent person," is essentially a non-police adult. Section 77(1) provides that where the court is satisfied (a) that the accused is "mentally handicapped", and (b) that the confession was not made in the presence of an "independent person," the jury must be warned that there is special need for caution before convicting the accused in reliance on the confession and they must be told that the unreliability arises because of his mental handicap and because of the absence of the independent person. No doubt mindful of the mess of the general law on corroboration warnings, it is specifically provided that no particular form of words need be used. Section 77(2) makes corresponding provisions for summary trials.

"Mentally handicapped" is defined in section 77(3) as involving "a state of arrested or incomplete development of mind which includes significant impairment of intelligence and social

functioning." As Mirfield points out in the course of a critical discussion of Section 77,[7] this definition excludes the mentally ill. However the terms of Section 77 are in addition to the possibility of exclusion for unreliability under Section 76(2) or unfairness under Section 78(1) or in exercise of the court's general discretion under Section 82(3). Therefore, although it would certainly have been preferable to make specific provision for all mentally ill or handicapped accused, there can be little doubt of the Court's power to safeguard the mentally ill within the ambit of PACE.

The writer respectfully agrees with Dr Mirfield that the failure of the legislature to bring juveniles within the ambit of Section 77 is hard to understand, particularly since Section 77 would appear to owe its existence at least indirectly to the *Confait* case. As Dr Mirfield puts it "What sense is there in making special provision for an adult with a mental age of 10, but none for a 10 year old?"

Be that as it may, the terms of the Section are clear and it therefore remains possible, at least in theory, for an English court to convict on the uncorroborated evidence of a confession obtained solely in the presence of police officers from a person who is a juvenile, or mentally ill, or, for that matter, mentally handicapped, although at least in the latter case the jury is, as a matter of law, required to be told of the potential dangers.

So far there appears only to have been one decided case dealing expressly with a failure by a trial judge to give a jury an adequate Section 77 warning. [8] In quashing the conviction, the Court of Appeal commented that the warning was "an essential part of a fair summing up."

Notes

1. See generally Zander p197, Mirfield pp165-166
2. Report paras 4-102 - 4-108
3. Report para 4.134
4. ibid
5. Most of the provisions relating to the protection of "persons at risk" are to be found in the code of practice which, inter alia, provides (para 13.13) that because of the risk of unreliable evidence, it is also important to obtain corroboration of any facts admitted whenever possible.
6. Although not an actual corroboration warning
7. p165. Zander suggests this may have been a simple oversight
8. R v Lamont [1989] Crim Lr 813

Chapter 8 The Accuracy Of The Record

8.1 Introduction

One of the most intractable problems inherent in confession evidence is the question of the accuracy of the record of the confession. Many of the difficulties stem from the fact that the majority of confessions are made in police stations with only the accused and the police present and either side may have an interest in telling something other than the whole truth. The issue has rarely been focussed as succinctly as it was by the Bennett Committee which investigated the interrogation practices of the Royal Ulster Constabulary in the late 1970s:

> "In addition to the obvious danger that the private nature of the interview process may encourage abuse, a further important consequence is that arguments about interrogation methods ... are always conducted in retrospect. No-one outside the police service is able to adjudicate on what methods should be used in the individual case, or to observe whether misconduct is or is not taking place; all they can do is argue about it afterwards. Retrospective argument as a means of getting at the truth has obvious limitations."[1]

This chapter is concerned with the means which may be adopted to serve the triple purposes of protecting the interests of the suspects, protecting the police from false allegations, and

providing an accurate record of what took place to assist the courts to reach the best possible decision on the issues of admissibility and sufficiency discussed in the previous chapters. As Mirfield puts it:

> "Though the search for the truth is, by no means, an absolute goal of the law and procedure governing criminal cases, if no countervailing principle or policy decisively intervenes, it must always be better to arrange trial and pre-trial procedures such that the likelihood of findings made by the trier of fact being correct is increased; other things being equal we had better have the truth." [2]

It should be made clear that the problems posed by "false confessors", those eccentric or disturbed individuals who "confess" to crimes of which they could not possibly be guilty, are outwith the scope of this work as are the psychological aspects of police interrogation techniques, which are sometimes claimed to lead to innocent persons confessing to crimes which they have not committed. Similarly this chapter is not concerned with judicial examination, which has its own rules for ensuring an accurate record.

Confession evidence attracts a very high status in the eyes of the courts both north and south of the Border, but, as has already been pointed out, it is all too easy for an unscrupulous

police officer to fabricate a false confession [3] or "touch up" a genuine one to make it more convincing, for example by adding in some "special knowledge". Dickson's views on this point are particularly striking. [4]

> On the other hand the accused has an obvious interest in denying what he is alleged to have said; oral evidence of what took place between the accused and the police is often fiercely disputed and such disputes, apart from wasting scarce court time, [5] frequently involve quite unwarranted attacks on the integrity of the policemen concerned. Matters such as accent, tone of voice or the context in which certain things were said may also be of importance in deciding the admissibility or sufficiency of a confession. [6] Mendacity apart, the possibility of an honest mistake or a lapse of memory cannot be discounted, problems which are, of course, by no means exclusive to confession evidence. However, one unique feature of confession evidence is identified by Mirfield:
>
> > "[I]t is normally acquired by officials aware, at the time they acquire it, that it is very likely to be presented before a court. It is possible for these officials to take steps to ensure that the record is both accurate and reliable and [it is] possible for the law to require or encourage them to take such steps." [7]

An accurate record of what transpired between the accused and the police will assist in determining whether the accused confessed at all, and, if so, under what circumstances and in what terms. In other words an accurate record will materially assist a court in deciding the difficult issues of fact and law to which confession evidence so often gives rise.

Possible ways of improving the accuracy of the record will be considered under three broad headings, viz, improving the accuracy of the written record, recording by mechanical means and introducing an impartial third party.

Notes

1. *Report of the Committee of Inquiry into Police Interrogation Procedures in Northern Ireland* Cmnd 7497 (HMSO, 1979) para 185
2. Mirfield p3
3. It is rare that the situation is as blatant as it was in R v Roberts [1953] 2 All ER 340 where the Crown declined to lead evidence of statements allegedly made by an accused who had been deaf and dumb since birth.
4. §§377 and 378 quoted in chapter 7.3 (i)(a) supra
5. The RCCP considered that the waste was not as great as commonly supposed - Report para 4.7. While this may well have been the case, a substantial amount of time undoubtedly was wasted. For a startling example see R v Turner (1975) 61 Cr App R 67.
6. One of the writer's colleagues tells (with great glee) of a Metropolitan police officer who had arrested in London a Glaswegian accused on a warrant for theft of a large quantity of soft drinks and who informed Glasgow Sheriff Court that the accused had replied "It's a fair cop guv, I stole the pop."
7. Loc cit note 2 supra

8.2 The Written Record

(1) Written Statements

Traditionally Scottish law has relied for proof of the accused's words on oral evidence from police officers, frequently using their notebooks as aides-memoire. [1] Written statements by accused persons are extremely rare, apart from post-charge "voluntary statements." [2] In current practice an accused's post-charge statement will be reduced to writing either by the accused himself or, much more commonly, by two officers unconnected with the case, and signed by the accused. It will contain an acknowledgement of the caution and the offer of legal advice and a statement that the accused has either read over the statement or had it read over to him. The signed statement will then be lodged as a production and spoken to by the officers who took it. The origins of this practice are uncertain, although it was probably derived from the declaration. Until the practice became established, judges (as already noted) tended to regard police interrogation as a usurpation of the function of judicial examination, an idea which took a long time to die out.

As recently as 1925 Lewis wrote:

> "Confessions made by an accused person after he has been charged, which have been reduced to writing by or at the instance of official persons, may be regarded as inadmissible as being in

> reality declarations of an inadmissible nature in respect of their irregularity." [3]

Even more recently, in 1966, Lord Kilbrandon was still arguing that after charge only a statement made before a magistrate was admissible. [4]

It may also be that the modern Scottish practice was at least partly influenced by the Judges' Rules in England, but in any event it is now of such universal application that it can be regarded as being beyond challenge and has been approved by judicial comment. [5] On the other hand there is no reported case where evidence of a post-charge statement has been held inadmissible because the normal practice was not followed. There are in fact only two cases directly in point.

Firstly Hamilton v H.M Advocate 1980 JC 66, is against the idea of the written statement being anything more than a simple written record of what the accused said. It had been argued that where the Crown *per incuriam* failed to produce the written statement, the oral evidence of the police officers as to what the accused had said was inadmissible as not being the "best evidence". This argument received short shrift from Lord Justice-Clerk Wheatley:

> "This submission proceeds on a misconception. When the statement was made it was made orally to the interviewing officers. Their appraisement of

the statement was what they individually heard. What was said by the applicant was then committed to writing by one of them and eventually read over to the applicant and signed by him as correct. But what the officers heard was primary not secondary evidence. The different methods by which the officers could speak to what was said by the applicant at the time attach to the reliability and not to the competency of the evidence. Committing the statement to writing and getting an accused to sign it as accurate may forestall a challenge to the accuracy of what is recorded as having been said by him, but that does not render incompetent the possibly more vulnerable recollection of what was actually said.

Secondly Cordiner v H.M. Advocate 1991 SCCR 652 is clear authority for the proposition that the normal practice is simply practice and not rules of law and a voluntary statement does not become inadmissible merely because it was not taken by an independent officer. In this case the accused had asked to speak with one of the investigating policemen who went on to record his voluntary statement. Such a departure from normal practice simply becomes an aspect of fairness. Cordiner can also be regarded as authority for the proposition that where the voluntary statement has been both tape-recorded and hand written,

it is unnecessary to produce the handwritten statement as well as the tape.

Although a written and signed statement is much more difficult to challenge than a policeman's simple oral evidence, a point acknowledged by Lord Wheatley, such methods of recording confessions have their limitations. The absence of research into Scottish police interviewing has already been noted, and in the absence of research one simply does not know what happens in Scottish police stations, particularly as, in Lord Devlin's words, it is the general habit of the police never to admit the slightest departure from correctness. However the writer's experience as a prosecutor leads him to think that Professor Glanville Williams' description of the pre-PACE situation in England may well by equally applicable in Scotland:

> "The statement reads as though it was volunteered by the suspect; but in part it may have consisted of a monosyllabic answer to a leading question asked by the officer, with one or more subordinate clauses. Since the statement does not distinguish between question and answer, the reader cannot tell what facts were suggested to the person making the statement by the way in which the question was worded. If the question was a complex one, the suspect may not have understood it; but this possibility cannot be assessed because the question itself is not recorded. And

the written word does not reproduce the inflection of the voice upon which meaning may depend. One cannot even be sure that the officer understood what the suspect said, or that the suspect understood the written statement when he read through it or had it read to him. His signature is no guarantee that the statement exactly represents what he said or wished to say." [6]

The same point was put slightly differently by the Thomson Committee:

"An unfortunate result of the present state of the law is that the police may be tempted to take answers given to questioning over a period, put them together into a single statement, and present that to the court as a spontaneous voluntary statement. Some of us with experience of these matters have seen so-called voluntary statements which covered so precisely the disparate points of the police case as to make their spontaneity highly suspect. [7] But in disputes in court as to the circumstances in which a statement was made it is difficult, if not impossible, for a judge to reject the statement as inadmissible on the grounds that the police account of the circumstances is untrue." [8]

Lord Devlin also hit one of the many nails in this issue on the head when, in an observation approved by the Thomson Committee, he said:

> "Lawyer-like tendencies flourish to an even greater extent among the police than they do at the bar or on the Bench. The police have sometimes seemed to treat the Judges' Rules as if they were a drill manual and to be unwilling to admit the slightest deviation from the text. Rather than become engaged in a discussion about whether a question was or was not necessary to remove an ambiguity, some police witnesses seem to have preferred stoutly to deny that they asked any questions at all and even to maintain that they hardly opened their mouths. Consequently statements have sometimes been put in evidence which have been said to be the prisoner's own unaided work as taken down by the police officer and in which the prisoner has recounted in the stately language of the police station (where, for example, people never eat but partake of refreshment and never quarrel but indulge in altercations) the tale of his misdeeds." [9]

The Thomson Committee's proposals for the taking of voluntary statements [10] were made in the context of their proposal that virtually all communications between police and suspect or

accused should be tape recorded, and as such they were not particularly radical and largely endorsed existing practice. The statement was to be preceded by a caution and an offer of an interview with a solicitor, it was to be recorded in a document written either by the accused himself or the police as his dictation, the document was to contain a signed acknowledgment by the accused of his right to silence and the fact that he had either seen a solicitor or decided not to see one, the last page was to conclude with an acknowledgment signed by the accused that he had read the document over and did not wish to add to it or alter it and it was to be signed by one witness. '' The police were not to interrupt or ask questions other than what was necessary for clarification and any questions were to be inserted in the record of the statement.

In England the RCCP also endorsed the existing practice, which at that time was governed by the Rule IV of the Judges' Rules. They noted that the accuracy of written voluntary statements made under caution did not seem often to be challenged and they declined to support any change that might diminish their use. [12]

Current post-PACE English procedure is not far removed from the Scottish. [13] Paragraph 12 and Annexe D of the Code of Practice on Detention, Treatment and Questioning [14] set out the requirements, although if the preceding interview has been contemporaneously noted and the record signed by the interviewee, or if the interview has been tape-recorded, there is normally no need for a

statement under caution, which should only be taken at the express request of the person concerned. It should also be remembered that PACE procceds generally on the assumption that suspects will have legal advice while in custody.

If a statement is to be taken, the suspect should always be invited to write it himself. He should write and sign that he makes the statement of his own free will, he acknowledges his right of silence and he is aware that the statement may be given in evidence. If the statement is to be written by a police officer, the suspect must signify in writing that he wishes this to be done. The suspect should be allowed to write the statement without prompting by the police except that an officer "may indicate to him which matters are material or question any ambiguity in the statement."

Where a policeman is writing the statement he must take down the exact words spoken. As Zander comments, "faithful compliance with this admonition would transform the taking of statements as it has been done in the past since it plainly prohibits the very understandable practice of police officers putting suspects' statements into a coherent tidy form." However, the policeman may ask questions which are "necessary" such questions and the answers given being recorded contemporaneously. At the conclusion, the suspect should read the statement and make any corrections he wishes. He should then sign that he has done so,

that the statement is true and that he has made it of his own free will.

Notes

1. In Scottish law a police officer's notebook, unless lodged as a production in its own right, is confidential to the officer and if he does not refer to it the defence have no right to see it - Hinshelwood v Auld 1926 JC 4. Police officers' notebooks are discussed further infra.
2. The Thomson Committee (para 7.14) recommended a procedure for taking pre-charge statements and suggested that such a statement should be taken by the investigating officer. They expressed no views on the appropriate person to take the traditional post-charge voluntary statement.
3. Lewis p322, founded on Isobel Cuthbert (1842) 1 Broun 311 and Alexander Hendry and James Craighead (1857) 2 Irv. 618
4. In Andrews (ed) *The Accused* p65
5. See Tonge v H.M. Advocate 1992 SCCR 313
6. *The Authentication of Statements to the Police* [1979] Crim LR 6
7. The writer was once presented with what purported to be a voluntary statement by a semi-literate glue-sniffer who had managed to remember the location, colour, make and year letter of no fewer than 12 cars he was alleged to have violated. Even more amazingly he had remembered them in exact chronological order!
8. para 7.11
9. *The Criminal Prosecution in England* p39
10. para 7.17
11. In practice the police (at least in Strathclyde) have adhered to the previous procedure of having one officer take the statement in the presence of another, the statement being signed by both.
12. Report para 4.9
13. See generally Zander p168
14. References are to the 1990 revision of the Code which comes into force on 1st January 1991

(ii) Notes and Notebooks

As previously mentioned, Scots law has generally proceeded on the basis that the primary evidence of what the accused said is the oral evidence of the police officer who heard it and Scots law has never accorded any special legal status to written statements or notes of interviews. [1] In the case of notes in a police officer's notebook, there is, compared to England, a notable lack of case law, but the accepted view is that such notes merely become part of the officer's oral testimony. [2] While a written, signed statement will normally be lodged as a production, it is generally not the practice to lodge a policeman's notebook, although there is no reason why, in an appropriate case, this should not be done. [3] Apart from such unusual situations, the "familiar practice in both solemn and summary procedure is that the policeman's notebook is not lodged, he is allowed to refer to any entry which he made contemporaneously with the events to which he is speaking, and the defence advocate may inspect the entry if he wishes to do so." [4]

It is not normal practice in Scotland for the accused to be shown, far less asked to sign, notes in a policeman's notebook and although officers are frequently asked in court whether the note was made at the time, and generally reply in the affirmative, the issue is rarely explored in depth. It would, in any event, be extremely difficult to prove otherwise and there would not appear to be any reported Scottish case in which a police

officer has been refused permission to refresh his memory from his notes because they were not contemporaneous. The rule requiring contemporaneous noting is generally applied on the common-sense basis that the notes should have been made as soon as practicable after the making of the statement but again there are no cases. It is thought that, were the matter to arise, the Scottish courts would take the same view as the (English) Court of Appeal did in Attorney General's Reference (No. 3 of 1979) (1979) 69 Crim App R 411 which approved Archbold's views that

> "... a witness may refresh his memory by reference to any writing made or verified by himself concerning, and contemporaneously with, the facts to which he testifies. 'Contemporaneously' is a somewhat misleading word in the context of the memory refreshing rule. It is sufficient for the purposes of the rule, if the writing was made or verified as a time when the facts were still fresh in the witness's memory."

In Scottish practice it is by no means unknown for one police officer simply to check and sign the notes in his colleague's notebook, a practice which, however undesirable it may be, does not appear to have attracted any reported judicial disapproval. [5]

Leaving aside the differences consequent upon tape recording, which will be discussed later, Scottish procedure in relation to the recording of interviews with suspects is still in a compar-

atively undeveloped state, a fact which is probably a function of Scots Law's historic attachment to *viva voce* evidence. The present position is broadly similar to the pre-PACE situation in England and subject to the same criticisms. [6] Verbatim contemporaneous records, although not unknown, are rare, preparation of notes after the event is the rule rather than the exception, suspects seldom see what goes into the notebook, and falsification is difficult, if not impossible, to establish in court. Above all there is a total absence of any enforceable legal requirement that record of interviews be kept in any particular format, or indeed that interviews be recorded at all.

In England the recording of interviews, unlike the taking of statements, has been radically affected by PACE. The RCCP had based their proposals for improving the accuracy of the written record on the premise that "where prepared questionnaires can be used or contemporaneous verbatim notes taken there are fewer difficulties over challenges at trial to the police record of the interview." [7] Where it was not possible to take a verbatim record or full contemporaneous notes "the product of the questioning ... should be presented to the court as what it is: a minute of the salient relevant points made at the interview." [8] If no contemporaneous record had been made, it should be the practice for the interviewing officer to note down, in the suspect's presence and for his signature, the main relevant points made during the interview, including denials as well as admissions or damaging statements. [9]

The interviewing of suspects is now governed by paragraph 11 of the Code of Practice For The Detention, Treatment and Questioning of Persons by Police Officers ("Code C") [10] and detailed rules for the keeping of records of interviews are set out in subparagraphs 11.5 to 11.13. [11]

Although the Code presupposes interviewing at the police station as the norm, the basic requirement now is that "an accurate record must be made of each interview with a person suspected of an offence whether or not the interview takes place at a police station." Records must be made either on special forms provided or in the officer's notebook.

Broadly stated, the record must be made during the course of the interview, unless it is impracticable or would interfere with the conduct of the interview, and it must "constitute either a verbatim record of what has been said, or failing this, an account of the interview which adequately and accurately summarises it." If an interview record is not made contemporaneously, it must be made as soon as practicable after its completion and the reason for not completing the record in the course of the interview must be recorded in the officer's notebook.

Unless it is impracticable, the interviewee should be given the opportunity to read the record and sign it as correct or indicate the respects in which he considers it inaccurate. Any solicitor

or "appropriate adult" present at the interview should also be give an opportunity to read and sign the record. There are provisions for dealing with suspects who cannot read or refuse to cooperate.

A new provision in the revised Code closes a loophole and requires that a record should also be made of any comments made by a suspect outwith the context of an interview but which are relevant to the offence. Where practicable the suspect should be given the opportunity to read the record and sign it as correct or indicate the respects in which it is inaccurate.

Given the record of the English courts in enforcing the Judges' Rules, the robustness with which they have enforced compliance with the recording provisions under PACE must have come as an unpleasant shock to the police. The case of R. v Canale [1990] 2 All ER 187 is a striking example, not only of the breathtaking arrogance with which the police cocked a snook at a whole range of requirements of the Code, but also of the forcefulness of the Court of Appeal's opinion.

In Canale the defendant had been convicted and sentenced to six years for conspiracy to rob. He had been interviewed four times by the police and at the first and third interviews no contemporaneous record was made, nor was a subsequent record made. The second and fourth interviews were contemporaneously recorded, but the second one in particular consisted largely of the accused

repeating admissions allegedly made at first one. The officers concerned had simply noted as the reason for not making a contemporaneous record the initials "B.W." which they later explained stood for "best way". This did not impress Lord Lane CJ:

> "In the officers' view the reason for failing to record the interview contemporaneously was that the best way was not to record the interview contemporaneously, which of course is not a reason at all. In the view of this court, it demonstrates a lamentable attitude to the 1984 Act and the Codes made thereunder."

Such records as had been kept had been neither on the prescribed forms nor in the officers' pocketbooks, one officer astonishingly attempting to explain this by saying that he had left his notebook at home when he changed his clothes and the other claiming not to have received a notebook since his transfer to the Flying Squad a fortnight earlier. (In the writer's opinion, the mere fact that the police could seriously advance such excuses shows how right the courts have been to take the tough line that they have.)

Lord Lane was unequivocal in his views on both the general issue and the behaviour of the police in the instant case:

> "This case is the latest in a number of decisions emphasising the importance of the 1984 Act. If,

which we find hard to believe, police officers still do not appreciate the importance of that Act and the accompanying Codes, then it is time that they did. The Codes of Practice, and in particular Code C relating to interviews and questioning of suspects, are particularly important.

In the instant case the police officers seem to have displayed a disregard of those rules and, in light of the initials "B.W." and what they stood for, we feel compelled to say that that was a cynical disregard of the rules. The explanation put forward ... is that in these preliminary conversations, namely interviews 1 and 3 they were endeavouring to tidy up a mass of information ... [and] wished to put the matter in apple pie order before the contemporaneously recorded interview took place, so it would be easier for the jury to follow the eventual statements which would be exhibits before the jury. Whether that is true, we beg leave to doubt."

His Lordship reaffirmed the earlier decision of R v Keenan [1989] 3 All ER 598 and reminded the police that contemporaneous noting had a twofold purpose:

"[T]he importance of contemporaneous noting of

interviews can scarcely be overemphasised. The object is twofold: not merely is it to ensure so far as possible that the suspect's remarks are accurately recorded and that he has an opportunity when he goes through the contemporaneous note afterards of checking each answer and initialling each answer, but likewise it is a protection for the police, to ensure so far as possible that it cannot be suggested that they induced the suspect to confess by improper approaches or improper promises. If the contemporaneous note is not made, then each of those two laudable objects is apt to be stultified."

In the instant case the trial judge had been deprived of material which should have been before him when he was deciding the issue of admissibility, and once he had decided to admit the statements, the jury also were deprived of evidence which should have been available to them.

While Scots law likes to think that its genius is its flexibility and its preference for broad concepts such as "fairness to the accused" rather than the minutiae of technical rules of admissibility, there is no doubt that the English courts are now taking a much more robust attitude to enforcing upon a reluctant police compliance with the requirements for the protection of the suspect. It may be that at the moment their attitude is almost

over-enthusiastic, but it is clearly appropriate that the police should be given, beyond a shadow of a doubt, the clearest possible message that a policeman is, as much as anyone else, subject to the requirements of the law and attempts to evade the requirements will not be tolerated. If this is not done, the PACE codes, which, after all, are at least indirectly the result of scandals such as *Confait*, will simply end up in the same lamentable state as the Judges Rules.

Given the extremely high status which the courts in Scotland accord to confessions, and the almost complete erosion of the requirement of corroboration, it is submitted that Scots law should pay a great deal more attention to the way in which non-tape recorded interviews are recorded by the police. In this respect, it is submitted that, for once, Scots law should look south of the Border. Although the English Court of Appeal has perhaps gone slightly too far, the Scots courts could, with advantage, adopt a much more critical attitude towards police record-keeping than they hitherto have done.

Notes.

1. Scots law is generally reluctant to require the police to record information in a particular way as a condition of admissibility. See eg Cummings v H.M. Advocate 1982 SCCR 109. The position may be different if it is necessary for the information to be recorded in a particular way so that, for example, its accuracy can be verified - Forbes v H.M. Advocate 1990 SCCR 69
2. Walkers p363 §341(b)
3. Macphail §§8,47, S8,47,
4. Macphail §9,47,
5. cf R v Bass [1953] 1 QB 680 per Byrne J p686, This decision is criticised by R,K, Cooke *A Police Officer's Notes* [1954] Crim LR 833
6. see Mirfield pp6-13; G, Williams *The Authentication of Statements to the Police* [1979] Crim LR 6, especially pp11-12
7. Report para 4,12

8. Report para 4.13
9. ibid
10. References are to the 1990 revision of the Code which comes into force on 1st January 1991
11. See Zander p161 et seq

8.3 Recording by Tape and Video

(1) Introduction and Early History

Nowadays it may seem self-evident that a tape recording, or possibly a video recording, of what took place between the police and the suspect will offer standards of accuracy and completeness which cannot be matched by any form of written record. Even contemporaneous noting cannot compete since the tone or inflexion of the suspecte's voice cannot be captured on paper and such records are not particularly difficult to falsify. In addition, contemporaneous noting interrupts the flow of the interview and this may deprive the police of an important psychological advantage. The authors of one of the main post-PACE studies of police interrogation found that in most interviews some 40% of the time was occupied by silence due to the need for the "scribe" to catch up, and contemporanoeus note taking "created a bizarre and wearisome atmosphere which stressed the interrogators as much as the suspects." It is surprising that against this background they also found that there was no marked effect on the overall admission rate. [1]

Tentative steps towards the recording of police interviews were being taken in America in the 1940s. [2] It may well be that the Americans harboured fewer illusions about the capacity of their police to indulge in questionable and occasionally downright illegal practices and in 1942 the American Law Institute in their Model Code of Evidence commented:

"In some instances confessions taken by the police have been recorded by a sound film. To impose a requirement on the police that they should take no confession unless recorded is believed to be practicable, effective and desireable. ... Certainly wherever it is practicable to supply and use the necessary equipment in a reasonably efficient manner it should be done and the courts should encourage such procedure in any legitimate manner." [3]

It is also noteworthy that there is a reported American example of the filming of an interview as early as 1948. [4]

The idea that recordings might play a part in the police investigation seems to have crossed the Atlantic in the early 1950s and the first discussion in Britain was in an article by T.B. Radley in the Criminal Law Review in 1954. [5] The author, who appears to be well-qualified technically, deals with both mechanical recording (ie by means similar to old-fashioned gramophone records) and "magnetic" (ie tape) recording. He goes into considerable technical detail about how recordings might be falsified, although it has to be said that his views of the dangers were probably exaggerated even at the time, and subsequent developments such as the superimposition of time signals, the invention of the cassette tape and the development of twin-deck recorders have eliminated most of the grounds for his fears.

However, Radley was the first British commentator to identify the need for independent custody of the tapes as a safeguard against tampering:

> "The essence of any safeguard which is at once real and understandable seems to lie in physically guarding the tape as soon as a recording has been made on it; and making sure that it is under guard until it is needed for a lawful occasion."

On the state of knowledge as it was in 1954, Radley's conclusion was that it was unsafe for the recorded confession to replace the written one, but he recognised the value of recording in its ability to capture matters which, even if the writer of a written statement wished to record them, could not be captured on paper:

> "A written confession can never contain exactly all that was said. A recorded confession, neglecting forgery, does. It would contain the questions of the police as well as the answers to them, and every intake of breath and casual cough to boot. It might be awkward for either side on occasion; but at least it would be the truth and nothing but the truth - neglecting forgery. ... [A] recording does contain a whole range of material which is beyond the reach of words as written down. ... A recording retains the way things are said."

For long one of the strongest advocate of tape recording of police interviews was Glanville Williams and he did not restict his advocacy solely to confessions:

> "More legal attention should be paid to the first statement made by the witness to the police; and the making of the statement should be tape- or wire-recorded wherever possible. A confession made to the police, if tape recorded and then sealed, might well have greater probative force than a version written by the hand of the policeman." [6]

Williams was to return to this theme several times in the following years and indeed as early as 1959 he was advocating the use by the police of pocket tape recorders. He added to Radley's view that tapes should be guarded until required by suggesting that they might be sealed and deposited with an independent third party such as the clerk of the court, (a suggestion which, interestingly, had been made to him by a senior police officer) and he also prophesied the twin-deck tape recorder. [7]

In 1960 Justice published a report on Preliminary Investigation of Offences in the course of which they commented that while it was easy for an experienced sound engineer to alter a recording and there were no perfect safeguards, "a close watch should be kept on technical developments in tape-recording which may lead to a satisfactory safeguard against falsification." They

suggested as an experiment the installation of tape recorders in police cars so as to record statements made by witnesses on the spot in motoring cases. [8]

One commentator [9] observed that the it was difficult to see why the danger of tampering should be such a formidable objection to tape-recording and drew an analogy with photographs, which, he argued, were equally susceptible to falsification but if properly proved were readily accepted by the courts.

Although taping of police interviews was still a long way off, by the early 1960 the courts were beginning to have some experience of the evidential use of tape-recording in other contexts and although there were difficulties, notably in the use of transcripts, the tapes themselves were generally admitted in evidence. [10] The first, and for many years the only, Scottish case involving a tape was Hopes and Lavery v H.M. Advocate 1960 JC 104.

In this case a blackmail victim was fitted with a concealed microphone and transmitter prior to meeting the blackmailer in Glasgow Central Station. Police Officers in a room in the station had a receiver, loudspeaker and tape recorder and other officers were able to watch the conversation take place although they could not hear it. The conversation was transmitted from the microphone to the receiver, to the loudspeaker and ultimately to the tape-recorder. At the trial evidence was led from a

police officer who heard the conversation coming over the loudspeaker. The tape recording was indistinct and, as might be expected, contained a lot of extraneous noise so in order to provide an intelligible account of the conversation, the tape was played over several times to a stenographer who made a shorthand record of what she heard and then prepared a transcript, which Lord Justice-General Clyde later described as "really more in the nature of a reconstruction by her of what the conversation, in her view, must have been."

At the trial the tape was played without objection, but objection was taken to the evidence of the police officer who had heard the conversation on the basis that the tape was the primary evidence and his evidence was therefore incompetent. Objection was also taken to the evidence of the stenographer and her transcript which she proposed to read out. The objection to the police officer was decisively rejected by the trial judge and his decision was upheld on appeal. He also allowed the evidence of the stenographer and her transcript although with much more hesitation.

On appeal to the High Court, the Lord Justice-General expressly reserved his decision on the competency of the girl's evidence, although he accepted that there were practical reasons for admitting it, not least the fact that the tape would otherwise have had to be played over several times in the court. Lord Carmont simply concurred which presumably means that he shared

Lord Clyde's reservation. The third judge, Lord Sorn, was much more positive:

> "I would like first to consider whether the course adopted by the prosecution of getting someone to decipher the recording and present the result to the jury was a reasonable course and one that was fair to the accused. I think it was both reasonable and fair. What would have been the alternative? It would presumably have been to play the recording to the jury over and over again, until all the members of the jury were satisfied that they had extracted all that they were capable of extracting from it. This would have caused an interruption of indefinite duration in the proceedings... . It seems to me much better that the jury should be presented with a reliable version of the conversation - though, of course, they should be made to understand that the recording itself was the true evidence. Then, so long as the recording and the transcription are made productions in the case, as they were here, this is quite fair to the accused. His advisers can see beforehand the version which the prosecution is to put forward and I have no doubt that the defence would be given facilities to check that version against the recording."

One issue which had exercised the court was the question of the stenographer's qualifications to act as an expert witness. She had admitted that she had never done anything of this nature before and indeed it appeared that there was no person available who had done anything similar. Lord Sorn adopted the novel view that in the circumstances the stenographer had become in effect an ad hoc expert:

> "Miss McIntyre was certainly not an expert in the sense of bringing some pre-existing qualification to her task, because she frankly admitted that she had never done anything of this kind before. She could write shorthand but she had no experience of listening to and deciphering recordings. But is it true to say that she was doing something, or expressing an opinion about something, which the jury could equally well have done, or formed an opinion about themselves? Given the same opportunity as Miss McIntyre it may be true to say that the jury would have been as well placed as she - but they did not have the same opportunity. They did not play the recording over and over again and make a special study of it ... . Miss McIntyre had had an opportunity which was denied to them. She did thus bring a special experience to her evidence and it might be said that in the course of carrying out her task, she had acquired a certain expertise in the thing she was doing.

> ... [T]here is no rigid rule that only witnesses possesing some technical qualification can be allowed to expound their understanding of any particular item of evidence. Expositions of this kind are often given, subject to the control of the presiding judge as to whether the person giving the exposition (without possessing some expert qualification) is equipped to do so, and as to whether it is fair to the accused that the exposition should be given"

However the High Court made it clear that, in the future, evidence on the interpretation of tape-recordings should if possible be given by persons who had expert qualifications.

The most important decision of the period in England was R v Maqsud Ali, R v Ashif Hussain [1965] 2 All ER 464 where the English Court of Criminal Appeal considered Hopes and Lavery and took the point that there was no difference in principle between a tape-recording and a photograph. Although their Lordships declined to lay down an exhaustive set of rules, they did hold that a tape-recording was admissible provided its accuracy could be proved, the voices properly identified and the evidence was otherwise relevant and admissible.

Notes

1. Irving and McKenzie *Police Interrogation; The Effects of the Police and Criminal Evidence Act 1984* p118
2. See R.E. Auld *The Admissibiltiy of Tape Recordings in Criminal Proceedings;*

A Comparative Note [1961] Crim LR 598

3. Rule 505
4. People v Dabb (1948) 32 Cal 2d 491
5. *Recording as Testimony to the Truth* [1954] Crim LR 96
6. (1957-58) 4 JSPTL (NS) 217 at p226
7. [1959] Crim LR 313 at p314. See also [1960] Crim LR 325 at p342
8. [1960] Crim LR 793 at p807
9. Auld op cit note 2 supra at p602
10. On the early English decisions see Auld op cit note 2 supra.

(ii) The English Proposals

The first official consideration of the tape-recording of police interviews in England and Wales was by a Working Party under the chairmanship of the then Inspector of Constabulary in 1965. [1] This body considered that the taping of interviews in police stations "would result in less crime being detected, and fewer criminals being convicted, without having any countervailing advantages." Senior police officers were to cling, limpet-like, to this view for twenty years until the issue was eventually forced by the recommendations of the RCCP.

Seven years later, the CLRC split on the issue. Given their recommendations on the restriction of the right to silence, the accuracy of the record was clearly a crucial matter. The majority recommended that experiments into the use of tape-recording by the police should be carried out to see whether technical difficulties could be overcome and whether recorders made a sufficiently valuable contribution to the ascertainment of the truth without seriously impairing police efficiency. Among reasons for this view the majority cited the fear of the police that criminals (sic) would refuse to answer questions on tape and the fear that the courts might come to regard evidence of an interrogation which had not been recorded as "inferior". Technical problems and difficulties over editing out inadmissible material were also mentioned. [2]

However a minority of three, including Professor Williams, took the view that statutory provision should be made for the compulsory use of tape recorders at police stations in the larger centres of population, and no steps to restrict the right to silence should be taken until this was done. The minority argued *inter alia* that such a provision would deter, if not eliminate, "third degree" methods, would help to prevent the fabrication of confessions, would reduce the potential for conflict as to what actually happened, and would generally assist in reducing the scope for error or malpracice by the police. [9]

The response of the government to these proposals was to establish a committee to consider the feasibility of an experiment. The Hyde Committee, which reported in 1976, identified the arguments for and against tape-recording, which were later picked up by the RCCP. In favour of taping were the following:

(1) What transpires during an interrogation is frequently vital to a case subsequently brought against the man questioned. It is very important that the court should have the best possible account of what took place. A tape-recording is of more assistance than any written record which must be prepared after an interrogation, because it gives the precise words used - and there is the additional advantage that a tape-recording will show the inflections of tone and voice.

(2) Tape-recording would deter, if not prevent, the use of any unfair questioning methods by the police. Conversely it would

reduce if not remove the risk of untrue and unfair allegations being made against police officers responsible for conducting interviews.

(3) Tape-recording would provide a means of resolving disputes about what took place during an interview, and thus reduce the time at present spent by the courts in "trials-within-trials". [4]

Against taping were the following:

(1) Criminal investigations might be hampered if interrogations were tape-recorded. In particular the use of a tape-recorder might adversely affect the willingness of a suspect to make admissions and his willingness to pass information about other persons involved in criminal activities.

(2) If the use of tape-recorders became standard, evidence of an interrogation not tape-recorded might be regarded as inferior and of less weight, even though it might have been quite impracticable to tape-record.

(3) Contrary to argument 3 above, the use of tape-recorders might lead to more "trials-within-trials". For example there might be disputes about what the suspect had said (if the recording was not clear); or allegations of tampering with the recording; or the clever criminal, knowing that his remarks were being recorded, might make untrue allegations - perhaps of bribery or assault - against the interviewing officer. [5]

Although it identified the arguments, the Hyde Committee was scrupulous in confining itself to the feasibility of a tape-

recording experiment rather that the desireability thereof, and their report recommended a limited experiment, which in their view had to involve real cases which went to court. They suggested that the experiment should exclude interviews in connection with summary offences and interviews with juveniles unless the case was likely to be heard in an adult court. The question of transcribing tapes and reducing them to a form which could conveniently be used in court exercised the Committee at length and in view of the likely requirement for transcripts, they considered that initially the experiment should be limited to the taking of statements. [6]

Despite this, and the unequivocal advocacy of Sir Henry Fisher, [7] who pointed out that the difficulties could be overestimated, there seemed to be little enthusiasm for even so limited an experiment. [8] Even though one was eventually announced, it never in fact took place because matters were overtaken by the appointment of the RCCP who carried out their own experiment. [9]

Among other things the RCCP's research suggested that there was less force than generally supposed in the commonly stated objections that the presence of a tape recorder would hamper investigations and enable false allegations of inducement or violence to be fabricated. They also noted the experience and views of investigators in the United States that the advantages of having admissions on tape greatly outweighed the drawbacks. A pertinent, and previously overlooked, point was made in that

"while the presence of a recorder inhibits some suspects from talking this cannot constitute a weighty objection since the suspect has a right not to answer questions." [10]

Research also suggested that the problem of tampering had been exaggerated, particularly given the development of the cassette recorder, whose tapes, unlike the open-reel type, were not susceptible to undetected tampering except with access to expensive and sophisticated equipment whose operation would be beyond the capability of anyone without technical knowledge. [11]

The RCCP clearly endorsed tape recording, although they suggested that until experience had been gained it should be restricted to the taking of statements and summaries. [12] However they were of the opinion that "the time for further experiments to test feasibility is past." In their opinion, tape recording could have started immediately on the basis of administrative guidance from the Home Office. [13]

On the other side of the coin, the RCCP rejected the suggestion that there should be automatic exclusion of evidence of non-tape recorded summaries or statements, although an officer who had not taped in circumstances where that might have been expected should be required to explain why. [14]

Although the RCCP had expressed the view that the time for experiments as to feasibility was past, field trials were clearly

going to be necessary. The trials eventually carried out were on a much wider scale than the RCCP had envisaged and took in the whole interview in the police station. The field trials were an unqualified success and showed that most of the fears expressed by the police were unfounded and also that the concerns expressed by the Hyde Committee and the RCCP about the cost of transcribing tapes had been unduly pessimistic. [15]

The historic antipathy of the higher ranks of the police to tape-recording once prompted Glanville Williames to remark that

> "One cannot help wondering whether the real objection ... is their fear of the consequences of public inspection of what happens in the interviewing of suspcts." [16]

If this was an accurate assessment, the actual experience of tape-recording has shown how wrong the police were. The Second Interim Report in particular shows that the results of taping were almost wholly beneficial and the outlook is optimistic. [17] In marked contrast to the hoary chestnut about taping having an adverse effect on the availability of information and intelligence, taped interviews led to an improvement in the total information gleaned from interviews in connection with serious cases and there was no evidence that suspects were more restrained in mentioning third parties on tape. Overall, once they were actually given the opportunity, officers appeared to welcome the change to taped interviewing and to perceive it as

assisting rather than hindering their work through the provision of an objective record of the interview.

The police themselves have now come to embrace tape-recording, if not exactly with enthusiasm, then certainly with something more than the grudging acceptance of the inevitable. Police paranoia about "electronic surveillance" has also been swept aside. Professor John Baldwin, who had been one of the RCCP's researchers, and whose work, he considered, had been hampered by police hostility has recently written:

> "It is now obvious to all concerned that, where disputes arise as to the veracity of an interview record, or allegations are made against the officer conducting the interview, the courts are in a weak position to determine which party is telling the truth. The enthusiastic acceptance on the part of the police of the need for tape recording to resolve difficulties of this kind represents in itself a dramatic conversion and one that would scarcely have been predicted a decade ago. ... How was it that police officers, after 20 years of resistance to the idea of tape recording, culminating in a determined effort to thwart even the experiments of a Royal Commission, could be persuaded to use the machines on a routine basis with scarcely a murmur of dissent? The answer to this question lies in the dawning realisation

that, if suspects are interviewed with fairness and propriety, then police officers have very little to fear from having the interview recorded. It may indeed be the case that they will emerge as the main beneficiaries of the exercise." [18]

The modern police view is probably well represented by the following comment from a Detective Inspector:

> "They've been trying tape recorders out and we're getting so many guilty pleas from them, it's unbelievable. Solicitors who begged and begged for tape recorders because we were "verballing" everybody now realise that that's the worst thing they could have asked for, because blokes do cough jobs. It's like boasting. You get murderers and sex people, they can't stop talking about it once they start. I think once we get tape-recorded interviews nationally, it will be much better. If you put the right questions to somebody, they will talk." [19]

At the court stage the evidence was generally tentative, but there were signs that a higher proportion of defendants were pleading guilty, [20] there were sign that trials were slightly shorter and there were fewer trials-within-trials.

Notes

1. P.E. Brodie *The Mechanical Recording of Interrogations by the Police*

2. 11th Report (Cmnd 4991) paras 50-51
3. ibid para 52
4. Cmnd 6630 para 9
5. ibid para 10
6. Report para 89. See comments in [1977] Crim LR 1
7. Fisher Report para 2.24
8. See Mirfield p20 et seq
9. J.A. Barnes and N. Webster *Police Interrogation - Tape Recording* Research Study No.8 (HMSO 1980). See also Report para 4.18 et seq
10. Report para 4.23
11. Report para 4.24
12. Report paras 4.26 and 4.27
13. Report para 4.29
14. Report para 4.30.
15. C.F. Willis *The Tape Recording of Police Interviews With Suspects; An Interim Report* Home Office Research Study No 82 (HMSO 1984); C.F. Willis, J. Macleod, P. Naish *The Tape Recording of Police Interviews With Suspects; A Second Interim Report* Home Office Research Study No 97 (HMSO 1988). The finding are summarised in Zander p130
16. *The Authentication of Statements to the Police* [1979] Crim LR 6 at p22
17. pp72-77
18. *Police Interviews on Tape* [1990] New LJ 662
19. R. Graef *Talking Blues - The Police In Their Own Words* (London, 1990) p292
20. The authors of the Second Interim Report are careful to point out that this conclusion is based on evidence from only one of the experimental areas,

(iii) The PACE Scheme

Section 60 of PACE laid on the Home Secretary a duty to issue a Code of Practice for the tape-recording of interviews with suspects and this was approved by Parliament in July 1988, coming into force on the 29th of that month and forming Code E. Tape-recording is being brought in gradually from area to area under the supervision of a National Steering Committee, with the government's stated intention being for it to become standard police practice throughout England and Wales by 1991.

Code E requires that all interviews with persons suspected of offences triable on indictment (or either way) must be tape-recorded, although interviews with terrorist suspects are excluded. Despite the exclusion, there is a limited experiment in London and Merseyside to tape-record summaries of interviews with terrorists. [1] Tape-recording also does not apply to interviews with someone who comes to the police station as a volunteer until such time as he becomes a suspect. However taping is supposed to commence after the person has been cautioned.

The custody officer may authorise the interviewing officer not to record if the equipment is not working, or no suitable room is available and there are reasonable grounds for thinking that the interview should not be delayed. Non-recording may also be

authorised if it is clear from the outset that no prosecution will result.

The whole of the interview is to be recorded including the taking and reading back of any statement. Recording is to be done openly, with a master tape being unwrapped, placed in the tape-recorder and sealed after use all in the suspect's presence. [2] (A second tape will be used as the working copy, and if the machine in use does not have a second deck, the working copy is to be made in the suspect's presence.) The suspect is also to be told that the interview is to be recorded. The interviewing officer will, on tape, state his name, rank and that of any other officer present, the date and time of the interview, and then caution the suspect. If the suspect objects to being recorded, his objections should themselves be recorded before the machine is switched off. A written record of the rest of the interview should be made, but if the officer thinks that he can reasonably continue to tape despite the suspect's objections, he may do so, although a Note to the Code reminds him that this decision may attract adverse comment in court. [3]

If a break is taken, that fact should be recorded on tape, together with the time. If the suspect leaves the room, the tape has to be removed from the machine and sealed, but if he remains in the room, the machine can simply be switched off. Once the interview resumes, the time requires to be stated again.

At the end of the interview the time requires to be recorded and the master tape sealed. The suspect has to be asked to sign the label and must be given a notice explaining the use to which the tape will be put and arrangements for access to it.

If the suspect wishes to make a written statement this should be taken while the tape is running.

If criminal proceedings follow, the interviewing officer should make and sign a written record of the interview and he may listen to the tape to refresh his memory. The written record need not be a full contemporaneous note, but should be a balanced account of the interview including any points made for the suspect and any key parts should be in direct speech. The primary purpose of the written record is to enable the prosecutor to make an informed decision about the case, and indeed prosecutors expect to rely on the written record, so keeping to a minimum the number of occasions on which the Crown Prosecution Service have to listen to a tape or read a whole transcript. If the defence accept the written record, it will also be used for the conduct of the case in court.

The field trials had established that the demand for transcripts was not nearly as great as had previously been supposed, transcripts being requested by the prosecution in only some six to eight per cent of cases and only a handful of them being longer than ten pages. [4] If the police transcribe a tape they will

provide the transcript to the C.P.S. who will in turn provide a copy to the defence. If the defence wish to transcribe a tape the police should provide them with a copy of the tape and they will then make their own arrangements to have it transcribed. In order to save time and money each side is supposed to provide to the other a copy of any transcript they have had made: "It is in the spirit of the tape recording arrangements that the content of the record of the taped interview should be agreed between the prosecution and the defence before the case comes to court." [5] However if agreement cannot be reached the issue will be resolved by playing the tape at the trial. [6]

Somewhat surprisingly, and in contrast to the Scottish scheme, the tape is retained by the police until committal for trial, and during this period it falls to be treated as any other exhibit. [7] Any editing of a tape, to exclude inadmissible or "sensitive" material should be done under the supervision of the C.P.S.

The Court of Appeal have laid down guidelines for the use of the tape in court [8] which provide *inter alia* for the interviewing officer or any other officer who was present to produce and prove the tape, including any challenge to its accuracy. There is no need to play the tape if the transcript is agreed. If the tape is to be played it is a matter for the judge whether the jury should have a transcript while the tape is being played. However the Court of Appeal noted that in their experience "a transcript

is usually of very considerable value to the jury to follow the evidence and to take to the jury room when they retire."

Notes

1. Zander p126
2. Once the master tape is sealed, the seal may only be broken in the presence of a representative of the Crown Prosecution Service and the defence, if the latter wish to attend - Code E para 6.2
3. Code E para 4.5 and Note 4G
4. Second Interim Report pp53-55
5. Home Office Circular 76/1988
6. The mechanics of having this done are set out in Practice Direction (Crime: Tape Recording of Police Interviews) [1989] 1 WLR 631
7. Code E para 6.1
8. R v Rampling [1987] Crim LR 823

(iv) The Scottish Proposals

Although the English position has been considered first, primarily because of the greater availability of material, Scotland actually led the way in the introduction of tape-recording of police interviews.

The issue was first discussed by the Thomson Committee ' who recommended that the interrogation of suspects in police stations should be recorded on tape "in order to provide a safeguard for persons being interrogated in the privacy of a police station and also to protect the police against unjustified allegations." The Committee also recommended that voluntary statements should be tape-recorded. Even the strongest English advocates of taping had acknowledged that there would require to be exceptions to deal with mechanical failures and other unusual events, but Thomson took by far the most extreme position on admissibility of any of the bodies who made recommendations on taping:

> "We realise that all or part of a police interr-ogation may not be recorded through failure of a tape-recorder. The question arises whether or not an account of any unrecorded interrogation given by a police officer from memory and notes made at the time of immediately afterwards, should be admissible in evidence. *We consider that it should not be admissible, as we feel strongly that particularly accurate recording of interrogation*

in a police station is essential as a safeguard to all the persons concerned. The same considerations do not apply to a voluntary statement which, although recorded on tape, will also be recorded in a written document authenticated by the accused. Such a statement should be admissible in evidence, even though the tape-recorder has failed." [2]

The Thomson Committee did not concern themselves particularly with feasibility, although they did carry out a small practical experiment which proved technically satisfactory, and they noted that both the availability of more sophisticated equipment and better training for police officers would improve matters even further. Tampering with tapes was considered unlikely, but to reduce the possibility the tape was to be sealed and placed in the custody of the Procurator Fiscal as soon as possible after the interrogation. [3]

A Working Party was established in 1978 under the chairmanship of Mr G. P. H. Aitken to supervise the setting up and operation of a research study into the tape-recording of police interviews with suspects. The study itself began in May 1980 with the establishment of experimental schemes in Dundee and Falkirk; later the experiment was extended to Aberdeen and Glasgow. Monitoring was undertaken between the date of inception of the experiment and 31 December 1983. Tape recording was initially

restricted to CID investigations in cases which were thought by the police to justify prosecution in the Sheriff or High Court and where the suspect was aged 16 or over. [4]

An interim research report was produced covering the first twenty-four months of the experiment [5] and as the first U.K. study of tape recording of police interrogations it naturally attracted some interest. This early research indicated that only a minimal number of suspects refused to be taped and even fewer attempted to fake maltreatment or assault by the police. However as far as the behaviour of the police was concerned, the figures showed that there had been a dramatic effect on both the length and the content of interviews. There was a dramatic rise, particularly in Falkirk, of suspects who made statements before arriving at the police station and there were delays between the suspect arriving at the police station and the tape-recorder being activated.

That tape-recording, particularly in Dundee, got off to a shaky start was due in no small measure to the decision by Lord Jauncey in H.M. Advocate v McFadden, unreported August 1980 to which reference has already been made. [6] In this case a whole interview was held inadmissible on the grounds of cross-examination, even though his Lordship found parts of it to be entirely fair to the accused. It was to be some three years before the issue was settled and McFadden overruled. [7]

In an article discussing the interim report two English commentators observed:

> "The SHHD Report assumes that suspects increasingly exercised their right to silence when being tape-recorded. It is more likely that the police extracted most of the information they wanted in the pre-interrogation interview (non-taped) and thus conducted themselves in the formal (taped) interview in such a way that their questions were designed not to elicit answers. ...
>
> It emerges that police acceptance of public scrutiny of their activities is low and, more importantly, that they have found ways of disguising this attitude in the context of tape-recording. What has happened is that the police have managed to give the appearance of accepting taping by recording an acceptable number of interviews. McFadden taught the police the lesson that there were real dangers in recording the traditional interrogation. What is recorded therefore is what is acceptable to the courts and what would pass public scrutiny. ... Interviews have been taped; interrogations have continued to take place in secret." [8]

The Working Group finally reported in 1985 and at the same time published the full results of the monitoring exercise. * The research evidence showed that tape-recording had had a substantial effect on the way the police both prepared for and carried out interviews. By the time the full picture was known, the police in Dundee had settled down to be perhaps the most scrupulous of the four groups of officers in complying with the requirements of the scheme and they were beginning to come to the view that once they had adjusted to it it was possible to operate tape-recording successfully and with a minimum of inconvenience, a view which was also, to a lesser extent, held in Aberdeen. . However officers in Falkirk and Glasgow remained suspicious of tape-recording and admitted to devices to avoid it. [19] While it has to be borne in mind that the bulk of the research was carried out before McFadden was overruled, the tenor of the evidence gathered showed that the police, while acknowledging the potential for reducing attacks on their credibility, were generally hostile to tape-recording and the most favourable response to its extension was likely to be grudging acceptance.

Nevertheless the Working Party took the view that the experiment had proved the technical feasibility of tape-recording and the debate had reached the stage where the introduction of a national scheme was inevitable. The ultimate objective was seen as the tape-recording of all interviews in police stations, but having regard to the practical and financial problems involved, it was recommended that the categories of interviews to be taped should

remain as they had been during the experiment. Introduction throughout Scotland should be phased on a geographical basis and national guidelines should be drawn up, although legislation was not considered necessary. [11]

Following a period of consultation, the Secretary of State for Scotland announced in a written answer [12] that he was asking Chief Constables throughout Scotland to begin the necessary preliminary work on buildings, equipment and training with a view to a rolling programme of implementation beginning on 1 April 1988. The Secretary of state also announced that suspects under the age of 16 were to be brought within the scope of tape-recording.

Notes

1. Report para 7.13c, 7.14c, 7.19d 7.20, 7.21, 7.23
2. para 7.23, author's italics.
3. para 7.21b
4. The guidelines to be followed, which were revised in 1982, are set out in full in E.C.M. Wozniak *The Tape Recording of Police Interviews with Suspected Persons In Scotland* (SHHD 1985) p131 et seq
5. *Tape Recording of Police Interviews: Interim Report - The First 24 Months* (SHHD, 1982). See M. McConville and P. Morrell *Recording the Interrogation: Have The Police Got It Taped?* [1983] Crim LR 158
6. supra vol. 1 p444
7. Lord Advocate's Reference (No.1 of 1983) 1984 SCCR 62
8. McConville and Morrell op cit note 5 supra at p162
9. See articles by J MacLean in (1986) 112 SCOLAG 9 and (1986) 113 SCOLAG 21
10. Wozniak op cit note 4 supra p17 et seq
11. Report pp18-19
12. 6 April 1987

(v) The Scottish Scheme [1]

Apart from the inclusion of suspects under 16, the final Scottish tape-recording scheme differs little from the experimental one. Tape-recording only applies to CID interviews in a police station, where the offence is deemed serious enough to warrant prosecution in the Sheriff or High Court. [2] Three categories of persons are to be tape-recorded, viz (a) those who have signed voluntary attendance forms; (b) those who have been detained under Section 2 of the 1980 Act; and (c) those who have been arrested. An accused person who is in custody for one offence may be interviewed in the course of investigation of others for which he is a suspect.

Tape-recording has had no effect on the rules of admissibility and the overriding requirement of fairness is maintained. If there is any doubt about whether tape recording is appropriate, the requirement of fairness should lead the police to conclude in favour of taping. It is, of course, also open to the police to tape-record interviews of persons outwith the scheme if they wish although this should not use up machine time at the expense of other more serious cases. In the writer's experience, certain police officers in Strathclyde will sometimes tape-record a witness in a major enquiry if they anticipate the possibility of the witness being reluctant at a later stage and this seems good practice.

Where tape recording is not practicable, for example because no tape recorder is available or there has been a mechanical failure, statements should be noted in note-books in the usual way, along with an explanation of the circumstances, since the officer may be required to justify in court his decision not to tape-record. If initially no recording can be made but one later becomes possible, there is no reason why comments or answers previously made cannot be put to the suspect on tape and the police are advised that such a practice might be "helpful and/or desireable."

Fears about tampering are overcome by the provision of sophisticated twin-deck cassette recorders with each of the two tapes carrying two tracks one of which records the interview and the other the time signal.

Tape-recording is to be done overtly. Before commencing the interview the seals on the tapes are to be broken in the presence of the suspect and one tape placed in each machine. Thereafter the interviewing officer is to state the time and date, identify himself (including rank and force), state the location where the interview is taking place and name any other persons in the room. The suspect will then be asked to identify himself and once he has done so he will be cautioned.

The suspect should be allowed to make as full a reply to the caution as he wishes. If he indicates that, rather than

answering questions, he wishes to give an account in his own words he should be allowed to do so.

If a suspect refuses to be recorded, the refusal should, if possible, be tape-recorded. If this is not possible, the police officers should note the refusal in their notebooks and the suspect should be invited to sign the notebooks to confirm his unwillingness to be tape-recorded. If the suspect indicates that he is willing to answer questions, but not while being recorded, the interviewing officer should point out to him that the recording is designed to protect the interests of the suspect and that any answers given remain subject to caution. However if the suspect persists in his refusal, the tape-recorded interview should be concluded.

Similarly, if a suspect in the course of an interview states that he is not prepared to continue answering questions on tape, the police should try to persuade him to allow the tape-recorder to remain switched on. He should be told that he will have an opportunity to give any information he wishes un-recorded after the tape has been switched off at the end of the interview. However if the suspect is adamant, the taped interview should be concluded immediately.

The caution and charge and any resulting reply should be tape-recorded and thereafter no further questions should be put to the suspect. If he wishes to make a voluntary statement, he should

be afforded the opportunity to do so on tape. If he prefers to write it out, the tape should be left running while he writes it, and thereafter he can either have it read over to him or read it out himself. The normal rules for the taking of a voluntary statement are to be followed even though the proceedings are being tape-recorded.

If it is decided to interrupt the interview, it should be concluded and the tape sealed, unless it is anticipated that the break will be short, for example a visit to the lavatory. In the latter case, the tape can be left running and an explanation given for the break in the interview. There is no equivalent of the English requirement for the tape to be removed from the machine if the suspect leaves the room.

Before the recorder is switched off, the interviewing officer should again state the time, day and date, details of those individuals present in the room and the location of the interview. Thereafter both tapes should be removed from the machine, placed in their cases. One of the tapes is to be sealed in the sight of the suspect, with a label signed by him and both the interviewing officers, and forwarded to the Procurator Fiscal as soon as possible. The other tape remains with the police. Only the Fiscal or a designated member of his staff is permitted to break the seal. If no report is made to the Fiscal, the sealed tape is to be kept by the police in a lockfast place separate from the police copy.

Where judicial examination is anticipated, the police should make a note of the relevant questions and answers, and this should accompany the report to the Procurator Fiscal. The suspect's answers must be reported verbatim although the questions may be paraphrased.

If the recording equipment malfunctions, the interviewing officer should try to record on tape the reasons why the interview is being terminated and bring it to an end, as nearly as possible in accordance with the normal practice. If another machine is available, the interview may resume using it with a new tape. Where there is no alternative, the officer may resume the interview off tape, but he should be prepared to justify his decision in court.

At the end of the interview the police should ensure that the police copy of the tape has voice recording, and if it is found to be blank, that should be reported to the Fiscal. The interviewing officers will then have to provide such account of the interview as they can from notes and memory.

Defence solicitors (and unrepresented accused persons) are only permitted to listen to the tape in the office of the Procurator Fiscal and they are not allowed to receive a copy of the tape either on loan or for retention and they are not allowed to make a copy.

Unlike the position in England, the police in Scotland have no responsibility for the transcription of interview tapes, which lies with the Procurator Fiscal. If the Fiscal decides to transcribe the tape and to use the transcript in evidence, a copy may be served on the accused not less than fourteen days before the trial and if the accused does not challenge its accuracy, it becomes admissible and sufficient evidence of the making of the transcript and its accuracy and does not require to be spoken to by witnesses. [3] If the accused does challenge the accuracy of the transcript, and the transcriber has to be called to give evidence, his (or more likely her) evidence is sufficient of the making of the transcript and its accuracy. [4]

There has only been one subsequent reported case in which tape recording has been an issue in its own right. This was the odd and rather worrying case of Tunnicliffe v H.M. Advocate 1991 SCCR 623. The circumstances were that Tunnicliffe had been apprehended in Colchester and interviewed on tape there. In addition to clear admissions of the crimes with which he was indicted, the taped interview contained references to crimes in England which were, of course, not before the Scottish jury.

The prosecution sought to make use of what would appear to have been an English transcript which had been edited so as to contain only references to the charges on the indictment. The defence apparently sought to allege that the entire Colchester interview had been unfair and as a preliminary to this objected

to the edited transcript, which objection the Sheriff upheld. Thereafter the Procurator Fiscal sought to play the whole of the tape and despite defence objections the Sheriff allowed this to be done leaving the question of prejudice to be dealt with in his charge to the jury. Having been convicted, the accused appealed.

At the appeal, the crown, in the person of the Lord Advocate, indicated that it was not proposing to support the conviction and the appeal was accordingly allowed. The fact that the interview had been conducted in England in accordance with English practice was clearly a major complication, and one of the main reasons for the Lord Advocate's position, but the High Court made certain further observations of more general application which are a great deal less than helpful. Although their Lordships accepted that "in principle there is nothing objectionable to editing a transcript if it is capable of being so edited," they went on to say:

> It is not impossible, we should have thought, for a tape to be edited in such a way that all those passages which could result in prejudice to the accused are excluded when the tape is played in precisely the same way as passages are excluded from the verbatim written record which is lodged as a production."

One cannot help but wonder if their Lordships thought through the possible implications of this statement or if they fully

appreciated the possible consequences. The whole purpose of tape recording is to provide an accurate and complete record of the interview and to suggest that the tape might be tampered with is to drive the proverbial coach and pair through one of the most important innovations in the protection of the accused. It is one thing to edit a transcript while preserving the tape intact but it is entirely another matter to suggest that (presumably) the prosecution should tamper with an important piece of evidence in order to anticipate a possible decision of the trial court. It may be that all that their Lordships were suggesting was that the tape should be played through before the trial on a machine with a counter and the appropriate numbers before and after the offending passage noted so that the tape could be played up to the appropriate point and then run past the inadmissible section, but if this was what they intended, why did they not simply say so?

It is to be hoped that Tunnicliffe is a decision on its own facts, and in particular on the English aspect, and does not set a precedent for the generality of Scottish tape recorded interviews.

Notes

1. This decription is based on the Memorandum of Guidance issued by the SHHD in April 1988
2. In Glasgow this also includes the Stipendiary Magistrate's Court
3. Criminal Justice (Scotland) Act 1987 Sections 60(1) and 60(2)
4. ibid Section 60(4)

(vi) Video Recording

Although tape-recording is undoubtedly a great step forwards in providing for an accurate record, it is sometimes suggested that video recording would be even better since it enables the demeanour of the suspect to be observed and it can assist even more than the tape in protecting the police from false allegations of violence or threats thereof.

Apart from video recordings made by the police themselves, video tapes from security cameras and the like are routinely played in British courts, the paucity of reported cases suggesting that few problems are encountered, and recordings made by television companies have been admitted in Scotland.

As a matter of technology there appears to be no reason why video recording of police interviews could not be introduced in Scotland tomorrow. The police (certainly in Strathclyde) already make use of video cameras for matters such as recording the locus of a crime. The Scottish courts have not so far pronounced on such practices, but in one English case the use of video recordings as an alternative to maps and sketches was approved although the judge commented that such recordings should be made as soon as possible after the event and every effort should be made to ensure that the recording accurately represented the scene as it was at the material time. [2] An increasing number of police traffic patrol cars are being fitted with video cameras

for the purpose of recording aberrant driving and the writer was recently shown a video of a vehicle pursuit on the Glasgow Inner Ring Road which depicted the incident far more graphically than any verbal description could ever have done.

A Canadian experiment into video recording in the police station with each officer being issued with his own tapes as a form of electronic notebook has yielded encouraging preliminary results and in particular has shown that, like tape-recording, video recording does not inhibit suspects from making confessions and admissions, and very few suspects decline to be inteviewed on tape. It also showed, if that were necessary, that there was no evidence that costly professional camera crews or other technical assistance was necessarly to produce a clear and reliable record of the interview. [3]

There is also an English experiment under way, perhaps ironically involving the scandal-hit West Midlands Police. [4]

In Hong Kong and certain other jurisdictions there is an established practice in grave crimes of video recording a confession in the form of a re-enactment of the crime. [5] In Li Shu-Ling v R. [1988] 3 WLR 671, the defendant had been convicted of murder. He had made a full confession to the police giving a great deal of circumstantial information and taking them to the place where he had disposed of property stolen from the victim. Two days later the police asked the accused if he would be willing to go

back to the scene and re-enact the way in which the killing had occurred with a policewoman playing the part of the victim. He was reminded that he was still under caution and that he did not need to comply with the request. He also agreed to the re-enactment being video recorded and in fact gave a running commentary on his own movements, translations of which were available for the non-Chinese speaking members of the jury. When the matter came before the Judicial Committee of the Privy Council, Lord Griffiths described the recording as "a visual confirmation of the earlier oral confession".

At the trial the only challenge to the admissibility of the video recording appears to have been an the basis of oppression by the police. The judge ruled in favour of admitting the evidence and when the accused later came to testify, he gave a very different version from what was shown in the video recording. He sought to explain the latter away by saying that he only did what the police had told him to. However there was nothing in the recording to suggest that the police were directing matters and his explanation was clearly disbelieved.

Before the Privy Council it was argued that such a reconstruction should, as a matter of principle, never be admitted although the defence had to concede that a video recording of the confession to the police would have been admissible and if in the course of a recorded confession the accused had been asked to demonstrate how he committed the crime using a dummy or possibly a police

officer that too would be admissible. The Privy Council cautiously approved the practice:

> "The truth is that if an accused has himself voluntarily agreed to demonstrate how he committed a crime it is very much more difficult for him to escape from the visual record of his confession than it is to challenge an oral confession with the familiar suggestions that he was misunderstood or misrecorded or had words put into his mouth. Provided an accused is given a proper warning that he need not take part in the video recording and agrees to do so voluntarily the video film is in principle admissible in evidence as a confession and will in some cases prove to be most valuable evidence of guilt.
>
> To meet the suggestion that lack of acting skill may result in serious distortion of a fair demonstration by the accused the video recording should be shown to the accused as soon as practicable after it has been completed and he should be given the opportunity to make and have recorded any comments he wishes about the film. If the accused says the film does not show what he meant to demonstrate there will then be a contemporary record of his criticism which the judge and jury can take into account when

assessing the value of the film as evidence of his confession."

This practice, interesting as it is, is unlikely to become part of Scottish procedure in view of the requirement to caution and charge as soon as possible and the inadmissibility of evidence obtained by questioning thereafter. However, it is suggested that the police could, with advantage, consider video recording the actions of an accused person who voluntarily takes them out of the police station for the purpose of showing them houses into which he has broken, where he has discarded a weapon, or the like. Such evidence is frequently attacked on the basis that the police knew all along the address of the premises or the place of concealment and the locus visit was merely a charade. A video recording would go a long way towards proving where the truth lies.

Returning to the police station, the main objection to the video taping of police interviews appears to be financial. As part of their research for the RCCP, Barnes and Webster carried out a small experiment which was techincally problem-free, but too limited to permit the drawing of conclusions as to practicability. They calculated that capital costs for video recording would be in the order of three times those for tape-recording, and annual costs approximately two and a half times as high. [45]

The RCCP accepted that video recording offered advantages over even taping, and commented that the advantages "may in due course be though great enough to warrant the use of video recordings here, and we would not want to discourage the police from using video when they felt the circumstances warrant it." [7] Although they did not recommend its introduction "at present" the RCCP considered that the possibility should be kept under review and subordinate legislation should be drafted in such a way as to leave the possibility open.

Interestingly, Lord Justice-Clerk Ross has recently called for the introduction of video recording and his call has also been endorsed by the Scottish Police Federation. [8]

Apropos the West Midlands experiment Professor John Baldwin has commented:

> "One does not need research to demonstrate the value of monitoring interviews conducted inside police stations with suspects. Yet the fact that police forces are prepared to open up to outsiders their internal methods and procedures represents in itself a significant advance, and it is hoped that, as a consequence of this, the research will shed light on the general question whether the interviewing procedures that are adopted are fair and produce an accurate record of interview of use to the courts." [9]

While the present writer would enthusiastically endorse a Scottish experiment along the lines of the West Midlands one, the advantages that the video recording of interviews in police stations would offer over tape-recording may turn out to be not so overwhelming or decisive as to justify its wholesale introduction at this stage. It may become otherwise in the future, particularly if there is ever a case where a tape is interfered with. Meantime as Mirfield puts it, "For the present, it seems clear that we should, in effect, not expect to run until we have learned to walk."

Notes

1. Macphail §§13,12. For the English law on such matters see Cross pp48-51
2. R v Thomas [1985] Crim LR 682.
3. A. Grant *Videotaping Police Questioning: A Canadian Experiment* [1987] Crim LR 375
4. J. Baldwin *Police Interviews on Tape* [1990] New JL 662
5. See S. Sharpe *Electronically Recorded Evidence* (London, 1989) pp4-5. The practice was first judicially approved in Hong Kong in 1976 - R v Tam Wing-kwai [1976] HKLR 401 and in Australia in 1972 - R v Lowery and King (No.1) [1972] VR 554.
6. Research Study No 8 Tables 3;6 and 3;7; see also RCCP Report para 4.31 and Mirfield pp40-41
7. Report para 4.31
8. Glasgow Herald 10 October 1991
9. op cit note 4 supra

8.4 Interrogation Before Magistrates

From time to time the idea has been advanced that the police should interrogate suspects before a magistrate or other suitably qualified independent referee. Such a system has operated in India for many years whereby the police have wide ranging powers to question suspects but the answers given are inadmissible in evidence, a ban which also applies to confessions unless made before a magistrate in the absence of the police. [1]

The first suggestion that such a scheme should be considered in England appears to have arisen in 1928 as the result of the Lees-Smith report regarding the interrogation by the Metropolitan Police of Miss Irene Savidge. [2] Miss Savidge, who was a potential witness to a charge of perjury against two police officers, was taken from work to Scotland Yard and there questioned alone and at length by a male chief inspector in the presence of a male sergeant. She alleged that in the course of the questioning indecent and offensive comments had been made to her, she had been terrorised and her statement had been distorted. Mr Lees-Smith, concluded *inter alia* that she "was asked a number of questions that ought not to have been asked, and that certain of her replies were forced into a form that misrepresented what she wanted to say." He went on later to add "What happened to Miss Savidge can easily happen to any man or woman in her position. Great perils to private citizens and to civil liberty have been revealed by her experience." [3]

As the result of the evidence which had been heard by his inquiry, Mr Lees-Smith suggested a total of fifteen questions as to the system followed at Scotland Yard. The first two were:

> 1. Are the police the proper authorities to take statements in the case of persons who are suspected or in custody and of witnesses whose personal character or interests are involved?
> 2. Statements taken at Scotland Yard or at police stations, whether of persons who are suspected or in custody or of witnesses, are almost always taken privately with no one else present except the police and the person making the statement. Is there sufficient security that the person making the statement is guarded from all improper pressure?" [4]

Around this time the Royal Commission on the Police [5] was also asking its witnesses whether they could suggest any authority, other than the police, to whom the taking of statements from persons who are suspected or in custody could properly or more advantageously be entrusted. The majority of the witnesses favoured the status quo although there was support for the idea that in unusual cases, such as a charge against the police, or if the victim of the offence was a policeman, it was a better alternative that statements should be taken by a magistrate.

In more recent years one notable proponent of such a scheme has been the organisation Justice. [6] They have advocated that the police should be empowered to bring a suspect before a magistrate and there conduct a full and searching interrogation, which would be recorded on tape and the result of which would be admissible in evidence. No other written or oral statement would be admitted with the exception of tape-recorded statements made on arrest or before arrival at the police station. In the scheme as conceived by Justice the suspect would be informed of a duty to answer questions and that adverse inferences might be drawn from his silence and he would have the right to legal representation. The suspect would also have a right at his own request to be taken before a magistrate to volunteer an explanation.

Such a scheme is immediately open to the objection that it infringes the right to silence but as Mirfield has pointed out, to introduce such a scheme without attenuation of the right to silence would probably be thought unacceptable as failing to achieve a proper balance between the need to protect the suspect and the need to allow the police to question suspects effectively.

In England neither the CLRC nor the RCCP favoured such a scheme. The CLRC considered [7] that such a procedure would be no more likely than the existing one to ensure that the person interrogated would tell the truth and they also considered that

there would be practical problems in arranging immediate availability of magistrates.

The RCCP also considered the practical difficulties of a scheme for interrogation before magistrates and on a practical basis alone considered that this approach should not be further pursued. [8] Practicalities apart, the RCCP (who, as has already been shown, took a very different view of the right to silence from the CLRC) considered that the idea was objectionable on grounds of principle as well. In their view, to require a suspect to speak, even with legal advice and under the protection of the court, was inconsistent with the very nature of the accusatorial system. They were clear in their opinion that "the burden of proof should not and cannot be altered in this way without turning pre-trial and trial procedures into inquisitorial procedures." [9] In addition they identified the important point that such a procedure could jeopardise the independence of the magistracy, who should "be seen to be independent of the police."

The RCCP also considered the possibility of using solicitors as independent monitors of interviews and rejected the idea on resource grounds and the possible conflict of roles for the solicitor. [10] Likewise the idea of using some sort of specially created service to provide the function was rejected on various grounds including the difficulty of finding people to do "a tedious job to be done in very uncongenial surroundings" and

doubts as to how long the public perception of independence would last. ''

Scots law with its historic procedure of judicial examination, greater restrictions on questioning, shorter times in police custody and independent prosecution system, has not had the same need for the introduction of an independent element into police questioning. The Thomson Committee only considered the matter in relation to formal post-charge statements, and then only briefly:

> "There is much to be said for requiring such statements to be made before the Sheriff both on grounds of history and of reliability, and some of us were at one time inclined to support such a requirement. However, taking account of the practical difficulties involved we recommend that such statements made to police officers should continue to be admissible in evidence ... ." [12]

It seems highly unlikely that any steps will be taken towards the introduction of independent third parties either north or south of the Border. Tape-recording is clearly here to stay and video recording a possible future development. Provided the police do not find ways of circumventing the safeguards there is simply not the same need for the introduction of an independent element when the recording of the interrogation is available for playing at the trial. An accurate record of the interrogation is now

available for a small fraction of the cost of independent monitoring by a human being.

Notes

1. See generally R.N. Gooderson *The Interrogation of Suspects* [1970] 48 Can Bar Rev 270 at 304
2. Cmd 3147
3. Report p33
4. ibid p30
5. Cmd 3297 (HMSO, 1929)
6. Gooderson op cit note 1 supra at pp304-305; also Mirfield p13
7. Eleventh Report para 47
8. Report paras 4.60-4.62
9. Report para 4.59
10. Report para 4.99
11. Report para 4.100
12. Report para 7.19

Chapter 9 Northern Ireland - The Response To An Exceptional Situation

9.1 Introduction

This chapter examines in general outline how the law relating to confessions and the right to silence in Northern Ireland has been affected by the response of the British government to the problem of terrorism in the Province.

> "Terrorism is the scourge of our time. The terrorist uses, or abuses, the privileges of a democratic society in order to undermine and destroy that society. What does a civilised man do when faced with an uncivilised man? The dilemma or paradox for democracy arises when the security of the realm is threatened, the life and safety and integrity of innocent people are threatened, and it becomes reluctantly necessary to suspend or reduce civil liberties by special legislation. The rule of law is always a balance between competing intersts. But without law and order, freedoms and civil liberties become meaningless; they cannot even exist." [1]

A detailed consideration of the historical and political background to the current, apparently insoluble, problems of Northern Ireland is thankfully outwith the scope of this work.

Suffice it to say that since the late 1960s, and in particular since 1969, Northern Ireland has suffered from terrorist violence far worse than anything seen anywhere else in Europe. The "Ulster Problem" is nothing new, being in effect the latest version of the "Irish Question" which has dogged British politics for three centuries, but the level of violence and the sophistication of the paramilitary forces, particularly the Provisional Irish Republican Army, were well beyond previous experience even though Ireland, both north and south of the border, has a long history of emergency legislation and special powers going back as far as 1775.

The root cause of the situation is an unresolved dispute over the legitimacy of the government of Northern Ireland leading to "military" activity by the I.R.A. who seek to expel the British from the six counties which comprise Ulster and create a united Ireland, a prospect which is utterly rejected by the majority Protestant population of the Province. The writer accepts that this is a gross over-simplification of the position and disregards several important factors such as the oppression of the Roman Catholic minority in Ulster and the denial of their civil rights, but in mitigation he pleads that the purpose of the present discussion is to look at the way in which the response to terrorism has resulted in a legal situation substantially different in principle and effect from the rest of the United Kingdom. For this purpose the existence of terrorism is accepted as a fact and the writer is content to leave the historical and

political aspects to those more qualified than he to expound them. [2]

Notes

1. A. Samuels *The Legal Response to Terrorism* [1984] Public Law 365
2. There is a useful, if somewhat partisan, summary of the troubles in K. Boyle et al *Law and State* (London, 1975) especially chapter 2, 3 and 9. Also A. Jennings (ed) *Justice Under Fire* (London, 1988) especially chapter 1.

9.2 Legal Background Prior to 1973

Successive British governments have consistently refused, at least overtly, to treat terrorists as anything other than common criminals and in particular they have attempted to deal with terrorism, whether Irish or otherwise, by the ordinary laws of the land supplemented where necessary by special powers. [1] Prior to 1973 these powers were contained in the Civil Authorities (Special Powers) Act (Northern Ireland) 1922-33, commonly known as tne "Special Powers Act", and various regulations made under it. The Act and its associated regulations conferred wide powers of arrest, questioning, search, detention and internment on the police and army and gave the (Northern Irish) Minister of Home Affairs almost unrestricted powers to make regulations with the force of law.

Of most interest in the present context is Regulation 10 which provided:

> "Any officer of the Royal Ulster Constabulary, for the preservation of peace and maintainance of order, may authorise the arrest without warrant and detention for a period of not more than 48 hours of any person for the purpose of interrogation."

Apart from the Special Powers Act, criminal law and procedure in Northern Ireland was broadly similar to the English model, with

few significant differences, although an accused in Northern Ireland did not obtain the right to give evidence in his own defence until 1930. A system of public prosecution had existed since 1801 and little use was made of lay Justices of the Peace who had no jurisdiction to try cases. A system of professional stipendiary magistrates, generally known as "Resident Magistrates" has existed since the early nineteenth century. [2]

While the above-quoted regulation provided a specific power of detention for questioning, the Special Powers Act had no effect on the admissibility of confessions. The Northern Irish courts generally continued to follow the English common law which had been the law in Ireland before partition. [3] As far as confessions were concerned the courts applied the exclusionary rule based on the test of voluntariness and the absence of "fear of prejudice or hope of advantage exercised or held out by a person in authority" as set out in Ibrahim v R [4]. It is noteworthy that any commentary on the Northern Irish law of admissiblity up to the late 1960s will consist almost exclusively of English authority with very little native gloss. [5]

As far as discretionary exclusion was concerned, the Northern Irish courts clearly regarded themselves as having a discretion to exclude confessions, [6] although the 1912/18 Judges Rules had a somewhat odd status, being acted upon without apparently being formally adopted [7] and when the 1964 Rules were promulgated the Northern Irish judges took the view "that it would be a mistake

to adopt the Judges Rules or an amended version of them without the fullest consideration and ... suggested that the introduction of new Rules should not be a hurried procedure." [8] Their Lordships certainly could not be accused of being in a hurry since it was to be 1976 before the 1964 Rules were adopted! In one case in 1973 [9] this led to the slightly weird situation of the judge considering the English 1964 Rules, which specifically permitted questioning of a person in custody, in order to decide whether the 1912/18 Rules, which were ambiguous on this point, had been infringed. The eventual common sense conclusion was that it would be difficult "to hold that something which was not considered prejudicial or unjust in England was so in this jurisdiction."

In the late 1960s and early 1970s the Northern Irish courts continued to pursue a stringent approach to the admissiblity of confession evidence and they refused to make any concession to the security situation. This issue, the divergence between the courts' rigid adherence to the common law and the perceived realities of the security situation, really began to come to a head following the establishment by the security forces of specialised interrogation centres, notably Castlereagh and Holywood.

The clearest statement of judicial attitudes to the general admissiblity of confessions in a non-terrorist context was R v Corr [1968] NI 193, a domestic murder. In the course of police inquiries, the appellant was asked to visit the police station

where he was interviewed over a period of about six hours at the end of which period he was cautioned and made a formal statement. (At the trial no challenge was raised to this statement). Corr was released at that stage but was asked to visit a different police station the following day where he was again interviewed, this time over a period of some twelve hours. At the end of this second period he made a further statement which was tantamount to a confession. At the trial objection was taken to the second statement on the basis that it was not voluntary although there was no suggestion that the police had made threats or promises or engaged in searching interrogation or oppressive cross examination.

The objection, and ultimately the one of the grounds of appeal, was that the police had asked certain questions and made certain comments to an accused person who was in custody requiring answers "so that he was deprived of the free and voluntary agency" of refusing to answer them. As a result, it was argued, the statement should either have been held to have been involuntary and hence inadmissible or should have been rejected by the trial judge in exercise of his discretion since there had been a breach of Rule 3 of the (1912/18) Judges Rules which was generally regarded as forbidding the questioning of a person in custody.[10]

In the event the court held that the statement was correctly admitted, but Lord MacDermott L.C.J. was prepared to advance the

grounds of exclusion beyond the old "threat or promise by a person in authority" rule:

> "The rule of law described by Lord Sumner cannot have been intended to apply to all statements which are alleged not to be voluntary, for it relates solely to the conduct of persons in authority; and it is plain also ... that he did not intend his words to apply necessarily to the questioning by a person in authority of a suspect in custody. ... As Lord Sumner indicated, the rule he stated is one of policy rather than logic, being directed to the control of those, such as the police, who are in a position of power and authority. But ... it would be verging on the irrational to limit it also to instances of threats or inducements inspiring fear or hope so as to exclude other forms of conduct by the same class which might be no less capable of eroding the will of the suspect concerned. The effect of a vigorous cross-examination ... on one who is not free to get away from his questioner may, in certain circumstances, be to arouse hope of release or fear of further detention or other prejudicial result in the mind of the suspect, according to whether or not he makes answers or keeps silent. But it may also act more direclty by subjecting the person questioned to a degree of

pressure which saps his will and makes him talk. We think such pressure may well lie within the principle of the rule enunciated by Lord Sumner, although not within its express terms, and may thus suffice to make statements obtained by it inadmissible in point of law."

Lord MacDermott repeated and somewhat amplified his comments in an address to the Bentham Club in 1968 [11] but it was to be 1972 before the question of the admissiblity of a statement obtained from a terrorist suspect in an interrogation centre arose. The case concerned was R v Gargan, unreported, Belfast City Commission May 10 1972. [12] In this case McGonigal J. had to determine the admissiblity of a statement made by the accused while in custody in Holywood detention centre. His Lordship rejected an allegation of physical ill-treatment but then proceeded to exclude the statement on the ground of oppression, apparently the first time a statement had been so excluded in either England or Northern Ireland.

The accused had been detained in Holywood for about 28 hours where he was interrogated for four separate periods ranging from 25 to 100 minutes. When not being questioned he was made to sit in a cubicle, facing a wall, on a chair which was itself placed facing the wall. It was this factor which the judge found "oppressive" rather than the length of the interrogation. In particular the accused was on one occasion left sitting in the

chair from mid-afternoon until shortly after midnight when he was questioned for an hour before being returned to the cubicle for a further nine hours ("with what sleep and food I know not" as his Lordship put it) before being questioned yet again.

McGonigal J. specifically discounted any question of the courts creating special rules of admissiblity for terrorist cases:

> "I am not concerned in this case with the rights or wrongs of interrogation of subversive agents or the battle against subversive activities. I am concerned with the admissibility of this statement and the application of the legal principles concerned in a criminal case; even if one which has a subversive flavour. What may be permissible and necessary for the protection of the public in a fight against subversion - and I pass no judgment one way or the other on that ... may be oppressive within the principles covering the admissibility of statements in the criminal courts and it is that test which has to be applied here. It may seem that there is a conflict between public interests but if so it is not for me to resolve. I can only apply the law as it is laid down."

Shortly after Gargan another case arising from Holywood detention centre came before Lord Lowry L.C.J. in R. v Flynn and Leonard unreported, Belfast City Commission 24 May 1972. [13] In this case

two sets of statements had been made, the first immediately after interrogation at the centre and the second at a later time.

His Lordship took the view that

> "The detention centre has been set up, as it seems, for the special purpose of gathering intelligence about subversive and terrorist activities, and the object of those conducting it it to extract information from the persons who are brought there for the purpose of being interrogated. Cautions are not issued. Several interrogations may take place and they may take place in the course of one day ... the interrogation set up was officially organised and operated in order to obtain information and in the case of these two [defendants] effectively did conduce towards the obtaining of information from persons who would otherwise have been less willing to give it."

The first sets of statements were accordingly involuntary and inadmissible and in reaching this conclusion his Lordship also drew an interesting distinction between "oppressive conduct" and "oppressive circumstances", the former involving "something wrong on the part of those in authority" (as in Gargan) and the latter, as in the present case implying "the creation of a set-up which

makes it more likely that those who did not wish to speak will eventually do so."

The second set of statements were also ruled inadmissible because the Crown had faied to prove beyond reasonable doubt that the influence of the earlier circumstances had been dissipated before they were made.

Like McGonigal J., Lord Lowry made it clear that the courts were not prepared to make any concession to the emergency situation:

> "Whatever the history of the test [of admissibility] ... may be ... it is not open to the court to substitute a different test based on some alternative conception of fairness or on the probability or, it may be in some cases, the near certainty, that the admissions are true. To do that would be to abandon the rule of law and to mould the pattern of criminal justice to suit individual circumstances." [14]

As the result of these and other decisions 55 other cases were abandoned by the Director of Public Prosecutions between January 1972 and April 1973 on the ground that confessions obtained in such circumstances were unlikely to be held admissible. [15]

Notes

1. Review of the Operation of the Northern Ireland (Emergency Provisions) Act 1979 Cmnd 9222 (1984) para 33. Hereinafter "Baker Report"
2. K Boyle et al *Law and State* (London, 1975) p168

3. R v Mary Johnston (1864) 15 Ir CLR 60
4. [1914] AC 599 discussed supra p
5. eg A.E. Comerton *Confessions in the Criminal Law* (1964) 15 NILQ 166; Lord MacDermott *The Interrogation of Suspects in Custody* (1968) 21 Current Legal Problems 1 at 14;
6. R v Murphy [1965] NI 138
7. Lord MacDermott op cit note 5 supra at p14; D.S. Greer *Admissibility of Confessions and the Common Law in Times of Emergency* [1973] NILQ 199 at 209 n64
8. D.S. Greer op cit note 7 supra
9. R v Clarke [1973] NI 45
10. supra
11. Lord MacDermott op cit note 5 supra
12. The references to and quotations from this case come from D.S. Greer op cit note 7 supra
13. This case is apparently reported in the Northern Ireland Judicial Bulletin to which the writer has no access. The references and quotations are once again taken from D.S. Greer op cit note 7 supra
14. In commenting on this case, D.S. Greer makes the pertinent point that the leading English case on illegally-obtained evidence, Kuruma v R [1955] AC 197, arose from the emergency in Kenya and there was nothing in the advice of the Privy Council to suggest that there should be "special" rules for "special" circumstances.
15. H.C. Deb. Vol 855 col 388 (17 April 1973)

9.3 Detention, Internment and Associated Abuses

(1) The Legal Basis for Detention and Internment

Reference has previously been made to the power available to the police and army under the Special Powers Act to arrest and detain virtually anybody for up to 48 hours for the purpose of interrogation. '

In addition to this power, the Northern Ireland government had draconian powers under the Special Powers Act to arrest and detain without trial (i.e. intern) any person who was suspected of acting, having acted or being about to act "in a manner prejudicial to the preservation of the peace or maintainance of order." The final responsibility for making an internment order lay with the Minister of Home Affairs who was entitled to order the continued detention of any person so suspected where it appeared to him to be expedient for securing the preservation of peace and the maintainance of order. [2]

This power was used from time to time but before the outbreak of the troubles in 1969 it had not been used on any appreciable scale since 1962. However following the outbreak of serious large scale violence there was considerable pressure on the Stormont government to use internment and it was brought in, apparently against the wishes of the army, in August 1971. There was a large-scale round-up of persons who were suspected (sometimes on rather dubious intelligence) of subversive

activities. The political and military effects seem to have been largely counter-productive, althought these issues are outwith the scope of this work, but the most important point is that the operations of the security forces, particularly that on 9th August 1971, threw into graphic relief exactly what could happen when normal legal controls on arrest, search and interrogation were removed. These issues are discussed further below.

When direct rule was introduced in March 1972, the Westminster government initially hoped to phase out internment while seeking a political solution, but once the truce with the I.R.A. collapsed it became apparent that this objective was impractical in the short term. Although a substantial number of existing detainees were released, it was decided to introduce a new system of detention without trial and in particular to replace the executive power of the (now abolished) Minister of Home Affairs under the Special Powers Act with a system of judicial determination. Under the new regime, detention without trial was portrayed not as a weapon of government against readily identifiable enemies of the state (as it had been by the Unionists), but rather as a means of dealing with suspected terrorists who could not adequately be dealt with in the ordinary courts whether by reason of the intimidation of witnesses or the inadmissiblity of evidence.*

This new approach led to the passing of the Detention of Terrorists Order 1972, shortly to be incorporated into the

Northern Ireland (Emergency Provisions) Act 1973. The details of the system introduced by the 1972 Order are not directly relevant to this work, and in any event internment ended in 1975, but broadly stated the Secretary of State for Northern Ireland or one of his ministerial deputies had to make an "interim custody order" which authorised the detention for a period of twenty eight days of a person "suspected of having been concerned in the commission or attempted commission of any act of terrorism or in the direction, organisation or training of persons for the purpose of terrorism."

Thereafter the case was heard by a judicially qualified Commissioner who had to hold a formal hearing and had to be satisfied not only that the suspect had been "concerned in the commission or attempted commission of any act of terrorism or in the direction, organisation or training of persons for the purpose of terrorism" but also that his detention "was necessary for the protection of the public". If he was so satisfied, the Commissioner would make a detention order. There were provisions for appeal and review of such orders and the Secretary of State could order the release at any time of a person subject to either an interim custody order or a detention order.

The procedure introduced by the 1972 Order was much less open to criticism than the powers of simple executive action available under the Special Powers Act. In effect in each case a charge of what amounted to criminal conduct had to be established to the

satisfaction of a judicial Commissioner at a formal hearing though without any restriction on the admissibility of evidence. It has been stated [4] that the way in which the 1972 system operated in practice emphasised the "military security" nature of the detention process in contrast to the normal procedures for judicial prosecution.

Notes
1, supra
2, K, Boyle et al *Law and State* pp55-58
3, Boyle op cit note 2 supra p58 et seq
4, Boyle op cit note 2 supra p61

(ii) <u>"Interrogation in Depth" - The Compton and Parker Reports</u>

The removal of the normal legal controls on the exercise of powers of arrest, search and interrogation inherent in the process of internment meant that the Army and the police were free to organise their security operations virtually as they pleased. As Boyle *et al* put it "the policies and practice of the various branches of the police and army were accordingly guided and controlled more by their own internal constraints and values than by the provisions of the law." [1]

The dangers of this situation became terribly apparent following the large-scale swoop on suspected terrorists on 9th August 1971. Boyle *et al* comment that prior to the introduction of internment there had been "no more than the occasional allegation of improper conduct" made against the R.U.C., but following this operation "there was a flood of complaints against the security

forces of torture and brutality in the treatment of many of those arrested and in particular those taken to a special interrogation centre established at Holywood Barracks in Belfast." [2] The complaints reached the stage where the British government appointed a Committee of Inquiry headed by Sir Edmund Compton to investigate them. [3]

Compton's inquiries established that the initial arrests had been made by parties of soldiers early in the morning of 9th August. The persons arrested were taken to one of three regional holding centres where their identities were confirmed and they were interviewed by officers of the R.U.C. special branch after which it was decided whether they should be released or further detained. A limited number of those selected for detention were subjected to "interrogation in depth" and this was where most of the complaints arose. The complaints related to ancillary matters rather than the actual interrogation itself, and in particular to what became known as the "five techniques" i.e. wall-standing, hooding, noise, bread and water diet and sleep deprivation.

Although it never became clear who organised and directed the system of interrogation in depth, it was apparent that both the army and the R.U.C. were involved. The Parker Committee, who, as will be discussed later, also investigated interrogation procedures noted:

"One of the unsatisfactory features ... has been

the fact that no rules or guidelines have been laid down to restrict the degree to which these techniques can properly be applied. Indeed it cannot be assumed that any U.K. minister has ever had the full nature of these particular techniques brought to his attention, and, consequently, that he has ever specifically authorised their use."[4]

The government provided Compton with a note of policy in relation to interrogation methods [5] which explained that the techniques then in use had been employed in many previous internal security operations since the end of the Second World War and had most recently been revised following a report on the Aden situation. The rules stated that "Subjects are to be treated humanely but with strict discipline" and they expressly forbade "violence to life and person, in particular mutilation, cruel treatment and torture." Also forbidden were "outrages upon personal dignity, in particular humiliating and degrading treatment." However the note also contained the government's view that:

"The precise application of these general rules in particular circumstances is inevitably to some extent a matter of judgment on the part of those immediately responsible for the operations in question. Intelligence is the key to successful operations against terrorists; and the key to intelligence is information regarding their operations their dispositions and their plans.

When combatting a terrorist campaign time is of the essence; information must be sought while it is still fresh so that it may be used as quickly as possible to effect the capture of persons, arms and explosives and thereby save the lives of members of the security forces and of the civil population.

Information can be obtained more rapidly if the person being interrogated is subjected to strict discipline and isolation, with a restricted diet; but violence or humiliating treatment ... are forbidden. ... "

Compton established that the security forces had used the "five techniques" to disorientate those being questioned and so to break down their resistance. Detainees were indeed required on occasions to wear black hoods, were exposed to continuous, monotonous noise, were deprived of food and sleep and were required to stand against a wall with their hands raised against it sometimes for lengthy periods.

Compton drew a somewhat arcane distinction between on the one hand "brutality", which is described as "an inhuman or savage form of cruelty, and that cruelty implies a disposition to inflict suffering, coupled with indifference to, or pleasure in, the victim's pain", and on the other hand "physical ill-

treatment". [6] The conclusion was that the detainees had been subject to "physical ill-treatment" (but not to "brutality"), although in the case of "wall standing" the ill-treatment lay in the action taken to enforce the posture rather than the posture itself. [7]

Compton's remit was purely factual and his Committee was not called on to consider the legality of the techniques and following their report a further committee, this time of Privy Counsellors, was appointed under Lord Parker to consider whether interrogation in depth should be allowed to continue. [8]

The Parker Report is a fascinating document principally because of the powerful dissenting minority report by Lord Gardiner. The Committee was unable to reach agreement on the main issue of policy before it. It was generally agreed that some of the practices described by Compton might well be unlawful, but the majority view of the Committee was that the security situation demanded tough interrogation techniques and subject to proper safeguards for those being interrogated

> "There is no reason to rule out these techniques on moral grounds and ... it is possible to operate them in a manner consistent with the highest standards of out society." [9]

Perhaps surprisingly, and certainly to the credit of the Westminster government, it was Lord Gardiner's powerful

dissenting view which was to prevail. His Lordship argued that the use of hooding, wall-standing, deprivation of diet and deprivation of sleep were civilly and criminally illegal under domestic law and nothing in any existing law (including the regulations under the Special Powers Act) extended ordinary police powers of interrogation or did anything to validate the procedures. "That being so," concluded his Lordship unequivocally, "No Army Directive and no Minister could lawfully or validly have authorised the use of the procedures. Only Parliament can alter the law. The procedures were and are illegal." [10]

Lord Gardiner was also extremely sceptical of the claim that the use of the techniques had led to the obtaining of intelligence information which would not have been obtained, or not obtained so quickly, by other means. He pointed to experience during the Second World War when prisoners were treated with kindness and courtesy but nevertheless much intelligence information was gathered, often very quickly, by interrogation, the cross-referencing of information and the use of microphones and "stool pigeons." [11]

In Lord Gardiner's opinion, the real question for the Parker Committee was whether they should recommend that Parliament

> "Should enact legislation making lawful in emergency conditions the ill-treatment by the police, for the purpose of obtaining information,

of suspects who are believed to have such information and, if so, providing for what degree of ill-treatment and subject to what limitations and safeguards." [12]

Not surprisingly, his Lordship was not in favour of such a recommendation and he put forward several reasons against it including lack of moral justification, difficulties in setting fixed limits on the amount of noise, wall-standing or whatever and the effect on the reputation of Great Britain in the international community. Two of his Lordship's reasons deserve to be set out in full:

> "(2) If it is to be made legal to employ methods not now legal against a man whom the police believe to have, but who may not have, information which the police desire to obtain, I, like many of our witnesses, have searched for, but been unable to find, either in logic or in morals, any limit to the degree of ill-treatment to be legalised. The only logical limit ... would appear to be whatever degree of ill-treatment proves to be necessary to get the information out of him, which would include, if necessary, extreme torture. ...
>
> (4) It appears to me that the recommendations ... [of the majority] ... necessarily envisage one of two courses.

> One is that parliament should enact legislation enabling a minister in a time of civil emergency ... to fix the limits of permissible degrees of ill-treatment to be employed when interrogating suspects and that such limits should then be kept secret.
>
> I should respectfully object to this, first because the Minister would have just as much difficulty as Parliament would have in fixing the limits of ill-treatment and, secondly, because I view with abhorrence any proposal that a Minister should in effect be empowered to make secret laws; it would mean that United Kingdom citizens would have no right to know what the law was about police powers of interrogation.
>
> The other course is that a Minister should fix such secret limits without the authority of Parliament, that is to say illegally, and then, if found out, ask Parliament for an Act of Indemnity. I should respectfully object even more to this because it would in my view be a flagrant breach of the whole basis of the Rule of Law and of the principles of democratic government." [13]

As already stated, the government eventually adopted Lord Gardiner's view rather than that of the majority and in 1972 it was announced that no further use of the "five techniques" would be permitted. [14] This, coupled with new procedures for frequent medical examinations of those under interrogation, had the effect of bringing about a marked reduction in the direct physical ill-treatment of suspects which had undoubtedly occurred in 1971 and 1972.

Some three years later Lord Gardiner himself chaired a committee which reviewed the working of the Northern Ireland (Emergency Provisions) Act 1973 in the context of civil liberties. [15] That Committee noted:

> "[B]ut violence has in the past provoked a violent response. The adoption of methods of interrogation "in depth" which involved forms of ill-treatment that are described in the Compton Report did not last for long. Following the report of the Parker Committee in 1972 these methods were declared unlawful and were stopped by the British Government; but the resentment caused was intense, widespread and persistent." [16]

Notes

1. *Law and State* p41
2. op cit note 1 supra p49
3. *Report of the Enquiry into Allegations Against the Security Forces of Physical Brutality in Northern Ireland Arising out of Events on the 9th August 1971* Cmnd 4823 (HMSO 1971) Hereinafter "Compton Report"
4. *Report of the Committee of Privy Counsellors Appointed to Consider Authoried Procedures for the Interrogation of Persons Suspected of Terrorism* Cmnd 4901

(HMSO 1972) Hereinafter "Parker Report". Majority report para 12

5. Compton Report para 46
6. Compton Report para 105. The definition of "brutality" was scathingly attacked by Lord Gardiner in the Parker Report (Minority Report) para 8
7. Compton Report paras 91-96
8. op cit note 4 supra
9. Parker Report (Majority Report) para 34
10. Parker Report (Minority Report) para 10
11. Parker Report (Minority Report) para 14
12. Parker Report (Minority Report) para 19
13. Parker report (Minority Report) para 20
14. HC Deb Vol 832 cols 743-744 (2 March 1972)
15. *Report of a Committee to consider, in the context of civil liberties and human rights, measures to deal with terrorism in Northern Ireland*, Cmnd 5847 (HMSO 1975) Hereinafter "Gardiner Report"
16. Gardiner Report para 20

(iii) The European Dimension - Ireland v The United Kingdom

The United Kingdom was one of the original signatories to the European Convention on Human Rights which was promulgated in 1950 with a view to protecting the human rights and fundamental freedoms of everyone within the jurisdiction of any of the signatory states. Two organs are provided to enforce the convention, the European Commission on Human Rights and the European Court of Human Rights which for the remainder of this section will be referred to as the "Commission" and the "Court" respectively.

For the purpose of the present discussion, the most important Article of the Convention is Article 3 which provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Article 15 of the Convention permits member states to derogate from certain of the rights and freedoms which it provides if there is a public emergency which threatens the life of the nation. Among the first derogations from the Conventions was a notice from the United Kingdom in respect of Northern Ireland on 27 June 1957 which was to remain in force until withdrawn in 1984. [1]

The right of derogation is not absolute. Even where notice of derogation is given, it is clear that the Commission and the

Court consider themselves entitled and empowered to review the right of the state to derogate from protected rights in the first place and to determine, given that derogation is held to have been permissible, whether the state has taken such measures only to the extent strictly required by the exigencies of the situation. In addition, Article 15 prohibits derogation from certain Articles, including Article 3, under any circumstances.

The procedure for enforcing the Convention is fairly straightforward. Under Article 24 one state may refer to the Commission any alleged breach of the Convention by another state. [a] There are formidable procedural hurdles to be overcome, including the need to ensure that all domestic remedies have been exhausted, but if it overcomes these hurdles, the referral will be considered and investigated by the Commission with a view to effecting a friendly settlement. If an amicable solution cannot be reached, the Commission will prepare a report in which it will establish the facts and express its views whether the facts found disclose a breach of the Convention. The report will be sent to the Committee of Ministers of the Council of Europe and to the states concerned. Within three months of the Commission adopting its report, the Commission itself or either of the states concerned may refer the matter to the Court for judgment which is final and binding. [a] If there is no referral to the Court, the Committee of Ministers may decide, by a two-thirds majority, whether there has been a violation of the Convention and what

steps the state concerned must take. This decision is also binding.

While these procedures are legally straightforward, and generally effective in enforcing the Convention, they are extremely time consuming. The litigation with which this section is concerned, Ireland v The United Kingdom, began with the filing of charges in December 1971, the Commission adopted its report in January 1976, the case was referred to the Court by the Irish government in March 1976 and the Court delivered its judgment in January 1978, the process thus having taken six years and one month. [4]

The Irish application related to a number of matters, but the issue of concern to the present discussion is the allegation that detainees in Northern Ireland were subject to torture or inhuman or degrading treatment contrary to Article 3. The Commission's report is vast, even the summarised version running to over 200 pages of English text, more than half of which concern this allegation. [5]

The Irish allegation related not only to the use of the "five techniques" but also to other forms of ill-treatment at various army and police centres, principally physical violence, special exercises and other forms of distressing treatment. The British government admitted the use of the "five techniques" but the other forms of ill-treatment were the subject of factual dispute. One issue which loomed large in the Commission's report, although

it is peripheral to the present discussion, was the question of whether there was an "administative practice" of inhuman treatment by the British government. Since the use of the "five techniques" was admitted, there was clearly such a practice in respect of them, but in relation to the other forms of ill-treatment it was necessary for the Commission to decide whether such a practice existed. This obviously caused some difficulty but the eventual conclusion was that such a practice did exist in respect of the other forms of ill-treatment. [6]

The Irish government submitted written evidence of 228 cases of alleged ill-treatment, 16 of which were ultimately examined in detail by the Commission as "illustrative" cases and specific findings were reached only in respect of these cases. The Commission heard 119 witnesses, of whom no fewer than 100 related to the Article 3 issue. In general it upheld the major allegations made by the Irish government and it concluded, *inter alia*, that:

> (a) the combined use in 1971 of the "five techniques" as an aid to the interrogation of fourteen persons amounted to a practice of inhuman treatment and torture in breach of Article 3;
>
> (b) ten other persons had suffered inhuman treatment contrary to Article 3 and there had been in 1971 at Palace Barracks, Holywood, near Belfast a practice in connection with the interrogation of

prisoners which was inhuman treatment in breach of Article 3.

The Commission started from a notion of "inhuman treatment" which included "at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation is unjustifiable." Torture was defined as "inhuman treatment which has a purpose such as the obtaining of information or confessions or the infliction of punishment" while degrading treatment was treatment which was "grossly humiliating or drives an individual to act against his will or conscience." Non-physical torture was "the infliction of mental suffering by creating a state of anguish and stress by means other than bodily assault."

The Commission expressly rejected the view of the majority of the Parker Committee that there might be circumstances which would justify conduct which violated Article 3. [7] The Commission stated *ex officio* that it

> "finds it necessary to state clearly that it did not have in mind the possibility that there could be a justification for any treatment in breach of Article 3 ... The prohibition under Article 3 of the Convention is an absolute one and ... there can never be under the Convention or under international law, a justification for acts in breach of that provision." [8]

The case eventually reached the Court in 1976 but judgment was not issued until 18 January 1978. [9] Before the Court, the British government did not contest the Commission's opinion on the two finding in relation to Article 3 and also gave an unqualified undertaking that the "five techniques" would not in any circumstances be reintroduced as an aid to interrogation. Although the Court took note of the undertaking, and the breaches of Article 3 were not contested, nonetheless it held that a ruling should be given.

The Court noted firstly that the "five techniques" were applied in combination and with premeditation and for hours at a stretch, and caused, if not actual bodily injury, at least intense physical and mental suffering and led to acute psychiatric disturbances during interrogation. Secondly the Court noted that the techniques were such as to arouse in the victims feelings of fear, anguish and inferiority capable of debasing and humiliating them and possibly breaking their physical or moral resistance.

In relation to the general issues the Court held:

(i) by sixteen votes to one that recourse to the "five techniques" amounted to a practice of inhuman and degrading treatment;

(ii) by thirteen votes to four that the use of the techniques did not constitute a practice of torture since they did not occasion

suffering of the particular intensity and cruelty implied by the word *torture*.

As to Palace Barracks, the Court considered that the evidence before it disclosed that, in the autumn of 1971, quite a large number of persons held in custody there had been subjected by members of the Royal Ulster Constabulary to violence (for example kicking and beating) which led to intense suffering and to physical injury that on occasion was substantial. The Court held:

(i) unanimously, that there had existed at Palace Barracks in the autumn of 1971 a practice of inhuman treatment;

(ii) by fourteen votes to three that the said practice was not one of torture since the severity of the suffering capable of being caused by the acts complained of did not attain the particular level inherent in the notion of torture;

(iii) unanimously, that it was not established that the practice continued beyond the autumn of 1971.

The Court described the treatment of detainees at Ballykinler military camp in August 1971, which included the compulsory performance of painful exercises, as a discreditable and reprehensible practice; however, it held, by fifteen votes to two, that this practice did not infringe Article 3.

The Court also considered that the information before it suggested that there must have been individual cases of violation

of article 3 in various other places in Northern Ireland. It concluded, however, by fifteen votes to two that no *practice* in breach of Article 3 was established as regards such places.

Finally, the Court held unanimously that it could not direct, as the Irish government had requested, the United Kingdom to institute criminal or disciplinary proceedings against those who had committed, condoned or tolerated the breaches of Article 3 found by the Court.

Notes

1. For the text of this and subsequent notices see *The Protection of Human Rights by Law in Northern Ireland* Cmnd 7009 (HMSO, 1977)
2. There is also a right of individual petition under Article 25 which is not relevant to the present discussion.
3. The case may also be referred to the Court by the state whose national the victim is.
4. For a helpful commentary on the Commission's report see K. Boyle and H.Hannum *Ireland in Strasbourg* (1976) 11 Ir Jur (NS) 243
5. (1976) 18 Yearbook of the European Convention on Human Rights p512
6. Boyle and Hannum op cit note 4 supra at pp249-251
7. Parker Report (Majority Report) para 30
8. loc cit note 5 supra pp750-752
9. The following extract is taken from the summary of the judgment in (1978) 21 Yearbook of the European Convention on Human Rights p602

9.4 The Diplock Report and the Northern Ireland (Emergency Provisions) Acts 1973 and 1978

Despite the previously described changes in procedure, internment was considered to be undesireable in principle and the government was still anxious to use it as little as possible. There was a definite danger that internment could replace the normal legal process entirely as the means of dealing with terrorist suspects. A Commission was accordingly set up in 1972 under Lord Diplock to consider "What arrangements for the administration of justice in Northern Ireland could be made in order to deal more effectively with terrorist organisations by bringing to book, otherwise than by internment by the Executive, individuals involved in terrorist activities, particularly those who plan and direct, but do not necessarily take part in, terrorist acts; and to make recommendations." [1]

To an extent the Diplock Commission's work was overtaken by events when the Detention of Terrorists Order 1972 was passed, but nevertheless they carried on and produced their report in the remarkably short period of two months. Their speed has been criticised as "undue haste" [2] and although they took evidence from various persons concerned with the administration of justice in Northern Ireland, there is no doubt that the Diplock Commission's report was rightly criticised in parliament and elsewhere as lacking factual evidence to justify the radical changes which were proposed. When taxed with this point in the

House of Lords, Lord Diplock's response showed, for a judge, a somewhat curt approach to the question of proof:

> "When I see a fire starting, and indeed we saw a fire starting then, I send for the fire brigade, not a statistician." [2]

This is not, of course, to say either that such evidence did not exist or that the changes to which the Diplock Report led were not necessary or appropriate. To a considerable extent the Gardiner Committee which reported in 1975 justified Diplock's views *ex post facto* and the Baker Report of 1984 contained a chilling description of two specific incidents involving intimidation of juries. In one case a juror described as "large and powerful" was in such a state after a night of telephone threats that he was reduced to begging in tears to be excused. The trial judge was forced to excuse the whole jury. In another case, involving a Loyalist, the intimidation was more subtle and involved the intermittent beating of a Lambeg drum at some distance from the court but sufficiently loudly to be heard by the jury. [3]

The Diplock Commission laid much stress on the danger of intimidation, principally of potential witnesses, but also of jurors, and took the view that until the fear of intimidation could be removed and the safety of witnesses and their families guaranteed, the use of some extra-judicial process for the detention of terrorists could not be dispensed with. [4] However

they made various far-reaching recommendations for changes in the criminal process to enable at least some of the cases presently being dealt with by internment to come before the ordinary courts. The Commission were at pains to point out that their proposals were only intended to take effect only for a limited class of crimes and only so long as the emergency situation lasted. Their proposals were not intended to affect the general criminal law of Northern Ireland.

The Diplock Commission began by identifying a number of crimes commonly committed by members of terrorist organisations, which they called the "Scheduled Offences". [5] When a scheduled offence was tried on indictment, the trial should be before a judge sitting alone without a jury. [6] When they turned specifically to the issue of confessions, [7] the Commission reviewed the existing law and implicitly criticised the decision in R v Flynn and Leonard [8]:

> "Although not strictly rules of law but rules of general guidance from which the judge who tries a case has a discretion to depart, [the Judges' Rules] appear to have been applied in Northern Ireland with considerable rigidity as if they were a statutory requirement from which no departure is permissible. In a recent decision the court ... has ruled that the mere creation by the authorities of any 'set up which makes it more likely that those who did not wish to speak will

eventually do so', renders involuntary and therefore inadmissible in a court of law any confession subsequently made even though the actual statement sought to be relied upon was made in writing after the accused had been expressly cautioned and notwithstanding that its contents are such that no man who was not guilty could have had knowledge of the facts that it discloses."

Professor Greer has pointed out that this criticism is misconceived and confuses two separate issues - the question of mandatory exclusion of an involuntary statement and the question of exclusionary discretion where there has been a breach of the Judges Rules. The latter issue was not before the court in either Gargan or Flynn and Leonard."

In another implicit criticism of the courts the Diplock Commission went on [10] :

"The whole technique of skilled interrogation is to build up an atmosphere in which the initial desire to remain silent is replaced by an urge to confide in the questioner. This does not involve cruel or degrading treatment. Such treatment is regarded by those responsible for gathering intelligence as counter-productive at any rate in Northern Ireland, in that it hinders the creation of the rapport between the person questioned and

his questioner ahich makes him feel the need to unburden himself. But as the rules as to admissiblity of confession have been interpreted in Northern Ireland the mere fact that the technique of questioning is designed to produce a psychological atmosphere favourable to the creation of this rapport is sufficient to rule out as evidence ... anything which the accused has said thereafter."

At this time the European Commission had barely begun its consideration in Ireland v United Kingdom and the speed with which the Diplock Commission produced its report precluded any detailed consideration of the implications of what they were saying, but coming as they did about a year after the Compton Report had confirmed the ability and willingness of the security forces to mistreat prisoners at least occasionally, these comments were more than a little disingenuous. The best that the Diplock Commission could come up with was the limp observation that they "would not condone" the practices described by Compton or Parker. The conclusion, however, was inevitable '''

"We consider that the detailed technical rules and practice as to the admissibility of inculpatory statements by the accused as they are currently applied in Northern Ireland are hampering the course of justice in the case of terrorist crimes and compelling the authorities responsible for

public order and safety to resort to detention in a significant number of cases which could otherwise be dealt with both effectively and fairly by trial in a court of law."

In place of the "current technical rules, practices and judicial discretions" as to the admissibility of confessions the Diplock Commission proposed a "simple legislative provision" based on the terms of Article 3 of the European Convention on Human Rights which, it will be remembered, forbids torture or inhuman or degrading treatment or punishment.

They did so for two reasons:

> "It is a simple concept which we do not think the judiciary in Northern Ireland would find it difficult to apply in practice. It would not render inadmissible statements obtained as a result of building up a psychological atmosphere in which the natural desire of the person being questioned to remain silent is replaced by an urge to confide in the questioner, or statements preceded by promises of favours or indications of the consequences which might follow if the person questioned persisted in refusing to answer."

The test of "torture or inhuman or degrading treatment" was, along with the concept of "Scheduled Offences" and the abolition

of juries for their trial, enacted into legislation by the Northern Ireland (Emergency Provisions) Act 1973. This Act also repealed the Special Powers Act which had long been demanded by the minority community and civil liberties groups. The 1973 Act and certain other emergency legislation was consolidated into the Northern Ireland (Emergency Provisions) Act 1978. Section 6 of the 1973 Act, which later became Section 8 of the 1978 Act, provided:

> 6(1) In any criminal proceedings for a scheduled offence, or two or more offences which are or include scheduled offences, a statement made by the accused may be given in evidence by the prosecution in so far as -
>
> (a) it is relevant to any matter in issue in the proceedings; and
>
> (b) it is not excluded by the court in pursuance of subsection (2) below.
>
> (2) If in any such proceedings where the prosecution proposes to give in evidence a statement made by the accused, prima facie evidence is adduced that the accused was subjected to torture or to inhuman or degrading treatment in order to induce him to make the statement, the court shall, unless the prosecution satisfies it that the statement was not so obtained -
>
> (a) exclude the statement, or
>
> (b) if the statement has been received in

evidence either -

(i) continue the trial disregarding the statement; or

(ii) direct that the trial shall be restarted before a differently constituted court (before which the statement in question shall be inadmissible).

(3) This section does not apply to a summary trial. [12]

Section 7 of the 1973 Act (Section 9 of the 1978 Act) included a provision which effectively, if not absolutely, shifted the onus of proof in relation to possession of a "proscribed article," essentially explosives, firearms and ammunition. Where the prosecution proved that the accused and the article concerned were both present in any premises, or the article was in premises of which the accused was the occupier or which he "habitually used otherwise that as a member of the public," the court might accept that as sufficient evidence of the accused's possession of the article "unless it is further proved that he did not at that time know of its presence in the premises in question, or if he did know, that he had no control over it."

Part II of the Act provided wide-ranging powers of arrest on suspicion [13] and search and Section 16 (Section 18 of the 1978 Act) explicitly limited the right to silence:

16(1) Any member of Her Majesty's forces on duty

or any constable may stop and question any person for the purpose of ascertaining that person's identity and movements and what he knows concerning any recent explosion or any other [recent] incident endangering life or concerning any person killed or injured in any such explosion or incident.

(2) Any person who fails to stop when required to do so under this section or who refuses to answer or fails to answer to the best of his knowledge and ability, any question addressed to him under this section, shall be liable on summary conviction to ... a fine ... . [14]

This section has been the subject of a surprising lack of reported judicial comment although the view has been expressed that it is doubtful whether it conforms to Article 5 of the European Convention on Human Rights. [15] It has also been pointed out that it is not necessarily limited to matters of terrorism since an "incident endangering life" could refer to a car accident. [16] There would not appear to be any requirement of suspicion, let alone reasonable suspicion, before the power can be exercised. There is no definition of "recent" and between 1973 and 1987 it was only explosions which had to be "recent", the qualification being added in respect of other incidents by the Northern Ireland (Emergency Provisions) Act 1987. There is

no time limit on the period during which the person stopped may be questioned, nor is there any indication as to the amount of detail which the person is required to give.

In 1975 the Gardiner Committee reviewed the operation of the 1973 Act and apart from recommending a few comparatively minor changes they generally took the view that it was working well. By the time of the Gardiner Report the courts had begun to interpret Section 6 and, as will be discussed later, they had taken the view that, contrary to the recommendation of the Diplock Report, Section 6 had not deprived them of their discretion to exclude confessions in the interests of justice. Gardiner recommended that there should be an express statutory provision preserving judicial discretion, [17] but, while no steps were taken to curtail the courts' use of discretionary exclusion, it was to be 1987 before a provision explicitly preserving it was enacted.

Notes

1. *Report of the Commission to Consider Legal Procedures to Deal with Terrorist activities in Northern Ireland* (Cmnd 5185). Hereinafter "Diplock Report".
2. G. Hogan and C. Walker *Political Violence and the Law in Ireland* (Manchester, 1989) p31
2a A. Jennings (ed) *Justice Under Fire* p58 et seq
3. Review of the Operation of the Northern Ireland (Emergency Provisions) Act 1978 Cmnd 9222 (HMSO 1984) para 99
4. Diplock Report para 27 et seq
5. Diplock Report para 6 et seq
6. Diplock Report Chapter 5
7. Diplock Report para 73 et seq
8. unreported. See supra p
9. [1973] NILQ 199 at p203. The English courts themselves were quite capable of similar confusion - see R v Prager (1972) Cr App R 151 discussed supra p
10. Diplock Report para 84
11. Diplock Report para 87
12. This sub-section was added by the Northern Ireland (Emergency Provisions) (Amendment) Act 1975 following the recommendation of the Gardiner Committee.
13. Powers of arrest on suspicion and detention for questioning were

also provided by Section 12 of the Prevention of Terrorism (Temporary Provisions) Act 1976

14. The section is given as currently in force after amendment by the Northern Ireland (Emergency Provisions) Act 1987 which *inter alia* inserted the word in square brackets into sub-section (1). As originally enacted the section provided for imprisonment for up to six months.
15. Hogan and Walker op cit note 2 supra p60
16. B. Dickson (ed) *Civil Liberties in Northern Ireland* (Belfast 1990) p10
17. Gardiner Report paras 46-50

9.5 Further Police Abuses - Amnesty International and the Bennett Report

(1) Interrogation Centres and the Amnesty International Mission

The difficulties in following the normal procedures of policing and detection in Northern Ireland in the mid and late 1970s were acute. Apart from the previously discussed problems of intimidation of potential witnesses, the examination of a *locus* and the collection of forensic evidence were frequently impossible. This might be due to the total destruction of the potential evidence, but it could equally be due to booby-trapping and other risks to the lives of security personnel such as hostile crowds. At other times a number of terrorist outrages were arranged to swamp the resources of the security services. [1] Following the ending of internment in 1975 the R.U.C. came under intense political pressure to apprehend and secure convictions of suspected terrorists. A decision was made to construct two special interrogation centres, one at Gough in Armagh and one at Castlereagh in Belfast. Both were opened in 1977 and their opening coincided with a major increase in the number of complaints relating to police interrogation. [2]

From their earliest inception a majority of those prosecuted for scheduled offences before the Diplock Courts have been convicted wholly or mainly on the basis of confessions made during the course of police interrogation. For example between January and June 1978 568 persons were prosecuted for scheduled offences of

whom 411 (72%) pled guilty. [3] Of the remainder 121 were convicted after trial and 36 were acquitted. The Director of Public Prosecutions informed the Bennett Committee that in 75-80% of these cases the prosecution case depended wholly or mainly on the confession of the accused. [4] There was little firm information for earlier years but it was suggested that the proportion had increased from about 65% in 1976 and 75% in 1977. [5]

Those figures only related to those who were, firstly, charged by the police and, secondly, against whom the Director of Public Prosecution considered that there was sufficient admissible evidence to justify prosecution. Many more people were interrogated than were charged by the police and according to the Bennett Committee, between September 1977 and August 1978 only 37% of those interrogated at Castlereagh and 24% of those interrogated at Gough and a further centre at Strand Road Londonderry were actually charged with any offence. As Boyle *et al* put it, it follows either that very large numbers of innocent people were being subjected to prolonged interrogation or that prolonged interrogation failed in a substantial number of cases to produce a confession from those who had something to confess. [6]

Despite the pious sentiments expressed by the Diplock Committee, complaints of police brutality during interrogation continued to be made and as already noted increased substantially after the opening of the interrogation centres. Shortly put, it was beginning to look as if the R.U.C. was ill-treating suspects in

order to extract confessions from them, confessions which were then leading to almost inevitable conviction before the Diplock Courts. In addition it was apparent that even when a suspect made a confession at an early stage, interrogation was continuing, often for the full three day detention period and detectives were using these further interrogation sessions as a means of eliciting information about general terrorist organisation and activities. [7]

By April 1977 police doctors, who regularly examined prisoners at the stage when they were being charged at police stations, became sufficiently concerned at the bruising, contusions, abrasions and other injuries (mental as well as physical) which they were seeing that they wrote to the Police Authority bringing the matter formally to their notice. The police, not surprisingly, denied the allegations and in turn alleged that many of the injuries were self-inflicted for the specific purpose of discrediting them. There were further exchanges between the doctors and the authorities with particular concern being expressed about the condition of prisoners who had passed through Castlereagh police station but no official action was taken. As the Bennett Committee put it, "when denials of ill-treatment of prisoners were made by the police, some of the medical officers who had examined prisoners, and found injuries, had reason to fear for their reputation." [8] Ultimately the chief medical officer at Gough police station, Dr Irwin, was sufficiently concerned by the injuries and the lack of action by the

authorities that he "went public," as a result of which he was later forced to resign. *

The issue attracted the attention of the media and various television and press reports added to the disquiet. In November 1977 a group of some thirty solicitors who regularly handled cases before the Diplock courts decided to form a group for the purpose of collating evidence of alleged brutality. They wrote to the Secretary of State for Northern Ireland stating their view that:

> "... ill treatment of suspects by police officers, with the object of obtaining confessions, is now common practice, and that this most often, but not always, takes place at Castlereagh R.U.C. station and other police stations throughout Northern Ireland." [10]

A mission from Amnesty International visited Northern Ireland between 28 November and 6 December 1977. They considered evidence relating to 78 persons who alleged maltreatment by R.U.C. personnel, principally at Castlreagh, and invariably by plain clothes detectives. Most of the 78 had been arrested under the Northern Ireland (Emergency Provisions) Act 1973 although some had been subject to the Prevention of Terrorism (Temporary Provisions) Act 1976. Generally Amnesty International found the allegation against the police to be established and they concluded that "maltreatment of suspected terrorists by the

R.U.C. has taken place with sufficient frequency to warrant the establishing of a public inquiry to investigate it."

Notes

1. Report of the Committee of Inquiry into Police Interrogation Procedures in Northern Ireland Cmnd 7497 (HMSO, 1979) para 25 et seq. Hereinafter "Bennett Report"
2. K. Boyle et al *Ten Years on in Northern Ireland* (Cobden Trust, 1980) p38
3. Although this figure appears high it was generally in step with the proportion of guilty pleas before the Crown Courts in Northern Ireland, which at this time was significantly higher than in England and Wales. See Hogan and Walker *Political Violence and the Law in Ireland* pp115-116
4. Bennett Report para 30
5. ibid
6. op cit note 2 supra p44
7. op cit note 2 supra p45
8. Bennett Report par 159
9. A. Jennings (ed) *Justice Under Fire* p43
10. Report of an Amnesty International Mission to Northern Ireland 1977 (1978) pp3-4.

(ii) The Bennett Committee

The idea of a public inquiry did not find favour with the British government but it was clear that the Amnesty International report could not be ignored. A Committee of Inquiry was therefore established under Mr Justice Bennett *inter alia* "to examine police procedures and practice in Northern Ireland relating to the interrogation of persons suspected of scheduled offences." It was, however, made clear to the Bennett Committee that they were not to inquire into individual allegations of maltreatment.

The Bennett Committee produced an excellent report which included a comprehensive review of the law and which was undoubtedly the most impressive of the reports relating to Northern Ireland reviewed in this work. The Bennett Committee was scrupulously fair in its assessment of the difficulties under which the R.U.C. were operating and the reasons for the reliance on admissions. [1] They were also careful to remind their readers that police questioning is a normal part of procedure in other parts of the United Kingdom and that admissions and confessions constituted a significant element in a high proportion of cases in England and Wales. [2]

However, despite the exclusion of individual allegations of maltreatment they took careful note of a considerable body of medical evidence before commenting that whatever the explanation, there were "injuries which were not self-inflicted and were

sustained during the period of detention at a police office." [3] Despite the measured language the Committee's view was unequivocal:

> "What we have found reinforces the concern shown by the doctors and the Police Authority, and demonstrates the need for an improvement in the supervision and control of interrogation. Moreover we cannot blind ourselves to the possibility that if, as we have found on the basis of medical evidence, ill-treatment causing injury could occur, so could ill-treatment which leaves no marks. ... What is aimed at is a system in which a prisoner who walks into a police office unhurt and unmarked shall be unhurt and unmarked when he leaves that office." [4]

The Committee noted that there was no code of conduct for police officers engaged in the interviewing of prisoners and there was a considerable need for such a code which, in their view should be enforceable as a matter of police discipline. They referred to a case where a prisoner (who in the event was not the subject of criminal proceedings) had been repeatedly interviewed, apparently on the decision of a junior officer, during a period of some 21 hours after which has was only allowed 2½ hours sleep. He had become so disturbed that he had slashed his wrist and butted his head against a radiator causing injury to his forehead.

The Committee were aware of the difficulty which could be posed by hard and fast rules but in a masterpiece of understatement observed that they:

> "[Could] not contemplate with approval a situation in which the zeal, and the apparently uncontrolled discretion, of an individual officer can lead a prisoner to contemplate self-destruction or to undertake self-mutilation. There must surely be doubts about the truth of any statements made in circumstances such as these." [5]

Although they stopped short of attempting to set out a comprehensive code of conduct, the Bennett Committee made a lengthy series of recommendations and suggestions for matters to be dealt with in such code. The recommendations included the prohibition of various forms of degrading treatment such as ordering a prisoner to strip, adopt an unnatural posture or carry out unnecessary physically exhausting action as well as the use of obscenities, insults, and threats of various types including physical force, abandonment in a hostile area and sexual misbehaviour. [6]

In relation to the timing and duration of interviews, Bennett recommended that no single interview should go on longer than the period between normal meal times and prisoners should be allowed a break for meals; except in the case of urgent operational reasons an interview should not commence after midnight; not more

than two officers should interview one prisoner at one time and not more than three teams of two officers should be concerned with interviewing one prisoner. [7]

The Bennett Committee also considered in some detail the various options and possibilities for independent supervision. In their evidence to the Committee, the Police Authority for Northern Ireland had raised the possibility of civilian supervisors whose main duty would be to ensure that the police followed the rules laid down in relation to interviewing suspects. Like the RCCP, the Bennett Committee rejected this idea on various grounds, although not without hesitation. The grounds for rejection included the difficulty of finding suitable people to do the job, the difficulty in establishing the relationship between the civilian supervisors and the police and the fact that "a body of officials working day by day in cooperation, as the public would see them, with the police, would quickly come to be tarred with the same brush in the minds of critical members of the community." [8] Related proposals to extend the functions of the Boards of Visitors of H.M. Prisons in Northern Ireland and the role of medical officers were also rejected. [9]

The Bennett Committee also considered the question of tape recording and although there were unable to advance the arguments appreciably beyond the debate in the rest of Britain, they pointed out some of the particular problems which tape recording would present in Northern Ireland. Although there was not a

problem with interviews on the way to the police station, since such interviews simply did not happen, interviews at police stations were likely to be much longer than anything seen elsewhere, particularly since the suspect might be detained for a period of several days. This was considered likely to lead to problems with the bulk of the records and the immensity of the task of producing and editing transcripts.

The Committee also pointed out that the main purpose of tape recording was to provide a reliable record, whereas the main issue before them was the need to prevent prisoners being ill-treated. This threw into prominence the arguments about who should be allowed to switch the machine on and off and what protection could be found against the faking of incidents by suspects. The fact that in Northern Ireland so much reliance was being placed on confessions increased the need for a reliable record, but on the other hand it also increased the need to ensure that the presence of the tape-recorder did not render the interrogation process ineffective:

> "We have felt bound, however, to give special prominence to the peculiar features of police interrogation in Northern Ireland ... and in particular the fact that persons known to have given information to the police are likely ... to suffer victimisation by the paramilitary organ-isations as a result. This applies both to information about the suspect's own part in crime

and, even more, to information about others' involvement in terrorist activity. In view of this, we believe that the fact that a permanent and reproducible record was being made, which the suspect could not later disown, would increase his reluctance to speak to a greater degree than elsewhere. ... Once a copy of the tape passed out of the hands of the police, it would be impossible to be sure into whose hands it might fall. In Northern Ireland, a risk to lives and security would ensue, bearing in mind that interrogation there is intended, and likely, to reveal intelligence about the activities of terrorist organisations."

For these reasons the Bennett Committee considered that Northern Ireland was not the best place to begin a system of tape recording. However they were strongly in favour of an experiment with tape recording elsewhere, and recommended that the matter be reconsidered in Northern Ireland once the experimental results were known. [10]

The Committee also rejected video recording, concluding that it would not offer any substantial advantages by comparison with the unrecorded visual observation of interviews. [11]

In the view of the Bennett Committee, there was no real alternative to the police themselves taking the necessary steps to ensure that maltreatment did not occur. Various steps in this direction had already been taken by the time of the Bennett Report, but there was room for further improvement. [12] Bennett came to the same conclusion as Amnesty International, namely that the uniformed branch of the R.U.C. was not implicated in the allegations of brutality, and from this starting point made several recommendations generally directed towards giving uniformed officers responsibility for ensuring the welfare of suspects.

Inter alia Bennett recommended that it should be made "entirely plain" to the uniformed inspectors that their responsibility for the welfare of prisoners extended to the interview room, and that if necessary they should enter the interview room and stop the interview if a breach of the law or force instructions was taking place or if it seemed reasonably likely that events in the interview room were leading to such a breach. Bennett also recommended the installation of spyholes in the doors of all police interview rooms in the Province and the installation of closed circuit television facilities in all interview rooms used for the interrogation of terrorist suspects and other persons arrested for scheduled offences. Any interference with the effective operation of the closed circuit television apparatus was recommended to be a disciplinary offence. Monitoring screens were to be provided for the senior uniformed officer and should

also be availble to the senior detective officer in charge of interviews. [13]

Further recommendations were made to strengthen the role of the medical officers, and in particular it was recommended that medical officers should see all terrorist suspects and persons suspected of scheduled offences during each period of 24 hours and should offer them the opportunity of medical examination. [14]

As far as access to legal advice was concerned, the Bennett Committee found that solicitors were invariably refused access to terrorist suspects, a position which they considered unjustifiable. They recommended that prisoners should have an unconditional right of access to a solicitor after 48 hours and every 48 hours thereafter, although solicitors should not be permitted to be present at interviews. [15] Although most of the Bennett recommendations were accepted, this one was only partially implemented with the government insisting that the police should have the right to be present at any interview between a suspect and his solicitor, a condition which most solicitors found unacceptable. [16]

One of the reasons why most of the Bennett Committee's recommendations were accepted was that they could be implemented by administrative means and did not require legislation and following the Bennett Report, the number of complaints concerning physical abuse of suspects dropped dramatically, [17] although

doubts have recently been expressed about the continuing effectiveness of the Bennett "regime". [16] It has also been suggested that since the Bennett recommendations made the extraction of confessions much more difficult, the policy of securing convictions on confessions alone lost its viability and thus led to the evolution of the "supergrass" system, which was, in turn, to become discredited. [19]

Notes

1. Bennett Report Chapter 2
2. ibid paras 38-40
3. ibid para 163
4. ibid par 164
5. ibid para 179
6. ibid para 180
7. ibid para 181
8. ibid paras 188-191
9. ibid paras 192-194
10. ibid paras 195-200
11. ibid para 201
12. ibid paras 210-211
13. ibid paras 221-229
14. ibid para 249
15. ibid paras 122-123 and 277-288
16. K. Boyle et al *Ten Years on in Northern Ireland* p51. The position has now been changed by Sections 14 and 15 of the Northern Ireland (Emergency Provisions) Act 1987 which has normalised matters and allows confidential communications.
17. G. Hogan and C. Walker *Political Violence and the Law in Ireland* pp118-119; A. Jennings (ed) *Justice Under Fire* p85
18. Hogan and Walker op cit note 17 supra pp117-118
19. Jennings op cit note 17 supra p 85

9.6 Judicial Decisions 1973-1984

(1) "Torture or Inhuman or Degrading Treatment

It will be apparent from the foregoing discussion that during the 1970s interrogation by the security forces was as much, if not more, directed towards obtaining intelligence and information about terrorist activities as it was towards obtaining confessions for use in court. It has also been pointed out that many more people were questioned than were prosecuted. It is probably fair to say that the Diplock Courts were never called upon to consider the worst excesses of the security forces. Nevertheless the enactment of Section 6 of the Northern Ireland (Emergency Powers) Act 1973 clearly made a major difference to the law on admissiblity.

Notwithstanding the absence of a jury, issues of admissibility of confessions in the Diplock Courts fall to be determined on the *voir dire* and if the statement is excluded the judge will often stand down under section 6(2)(ii) (later section 8(2)(ii)). If the statement is not excluded, the practice seems to be that the evidence need not be reheard but must be expressly reconsidered at the trial stage. [1]

The first judicial comment on the new legislation came in the unreported case of R v Corey in 1973. The Lord Chief Justice entertained no doubt that many statements which would previously have been excluded as being involuntary were now to be

admissible:

> "Section 6 of course has materially altered the law as to the admissibility of statements by singling out torture and inhuman and degrading treatment. This is clear from the fact that such things have always made for the exclusion of an accused's statement since they deprive it of its voluntary character. Accordingly Section 6(2) would merely be a statement of the obvious if it did not in conjunction with Section 6(1) render admissible much that previously must have been excluded. There is no need now to satisfy the judge that a statement is voluntary in the sometimes technical sense which that word has acquired in relation to criminal trials." [2]

The first reported decision on the test of "torture on inhuman or degrading treatment" was R v Hetherington and Others [1975] NI 164, where Lord Lowry LCJ was the trial judge in a typical terrorist case relating to the murder of two police officers with the only evidence against the accused being their confessions. The accused, who all gave evidence, had alleged that they had been maltreated in police custody. In addition medical evidence was led of certain injuries which had been found on them during their time in custody and which were, up to a point, consistent with their allegations. The injuries were not particularly

severe and certainly did not indicate the use of torture or inhuman treatment. However, Lord Lowry considered that degrading treatment "while it must overlap considerably with torture and inhuman treatment, must also cover conduct which does not necessarily fall within the first and second types of behaviour mentioned in the section." His Lordship accordingly found that if the treatment necessary to cause what the doctors had seen had been meted out to persons being interrogated in custody, it was degrading treatment. His Lordship also took the view that once prima facie evidence of torture or inhuman or degrading treament had been adduced, it was for the prosecution to prove beyond reasonable doubt that that the accused's statement had not been obtained by it. His Lordship set out four reasons for his view:

1. The context of section 6 is that of a criminal trial and the prosecution's standard of proof of issuse in such a trial (even when they must first be raised by the defence) is proof beyond reasonable doubt;

2. The use of the word "satisfied" in section 2(4) (sic) must imply proof beyond reasonable doubt;

3. At common law where, with a view to the admission or rejection of statement evidence, the issue for the trial judge is one of voluntariness, the proof must be beyond reasonable doubt;

4. A statute, particularly where it abridges the

rights of an accused, must in case of ambiguity be construed so as to alter the law as little as possible consistently with the language used.

Lord Lowry accordingly held that the prosecution had not discharged the onus and the statements were inadmissible. One of the accused, Hetherington, had made a separate written statement admitting membership of the I.R.A. but Lord Lowry applied R v Flynn and Leonard [3] and took the view that it "would be unrealistic to find that such influence as may have existed [the previous day] had been dissipated effectively by the time this statement was made."

Two years later the issue first came before the Court of Criminal Appeal, presided over by Lord Lowry, in R v Thompson [1977] NI 74 and the opportunity was taken to clarify some of the procedural issues.

The accused was charged with the murders of four soldiers who had been blown up by a remotely-detonated bomb. He had been arrested within hours of the explosion and was interviewed five times by the police in the space of one day. At the fourth interview he intimated that he would make a written statement, but before doing so he gave a verbal statement and drew certain diagrams of the bomb.

At the trial the accused alleged that he had been subjected to torture or inhuman or degrading treatment in that he had been made to stand with his arms and legs out-stretched, was frequently kicked in the ribs and testicles, was subjected to verbal abuse, was made to do press-ups and other exercises. He also alleged that he was punched in the abdomen, slapped across the face and twice had a plastic bag put over his head. He collapsed during the fifth interview, but medical evidence was adduced by the Crown to the effect that this was due to a hysterical reaction, the doctors also giving evidence that they had seen no evidence of physical maltreatment. A certain amount of contrary medical evidence was adduced by the defence, but having heard all the evidence the trial judge ruled in favour of admitting the statments.

On appeal it was held that he was fully entitled to do so and the Court of Appeal's judgment adds nothing to Lord Lowry's exposition of the law regarding admissiblity in Hetherington. However the Court took the opportunity of issuing a "reminder" of the position relating to a voir dire governed by Section 6(2) of the 1973 Act. Under the statute, once prima facie evidence of the making of the statement was adduced by the Crown, the accused had to raise a prima facie case of torture or inhuman or degrading conduct before admissibility became a triable issue. The correct course was for the defence to make its case under Section 6(2) and only if a triable issue was raised did it become

the duty of the Crown to rebut the defence case and prove beyond reasonable doubt that it was wrong.

Lord Lowry also commented on the duty of the judge when giving judgment in a trial in a Diplock court. Such a judge has no jury to charge and will therefore not err if he does not state every legal proposition and review every fact and argument on either side. His task is to reach conclusions and give reasons to support his view and, preferably, to notice any difficult or unusual points of law in order that if there is an appeal, it may be seen how his view of the law informed his approach to the facts.

There have been no further reported cases bearing directly on the issue of "torture or inhuman or degrading treatment" and the issue seems to have effectively been settled by Lord Lowry's decision in Hetherington.

In any event the improvement in police practices which followed the Bennett report would clearly go a long way towards reducing the scope for the defence to rely on police maltreatment. As will be discussed later, the courts themselves made it clear that even where the conduct complained of fell short of torture or inhuman or degrading treatment, a statement might still be excluded as a matter of judicial discretion.

In R v O'Halloran [1979] NI 45 and other unreported cases,[4] the courts themselves ruled out physical violence entirely. In O'Halloran the Lord Chief Justice said:

> "This court finds it difficult in practice to envisage any form of physical violence which is relevant to the interrogation of a suspect in custody and which, if it had occurred, could at the same time leave a court satisfied beyond reasonable doubt in relation to the issue for decision under Section 6 (now Section 8)."

Notes

1. Hogan and Walker *Political Violence in Ireland* p110 et seq. Also D.S. Greer *The Admissibility of Confessions Under the Northern Ireland (Emergency Provisions) Act 1978* [1980] 31 NILQ 205 at 234-235
2. This extract is given in the judgment of Hutton J. in R v Dillon [1984] NI 292 at 299
3. Unreported, 1972. Discussed supra p
4. See D.S. Greer op cit note 1 supra especially p213 note37. Cf R v McCormick [1977] NI 105 discussed infra. O'Halloran can , to an extent, be regarded as a response to criticism of McCormick. See Hogan and Walker op cit note 1 supra p114

(ii) Judicial Discretion

The first reported case in which the courts had to address the question of the effect of Section 6 of the 1973 Act on the Court's discretion to exclude evidence ' and the decision which effectively set the trend for subsequent cases was R v McCormick and Others [1977] NI 105, a decision of Lord Justice McGonigal sitting at first instance. The learned judge's long and erudite judgment shows that he had no doubt that Section 6 did not deprive him of a discretion to reject otherwise admissible evidence. In what was in effect the preamble to his judgment his Lordship observed:

> "Section 6(1) stresses the limited nature of the objections which can be taken by providing that unless excluded by Section 6(2) the relevant statement may be admitted in evidence. This is, of course, subject to the overall discretion of the trial judge to exclude any evidence on the ground that its prejudicial effect outweighs its probative value."

Before the question of discretionary exclusion could arise, it was necessary to determine whether the statement in fact passed the test laid down in Section 6(2). In determining this issue, his Lordship noted that the terms of Section 6(2) were derived from Article 3 of the European Convention on Human Rights and for guidance he turned not to existing English or Irish authorities

but to the judgment of the European Commission in Ireland v United Kingdom and their earlier decision in what was generally known as the Greek Case. [2]

The main points of the Commission's report in Ireland v United Kingdom, and in particular their definitions of "torture", "inhuman treatment" and "degrading treatment" have already been mentioned [3] but it should also be pointed out that in the Greek Case the Commission had distinguished between acts prohibited under Article 3 and "a certain roughness of treatment" which "may take the form of slaps or blows of the hand on the head or face". In the view of the Commission such roughness was "tolerated by most detainees and even taken for granted."

Applying the Commission's definitions, which he noted appeared to "accept a degree of physical violence which could never be tolerated ... under the common law test," Lord Justice McGonigal came to the view that:

> "A statement which is made is admissible under the Section, however induced, unless induced by conduct falling within the descriptive terms "torture or inhuman or degrading treatment" in the sense used in the section and it is only excluded by the section even in those three cases if the acts complained of were acts done *in order to induce the statement.*" [3]

His Lordship then addressed in more depth the question of judicial discretion:

> "That does not mean, however, that these courts will tolerate or permit physical maltreatment of a lesser degree deliberately carried out for the purpose of or which has the effect of inducing a person interviewed to make a statement. Not only would such conduct amount to an assault and in itself be an offence under the ordinary criminal law but it would be repugnant to all principles of justice to allow such conduct to be used as a means towards an end, however desirable that end might be made to appear. ...
>
> It is at this stage, however, when a statement has passed the test of admissiblity under section 6 that the trial judge's discretionary powers have to be considered, and it is the proper exercise of these powers which provide an extra-statutory control over the means by which statements are induced and obtained."

After a review of earlier authorities, his Lordship then stated:

> "It is clear from the authorities ... that the judicial discretion to exclude evidence is widely based and includes cases where statements have been obtained by maltreatment. It does not, of

course, mean that every incidence (sic) of mal-treatment will lead as of course to exclusion. Each case must be considered on its merits and the discretion ... is still the discretion of the individual trial judge. In considering its exercise in any case the trial judge must take into account not only the conduct complained of but its effect on the person subjected to it and all other relevant circumstances."

However, the judge should also have regard to the standard of maltreatment necessary to exclude a statement under section 6 and should take care not to defeat the will of parliament:

"If he exercises his discretion without regard to the section he will in all probability exclude statements obtained in circumstances not considered by Parliament to warrant exclusion. ... The effect of the exercise of the discretion if unfettered by the existence of section 6 might be, therefore, to negative the effect of section 6 and under the guise of the discretionary power have the effect of reinstating the old common law test in so far as it depended on the proof of physical or mental maltreatment. In my opinion the judicial discretion should not be exercised so as to defeat the will of parliament as expressed in the section. While I do not suggest its exercise

should be excluded in a case of maltreatment falling short of section 6 conduct, it should only be exercised in such cases where failure to exercise it might create injustice by admitting a statement which though admissible under the section and relevant on its face was *in itself* ... suspect by reason of the method by which it was obtained. ... This would require consideration not only of the conduct itself but also, and since the effect of any conduct varies according to the individual receiving it, possibly equally important its effect on the individual and whether, to use the words of the Commission Report

> ... the maltreatment was such as to drive the individual to act against his will or conscience."

In McCormick Lord Justice McGonigal had made it clear that once the point of admissiblity was taken, the onus was on the prosecution to satisfy the judge that the statement was taken in a manner and in circumstances which justify its admission in evidence, whether decided by section 6 or against an exercise of judicial discretion. A year or so later in R v Milne [1978] NI 110 his Lordship, again sitting at first instance, had to deal with the question of judicial discretion in the situation where the accused refused to recognise the court and refused to take any part in the proceedings. As the result of the accused's attitude to the court, the point of admissiblity was not "taken"

in the normal sense and his Lordship effectively raised it *ex proprio motu*. If there was, the learned judge considered, something in the evidence which raised a doubt in his mind as to its admissiblity, he had to consider that even though the accused for reasons of his own had elected to take no part in the case.

In Milne the accused had been interviewed for 39 hours out of 72 and during this period he had eaten (by his own choice) nothing more than a Twix bar. In the course of the Crown evidence it came out that at one point, towards the end of the interviewing process and shortly before he made an incriminating statement, the accused had claimed to be "all mixed up" and "not thinking straight" and a short time later told his interrogators that he was still "confused". The statement was clearly admissible on the basis of section 6 but Lord McGonigal decided to exercise his discretion to exclude it:

> "It does not ... follow that length of time or persistent questioning is in itself such as to mean a statement is not voluntary, but if there is evidence to suggest that it is not or may not be it is for the Crown to satisfy the court that it is. If the crown fails to satisfy the court that the statement is voluntary, then although the case may not come under section 6(2) the court must, in my opinion, consider whether it should be excluded as a proper exercise of the court's discretion. ... The application of the discretion ... depends

solely on the court ... looking at the facts and circumstances of a particular case and deciding whether as a fact it is satisfied that the statement was a voluntary statement. That is, that it was not made by a person driven by the conditions or circumstances under which it was made to act against his will or conscience."

By the time of the next reported decision, R v McGrath [1980] NI 91, a judgment of the Court of Appeal, the Northern Ireland (Emergency Provisions) Act 1978 had been passed, and Section 6 of the 1973 Act had become Section 8 of the 1978 one. The point in McGrath was one of some novelty, and, it is submitted, little hope of success. The accused had been arrested three times in connection with the same offence, in June 1976, March 1977 and finally in November 1977 when he made an oral admission and a written confession. One oddity, not followed up in the brief report, is that after he was arrested in March 1977 the accused was bailed in May 1977 and the charge was "dropped" in October, the month before his third and final arrest.

The basic point in McGrath was that the repeated arrests amounted to mental torture, or at least inhuman treatment. Defence counsel argued that the conduct had to be judged from the standpoint of the effect on the victim, independently of the intention of the person responsible. The trial judge, Lord Justice Gibson, had taken the view that:

"In order to constitute treatment within the act there must be either physical or mental ill-treatment and that that must be of a very grave nature. ... All physical or mental illtreatment is not torture or inhuman or degrading, and I have also come to the conclusion that the illtreatment which would fall within the section must be done with the intention of causing either physical or mental suffering and that that physical or mental suffering must be of a very high degree and it must have been done also as the section indicates with the purpose of inducing a statement. So those are the physical acts, there must be grave physical illtreatment and secondly the intention of causing a high degree of suffering and the motive must be to produce a statement. I am quite satisfied that it is not enough to intend merely to do an act which, in the result, without any foresight by the police officer, does produce suffering, that to my mind is not anything, within the section, that is to say in order to bring a case within the section one must do more than be satisfied that the suffering resulted from conduct; it must be shown that at least there is a prima facie case that suffering was intended or at least foreseen when the conduct was adopted."

The appeal court approved the trial judge's interpretation of section 8(2) and commented that on the findings in fact there was nothing which *could* have prevented him from being satisfied beyond reasonable doubt that the accused had not been subjected to torture or inhuman or degrading treatment. They added that:

> "Section 8(2) is aimed at discouraging the deliberate infliction of suffering rather than contemplating the incidental effect on a suspect who becomes the victim of conduct which is not deliberately bad conduct. The words 'subjected to' in section 8(2) appear to us to lend further support to this opinion since they appear to look to a situation where the victim is deliberately made the subject of the outlawed conduct."

R v Culbert [1982] NI 90 does not particularly advance the law, but its importance lies in the opinion of the Court of Appeal that the guidelines for police interviewing which had been laid down after the Bennett report did not relate to the interpretation of section 8(2) and did not set a standard by which to decide whether a person had been subjected to inhuman or degrading treatment.

The final case in this category, R v Dillon [1984] NI 292, is not particularly remarkable but includes a first instance judgment by Hutton J. running to some 20 pages in which the law is comprehensively and carefully considered in a manner which would put

many a Scottish judge to shame. Hutton J's judgment in Dillon is a synthesis of the existing law and the application of that law to the facts of the case and, despite its impressive command, in fact adds little of real consequence of its own. In essence the judgment comes down to this. If there has not been torture, inhuman or degrading treatment, statements by a terrorist suspect made after a period of searching questioning in custody will be admissible notwithstanding that at the outset the suspect did not wish to confess and the questioning caused him to speak when otherwise he would have remanined silent.

One particular point of interest, (if only because it is stated in a single sentence of 120 words!), is the learned judge's explicit disavowal of what Mirfield terms the "disciplinary principle" [4] in relation to the exclusion of statements to the police:

> "Further, in a case such as this where the court decides that the statements are admissible and where the court further decides in relation to the circumstances of that particular case and the course of questioning, including the length and times of the interviews as it affects the particular accused, that there is no ground for exercising the court's discretion to exclude the statements, I consider that the court should not exercise its discretion to exclude the statements and thereby, in effect, bring about the acquittal

of the accused on certain counts for the sole reason that it wishes to ensure that in other cases the police will not follow a certain course in conducting the interviews of other suspects."

Notes

1. The issue had previously arisen in two unreported first instance cases R v Corey, 1973, (referred to supra) and R v Irwin, 1977, both of which are referred to in R v McCormick and Others.
2. Denmark and Others v Greece, Collection of Decisions of the European Commission on Human Rights, Vol 26 p80
3. Emphasis added
4. Mirfield p70 et seq. See R v Sang [1979] 2 All ER 1222; [1980] AC 402

(iii) The Relationship between the Emergency Powers Legislation and Non-Scheduled Offences

When the Diplock Commission first conceived the concept of the "Scheduled Offences" they did so on the basis that the offences were "commonly committed" by terrorists. However like any other country Northern Ireland has its share of, say, murders or manslaughters which owe nothing to terrorism. Since the whole thrust of the Emergency Powers legislation was directed towards combatting terrorism, it is clearly inappropriate that a domestic murder or some equally obviously non-terrorist crime should be tried before a Diplock Court and subject to the special rules of evidence presently under discussion. The Northern Ireland (Emergency Provisions) Act 1973 accordingly provided [1] that the Attorney General could certify that certain offences should not be treated as scheduled and when this was done the offences fell to be dealt with as ordinary crimes and subject to the ordinary rules of procedure although Section 8 continues to apply in relation to the admissiblity of statements even when the scheduled offence is "certified out". [2]

Inevitably the scheduled and non-scheduled offences will overlap and there will be anomalies. Complaints have also been voiced that the Attorney General fails to "certify out" appropriate cases so that the prosecution can take advantage of the absence of a jury and lower standards of admissibility in the Diplock courts. [3]

Only one reported case has touched on this area, and then only indirectly, this being R v McBrien and Harman [1984] NI 280 a non-Diplock trial for murder. Harman had been arrested for the murder of her husband. The murder would appear to have been claimed by the I.R.A. and presumably for this reason Mrs Harman's arrest was carried out under Section 12 of the Prevention of Terrorism (Temporary Provisions) Act 1976. Following her arrest the accused was taken to Castlereagh where she was held for three days and questioned five times making two written statements and a number of verbal admissions. Objection was taken to the admission of this evidence at her trial and since the crime was non-scheduled the matter fell to be determined by the common law.

Various arguments were put forward in support of the defence argument that the statements had been obtained by oppression. In particular it was argued that for a person suspected of a non-scheduled offence to be brought to Castlereagh at all was oppressive, in the same way as the circumstances of interrogation at Holywood were held to be oppressive in R v Flynn and Leonard.[4] Having reviewed the leading English authorities, Carswell J. had little difficulty in rejecting this argument along with the others put forward in support of the claim of oppression.

Having found that the statements were admissible as a matter of law, Carswell J. then had to decide whether to exercise his discretion to exclude them as having been unfairly obtained. The defence argued that Mrs Harman's arrest under section 12 was

invalid and unlawful as was her consequent detention. If she had been arrested at common law she would have been brought before a Magistrates' Court as soon as practicable after 24 hours had elapsed from the time of her arrest. If this had happened she would not have been in a position to make certain of the later statements. It was also alleged that the police had been in breach of the Judges Rules by failing to charge the accused when they had sufficient evidence to do so. All these arguments were rejected by the learned judge whose conclusions included the following. (i) The statements, both verbal and written were voluntarily made and part of a "continuing process of revelation". (ii) The police were acting in good faith in arresting Mrs Harman under the 1976 Act. They might have been right or wrong in their decision to do so but his Lordship was satisfied that the police did not act with the deliberate intention of putting the accused as a disadvantage, or with the object to wear down or break her will.

McBrien and Harman is hardly a landmark in the law of confessions but it is of importance as one of the few recent Northern Ireland decisions concerning the common law tests of voluntariness and the absence of oppression and the exercise of judicial discretion in a common law setting. Carswell J's decision is entirely in accordance with contemporary English case law.

Notes

1. Schedule 4 Notes 1 and 2
2. G. Hogan and C. Walker *Political Violence in Ireland* p110
3. eg D. Walsh *The Use and Abuse of Emergency Legislation in Northern Ireland* pp79-80
4. unreported 1972 discussed supra

9.7 The Baker Review and the Northern Ireland (Emergency Provisions) Act 1987

The Westminster government continued to be keen to normalise the legal position in Northern Ireland as far as possible and in April 1983 Sir George Baker was appointed to review the operation of the Northern Ireland (Emergency Provisions) Act 1978 with the following terms of reference:

> "Accepting that the temporary emergency powers are necessary to combat terrorist violence, and taking into account Lord Jellicoe's review of the working of the Prevention of Terrorism (Temporary Provisions) Act 1976 as it affects Northern Ireland, to examine the operation of the Northern Ireland (Emergency Provisions) Act 1978 in order to dertermine whether its provisions strike the right balance between the need, on the one hand to maintain as fully as possible the liberties of the individual and on the other to provide the security forces and the courts with adequate powers to enable them to protect the public from current and foreseeable incidence (sic) of terrorist crime; and to report."

The Baker review was published in 1984. [1]

Broadly stated, Baker took the view that circumstances in Northern Ireland left little room for manoeuvre and that it would be irresponsible to abandon the emergency powers entirely. His report was long and comprehensive, and dealt with all aspects of the legislation, although the view has been stated that its value is diminished by inconsistent interpretation of the terms of reference. [2]

Baker came down in favour of the retention of single-judge Diplock courts for the trial of scheduled offences but considered that there should be many more scheduled offences which might be "certified out" and hence tried before non-Diplock courts. [3] From time to time the allegation had been made that the Diplock judges were becoming "case hardened". Baker defined this to mean that the judge "has heard it all before; therefore he does not believe the accused; therefore he is or becomes prosecution minded". [4] While the possibility of this happening was acknowledged, the judges themselves recognised the danger and Baker rejected the allegation of "case hardening".

When he turned to the question of evidence, and for present purposes the aspect of greatest interest is evidence in relation to statements by the accused, Baker explicitly endorsed the need to gain evidence through interrogation and he reviewed, with general approval, the way in which the Northern Irish courts had operated Section 8 (and its predecessor Section 6). He rejected the criticism that the combined effect of R v McCormick and R v

Milne [5] had been to erode the minimum standard of Article 3 and Article 7 of the International Covenant on Civil and Political Rights and stated his own view that "no physical violence of any degree would now be tolerated and I cannot believe that violence could occur, unless the accused was the aggressor." [6] He also strongly favoured the tape recording of interviews. [7]

As Lord Gardiner had done some years previously, Sir George Baker argued that the discretion under which the Northern Irish judges had rejected confessions not specifically excluded under the statute should itself be placed on a statutory footing. Baker noted "Here as elsewhere it is very much a question of how the Act looks. The difference between what is said in the section and what really happens in court is said, and I have some sympathy with this view, to produce vagueness and complexity which confuses ordinary folk. More importantly it gives opportunity for exploitation, exaggeration and half truths for propaganda purposes." [8] Baker also observed that:

> "In recent years few confessions have been excluded. It is impossible to say in every case whether they were rejected in the exercise of the judges' discretion but certainly 40%-45% were. Should anyone seek to use this as an argument to support a suggestion that judges are case-hardened I emphasise that allegations of physical ill-treatment have virtually ceased since the implementation of Bennett's recommendations in

1979. Counsel tell me that fights with allegations of confessions obtained by violence are a thing of the past." [9]

Baker recommended that Section 8 should be redrafted to exclude violence and to include the judges' discretion.

The legislative answer to the Baker Report was the Northern Ireland (Emergency Provisions) Act 1987 which made various amendments to the 1978 Act based on Baker's recommendations. [10] The general thrust of the 1987 Act was, as might be expected, towards "normalising" the procedures used against terrorism. The 1987 Act provided a new Section 8 of the 1978 Act in the following terms:

> 8(1) In any criminal proceedings for a scheduled offence, or for two or more offences at least one of which is a scheduled offence, a statement made by the accused may be given in evidence by the prosecution in so far as-
>
> (a) it is relevant to any matter in issue in the proceedings, and
>
> (b) it is not excluded by the court in pursuance of subsection (2) below or in the exercise of its discretion referred to in subsection (3) below (and has not been rendered inadmissible by virtue of such a direction as is mentioned in subsection (2)(iii) below).

(2) Where in any such proceedings-

(a) the prosecution proposes to give, or (as the case may be) has given in evidence a statement made by the accused, and

(b) prima facie evidence is adduced that the accused was subject to torture, to inhuman or degrading treatment, or to any violence or threat of violence (whether or not amounting to torture) in order to induce him to make the statement,

then, unless the prosecution satisfies the court that the statement was not obtained by so subjecting the accused in the manner indicated by that evidence, the court shall do one of the following things, namely-

(i) in the case of a statement proposed to be given in evidence, exclude the statement;

(ii) in the case of a statement already received in evidence, continue the trial disregarding the statement; or

(iii) in either case, direct that the trial shall be restarted before a differently constituted court (before which the statement in question shall be inadmissible).

(3) It is hereby declared that, in the case of any statement made by the accused and not obtained by so subjecting him as mentioned in subsection (2)(b) above, the court in any such proceedings as

are mentioned in subsection (1) above has a discretion to do one of the things mentioned in subsection (2)(i) to (iii) above if it appears to the court that it is appropriate to do so in order to avoid unfairness to the accused or otherwise in the interests of justice.

(4) This section does not apply to a summary trial.

Although the new Section 8 appears to broaden the range of conduct which makes confessions inadmissible by adding specifically "violence or threat of violence" as a ground for exclusion, the difference is more apparent than real. Clearly the new provision would strike at the "certain roughness of treatment" which the European Commission regarded as acceptable in the Greek Case and which Lord Justice McGonigal was prepared to accept in R v McCormick and Others, but the Courts themselves had already prohibited violence in R v O'Halloran. [11] It has also been pointed out that the new Section 8 leaves some important issues unresolved, notably whether and to what extent it precludes psychological or mental pressure on the accused. [12] Another unresolved issue is the effect of threats of violence against third parties (such as members of the accused's family).

With all due deference to Lord Gardiner and Sir George Baker, the present writer, being a Scot and used to the broad application of judicial discretion in many contexts, finds it difficult to

understand what purpose is served by placing this discretion on a statutory basis. The Northern Irish courts had quickly held themselves to retain their discretion to exclude statements and had exercised that discretion in a wise and careful way, treading the delicate line between allowing the common law rules to re-establish themselves by the back door and allowing an unacceptable degree of latitude to the security forces.

It has been argued that the statutory discretion now available to the judges in Northern Ireland is wider that that enjoyed by the English judges under PACE, since in the former case the court may exclude the statement "if it appears to the court that it is appropriate to do so in order to avoid unfairness to the accused or otherwise in the interests of justice," while under PACE the test is that the evidence "would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it." [13] The present writer is unable to see any material, practical difference between these two provisions. He would submit that if judicial discretion exists at all, it cannot be fettered and exists precisely in order to deal with issues which by their nature do not admit of statutory regulation or otherwise fall outside the provisions of the existing law. As one eminent Scottish judge put it:

> "The purpose of the [common law] discretion is that it should be sufficiently wide and flexible to be capable of being exercised in a variety of

> circumstances that may occur from time to time but which cannot be foreseen." [14]

To attempt to put such a discretion on a statutory footing, other than perhaps simply to confirm its existence, seems a pointless exercise, particularly since the appellate process exists to deal with any unwise or inappropriate use of judicial discretion.

Notes

1. Cmnd 9222 (HMSO 1984). Hereinafter "Baker Report"
2. D. Bonner *The Baker Review of the Northern Ireland (Emergency Provisions) Act 1978* [1984] Public Law 348
3. Baker Report Chapter 4 paras 96-151
4. ibid para 122
5. [1977] NI 105 and [1978] NI 110 respectively, discussed supra.
6. Baker Report paras 192-193
7. ibid paras 308-319
8. ibid para 197
9. ibid para 198
10. The Act is reviewed by J.D. Jackson in [1988] 39 NILQ 103
11. Discussed supra
12. Jackson op cit note 10 supra
13. ibid
14. R v Sang (1979) 2 All ER 1222 per Lord Fraser at p1241

9.8 The Northern Ireland (Emergency Powers) Legislation - Overview and Conclusions

At the time of drafting this chapter, July 1991, yet another attempt to resolve the problems of Northern Ireland has come to naught with the failure of the so-called "Brooke Initiative". The Loyalist paramilitary organisations have called off a ceasefire which they had called during the talks and I.R.A. bombs have recently been planted in Preston and London. The situation is both familiar and depressing, as is the realisation of the extent to which political violence and its consequences has become a part of normal life for many of the population in Northern Ireland. It is difficult for an outsider to understand what lies behind the troubles and it is even more difficult to imagine where a solution is likely to be found. It is clear that legislation to deal with terrorist violence is going to be required for the foreseeable future.

It has been pointed out, rightly, that there is an inherent illogicality in trying, on the one hand, to deal with terrorists as common criminals and, on the other hand, providing special powers and rules for use in terrorist cases and the Northern Ireland (Emergency Provisions) Act 1987 is a further step towards the assimilation of terrorism legislation and "ordinary" criminal procedure. How much further this process of "normalisation" can go is unclear.

Although subject to considerble criticism, much of it politically motivated, the Diplock Courts appear to have operated in a reasonably successful manner and when compared with the alternative of internment are much the lesser of two evils. Such courts appear to comply with the minimum standard laid down in Article 6 of the European Convention on Human Rights and they are regarded as sufficiently fair to warrant extradition by courts in the United States and the Irish Republic. Even Dermot Walsh has to admit, albeit grudgingly, that there would be significant problems in returning to trial by jury. [1]

The absence of a jury is not significant in many cases because the defendant pleads guilty. Moreover in a trial before a jury the admissibility of a disputed confession normally falls to be determined by the judge before the matter reaches the jury. Although allegations of "case hardening" have been made against the Diplock courts, no such allegations have ever been proved.

The special rules on admissiblity of confessions appear to have, in the words of Hogan and Walker, "attained their objective of feeding sufficient evidence into the court system without reliance on witnesses" and this has been achieved without either official resort to treatment contrary to Article 3 of the European Convention or abrogation of the minimum standards of legal process under the Convention. [2] There has, however, been a cost. While one can dismiss the description of Section 8 as "one of the most mischievious and humanly degrading [provisions] ever

to appear in the criminal legislation of any country" [3] as both extravagant and inaccurate, if not downright foolish, there can be no doubt that the reputation and standing of the security forces, courts and state were damaged particularly during the 1970s.

However, if one lesson is to be learned from the experience of Northern Ireland it is the danger of the complacent assumption that savage brutality by the forces of law and order in the interests of obtaining evidence and intelligence "couldn't happen here". It could and it did. While the situation in Northern Ireland is complicated by historical and cultural factors absent elswhere in Britain, the experiences of the early 1970s show beyond peradventure the need for the supervision, whether by electronic means or otherwise, of what takes place in police stations. It appears that the law in Northern Ireland has now, after a very shaky start, reached a reasonable, and above all practical, compromise between the need to take dangerous terrorists out of circulation and the need to protect civil liberties. As far as the present writer is aware, the critics of the Emergency Powers legislation have never been able to suggest any real alternative to the test of "torture or inhuman or degrading treatment" which does not involve a real risk of a return to the situation in the early 1970s when it was clear that the common law test of voluntariness was found wanting.

Notes

1. *The Use and Abuse of Emergency Legislation in Northern Ireland* p100

2. *Political Violence and the Law in Ireland* p119
3. B.J. Narain *Public Law in Northern Ireland* (1975) 195

9.9 Recent Developments

(1) The Criminal Evidence (Northern Ireland) Order 1988

Apart from the brief description of the legal position prior to 1973, the whole of this chapter has been devoted to matters directly concerned with the emergency situation in Northern Ireland. The general criminal law of the Province was little affected by the emergency provisions, and indeed remained virtually untouched throughout the entire period. However recent developments have brought about major changes in the general law, which in the case of the Criminal Evidence Order may owe more to expediency than anything else and it is now proposed to turn away from terrorism *per se* and consider these changes.

As previously discussed, Section 16 of the 1973 Act (later Section 18 of the 1978 Act) brought about a fairly modest restriction in the right to silence by requiring a person to answer questions concerning his identity and movements and what he knows about any recent explosion or other recent incident endangering life or concerning any person killed or injured in any such explosion or incident. Apart from this, the emergency legislation had virtually no effect on the right to silence which was broadly similar to the pre-PACE English position. It would appear that the Northern Irish judges tended to refrain from making adverse comments to juries about the failure to testify and also from drawing adverse inferences in cases where they sat as a tribunal of fact. [1]

It is therefore somewhat surprising that the most drastic curtailment of the right to silence in the United Kingdom was brought about not specifically in the context of terrorism, but rather in the context of the reform of the general Northern Irish law of criminal evidence and procedure. The Criminal Evidence (Northern Ireland) Order 1988, [2] which pre-dated the report of the (English) Working Group on the Right of Silence, effectively abolished the right to silence in all criminal proceedings in Northern Ireland. The suggestion has been made [3] that the operative factor in the decision to move on the right to silence in Northern Ireland was the upsurge in terrorist violence in the summer of 1988.

In any event, whatever the reason for it, this major change in the law was brought about not, as one might have expected, by lengthy and detailed consideration and parliamentary debate but by an Order in Council introduced in parliament as a "reserved matter" under Schedule 3 of the Northern Ireland Constitution Act 1973. [4] The Order, which was not preceded by a proposal, progressed from draft to law in the startling period of three and a half weeks. One effect of this procedure was that the Order had to deal with the general criminal law since legislation relating specifically to terrorism would have required a Bill in Parliament.

The government claimed that the proposals in the Order were brought forward only after the most careful thought. Their

position was explained by the Secretary of State in the following terms:

> "For some time the government has been reviewing the law on criminal evidence in Northern Ireland in the light of the grave challenge from continuing terrorist violence and from other serious crime, particularly racketeering. They have had before them a formidable body of persuasive evidence for change, including the acknowledged difficulties faced by the police in bringing to justice hardened, professional criminals, often assited by able legal advisers, who are thoroughly trained in resisting police questioning, and in the case of terrorists, who even publish in their news sheets detailed instructions on techniques for resisting questioning under the heading 'Whatever you say, say nothing'. ... These practices are now widely recognised and imitated throughout the criminal elements in Northern Ireland." [5]

Later in the debate Mr King added:

> "... I was asked whether I have any figures. The R.U.C. informs me that of all those detained for questioning in connection with serious crimes, including terrorist offences in Northern Ireland, just under half refuse to answer any substantive

questions while in police custody. Many of those people will not answer any questions. It is clear that in too many cases justice is being thwarted."[6]

The legislative procedure adopted, as well as the terms of the Order, received a sharp response from the Standing Advisory Commission on Human Rights, a body established by law to advise the Secretary of State on matters relating to human rights in Northern Ireland.[7] The Commission were disturbed that they had not been consulted and had only learned of the publication of the Draft Order through the media. They were concerned that the Draft Order had been laid before the Home Office Working Group (on which the Northern Ireland Office was represented) had reported. They were particularly concerned at the fact that the matter had not been dealt with by Bill.[8] After calling on the government to publish the figures claimed to justify their position, the Commission observed:

> "If the purpose of the inference provisions is principally to deal with terrorist finances and the 'wall of silence' encountered in interrogating persons suspected of terrorist offences, then, as 'provisions for dealing with terrorism or subversion' are 'excepted' matters for the purpose of the Northern Ireland Constitution Act 1973, it would in our view be appropriate for Government to proceed by Bill. We note here that the Prevention

of Terrorism (Temporary Provisions) Bill was laid before Parliament in November 1988. The Bill contained provisions concerned with terrorist funds and withholding information which might be of material assistance in preventing acts of terrorism and apprehending terrorist offenders. Arguably, the Bill could have been a vehicle for introducing inference provisions. This would not have precluded use of the Order procedure for amending the general criminal law of Northern Ireland, which is a 'reserved' matter under the 1973 Act, should this have been thought desirable *following full consultation in light of the conclusions of the working party.* In all the circumstances, the doubt remains that the Order procedure without a Proposal was used so as to minimise the opportunity for public debate." [8]

The Commission discussed at some length the reports of the CLRC and the RCCP and noted the difference of views. Their own conclusion was stark:

"These differing views of the CLRC and a majority or the RCCP underscore our point that the decision to lay the Draft Order before Parliament *before the working group had reported* to the Home Secretary was a mistake. In our opinion this

> decision will not have helped maintain confidence in Northern Ireland's administration." [3]

Broadly stated, the Order permits the drawing of adverse inferences from silence in four basic situations: where the accused on being questioned or charged fails to mention any fact relied on in his defence; where the accused fails without good reason to give evidence at his trial; where the accused fails to account for any object, substance or mark on his person, clothing or footwear or otherwise in his possession or in the place where he is arrested; and where the accused fails to account for his presence at a place at or about the time an offence was committed. In all cases as well as drawing an adverse inference the court may treat the accused's failure or refusal as, or as capable of amounting to, corroboration of any evidence given against him in relation to which his failure or refusal in material.

Article 3 of the Order allows the court when deciding *inter alia* whether there is a case to answer or whether the accused is guilty of the offence charged to have regard to evidence that the accused

> "(a) at any time before he was charged with the offence, on being questioned by a constable trying to discover whether and by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings; or

(b) on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention any such fact, being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed as the case may be... "

A new form of police caution has been introduced:

"You do not have to say anything unless you wish to do so but I must warn you that if you fail to mention any fact which you rely on in your defence in court, your failure to take this opportunity to mention it may be treated in court as supporting any relevant evidence against you. If you do wish to say anything, what you say may be given in evidence. [19]

Article 4 permits the drawing of inferences from a failure by the accused to give evidence at the trial. Under Article 4(2) the court must warn accused persons of the effect of a refusal to testify and the following terms have been approved by the Supreme Court Judges:

"The court, as it is required to do by law, is about to call on you to give evidence in your own defence. I am also required by law to tell you that if you refuse to come into the witness box to

be sworn or if, having been sworn, you refuse, without good reason, to answer any question, then the court (or the jury) in deciding whether you are guilty or not guilty may take into account against you to the extent that it considers proper your refusal to give evidence or to answer any questions and [if relevant] your refusal may also be regarded by the court (or the jury) as corroboration of the evidence given against you. I now call upon you to come to the witness box to be sworn and to give evidence in your defence." ''

Article 4(5) specifically provides that the article does not render the accused compellable to give evidence on his own behalf, but it scarcely needs to be said that there will be considerable pressure on the accused to testify. While inferences may not be drawn if the accused fails to testify "for good cause" Article 4(6) provides that any refusal shall be taken to be without good cause unless the accused is entitled to refuse to answer by virtue of any statutory provision or on the ground of privilege or unless the court in the exercise of its general discretion excuses him from answering.

It would also appear that the prosecution may now comment on the failure of the accused to testify since Article 4(10) repeals the prohibition on prosecutorial comment formerly contained in

Section 1(b) of the Criminal Evidence (Northern Ireland) Act 1923. [12]

Under Article 5 an adverse inference may be drawn if the accused fails to account for the presence on his person, clothing or footwear "or otherwise in his possession" or in any place in which he is at the time of his arrest "any object, substance or mark or ... any mark on any such object". There are certain provisos before inferences may be drawn. A constable must "reasonably believe" that the presence of the object, substance or mark may be attributable to the accused's participation in the commission of an offence, the constable must inform the accused of his belief and he must request the accused to account for the presence of the object, substance or mark.

Article 6 makes a similar provision, and applies the same provisos, where the accused fails to account for his presence, having been found by a constable at or about the time the offence for which he was arrested is alleged to have been committed and the constable "reasonably believes" that the accused's presence at that place and at that time may be attributable to his participation in the commission of the offence.

Articles 3 and 4 clearly owe their origin to the Eleventh Report of the CLRC [13] but Articles 5 and 6 are apparently based on Sections 18 and 19 of the Criminal Justice Act 1984 of the Irish Republic. It would appear that in the Republic these powers have

not been used and it is also noteworthy that they were enacted there for a limited period of four years and would cease to operate at the conclusion of that period unless there was a resolution of each House of the Irish Parliament that they should continue in operation. [14]

It would appear that the Standing Advisory Committee on Human Rights was not the only body to be unhappy with the Criminal Evidence Order. A certain amount of information has "leaked" which suggests that the Northern Irish judges were a great deal less than enamoured of it. [15]

In court judicial reaction to the 1988 Order has been cautious and it has been common for judges to comment that they are not prepared to use Article 4 to bolster up a weak case and this has occurred in some cases involving possession of firearms and explosives where the defendant has remained silent both before and at the trial. The view has been taken by certain judges that before an adverse inference can be drawn the weight of the prosecution evidence should be "just ... on the brink of the necessary standard of proof." [16]

On the other hand, in one case where the accused had made a qualified admission to the police but refused to give evidence the judge took the view that the refusal to give evidence and to give substance to the exculpatory part of his admission entitled the court to discount that part of the admission. [17]

In certain other cases, including the infamous murder of the two army corporals, the courts appear to have used inferences in a manner closer to that presumably intended by Parliament. [18]

The present situation with regard to the drawing of inferences from silence is unclear although it is apparent that the order has not had the dramatic effect which the government had hoped. The Order has only been in force for some two years and as yet there has been no opportunity for guidance from the Court of Appeal. J.D. Jackson suggests that the courts have to decide whether, on the one hand, the Order "licences drawing whatever inferences are logically tenable from silence". In this case, while caution could still be advocated there would be no need for restrictions such as the "on the brink" standard. On the other hand, Jackson suggests, the view might be taken that since the Order did not specifically abolish the right to silence, the right should still be taken into account as a legal principle and that whatever the logic of the situation it should not be legally proper to draw inferences unless the prosecution evidence is on the brink of the necessary standard.

Jackson also suggests that the Order is neither fair nor effective in achieving the end of encouraging those suspected of terrorist activity to answer questions when there was not enough evidence to convict them. It is not fair because the cautions that are to be given induce criminal suspects to respond to questioning at a stage when a reliable record may not be able to

be produced of what they have said and when there may be no evidence against them. It is not effective because the persons to whom it was intended to apply are the very people who will wait to see how judicial attitudes develop and in the absence of any guidance on what matters may be taken into account in determining what inferences "appear proper" it is still open to the triers of fact to take account of the right to silence.

The present writer respectfully agrees with Mr Jackson's view and would add that as well as being ill-conceived and obscure the Order smacks of pandering to police lobbying without any real thought being given to the consequences. Further judicial decisions, and in particular decisions of the Court of Appeal, must be awaited before firm conclusions can be drawn, but in the meantime, as Jackson neatly puts it:

> "The right of silence has been regarded as a sacred cow, but the lesson for those who view abolition or curtailment of the right as a panacea for the conviction of offenders is that they may be just as guilty of putting their faith in a sacred cow." [19]

Notes

1. J.D. Jackson *Curtailing the Right of Silence; Lessons from Northern Ireland* [1991] Crim LR 404 at p410. Hereinafter cited as "Jackson, *Curtailing*"
2. S.I. 1988 No.1987
3. J.D. Jackson *Recent Developments in Criminal Evidence* [1989] NILQ 105 at 108. Hereinafter cited as "Jackson, *Developments*"
4. For an explanation of the complex concept of "reserved" and "transferred" matters and their import see B. Dickson *The Legal System of Northern Ireland* (Belfast, 1984) p32 et seq
5. H.C. Deb vol 140 Col 183, 8 November 1988

6. ibid Col 187
7. Fourteenth Report 1987-89, H.C. Paper 394 (HMSO, 1989) pp9-19 and Appendices A and B
8. Report para 13, Emphasis in original.
9. Report para 18, Emphasis in original.
10. Jackson *Developments* p112
11. Jackson *Curtailing* p410 n26
12. Jackson *Developments* p115
13. Cmnd 4991 discussed supra
14. The Irish Act and its history is the subject of a note by P. McEntee and O. McGuinness published as Appendix A to the Fourteenth Report of the Standing Advisory Committee on Human Rights
15. See The Independent December 28 1988
16. Jackson *Curtailing* p410
17. Gamble and Others unreported 1989 quoted in Jackson *Curtailing* at p411
18. Jackson *Curtailing* pp411-412
19. Jackson *Curtailing* p415

(11) The Police and Criminal Evidence (Northern Ireland) Order 1989

The above Order has introduced into Northern Ireland virtually the same regime as was introduced in England and Wales by PACE and its associated Codes are in very similar terms to the revised English versions. Since PACE has already been discussed earlier in this work, [1] a few brief supplementary comments will suffice.

The provisions in the Order relating to the treatment of persons in custody are practically the same as under PACE although the definition of a "solicitor" is restricted to a person qualified to practice under the Solicitors Act 1974 or the Solicitors (Northern Ireland) Order 1976 and there is no provision for the establishment of duty solicitor schemes. [2]

Persons detained under the Prevention of Terrorism (Temporary Provisions) Act 1989 are excluded from the PACE regime. However such persons are subject to the safeguards under the Northern Ireland (Emergency Provisions) Act 1987 which provides rights of intimation and access to legal advice broadly similar to those provided under the Order.

In relation to confession evidence, Articles 74 and 76 of the Order are the equivalents of Sections 76 and 78 of PACE respectively. However neither of these Articles applies in relation to scheduled offences. Article 74 has no effect "in

relation to criminal proceedings to which Section 8 of the Northern Ireland (Emergency Provisions) Act 1978 applies" and Article 76 does not affect the admissiblity of a statement under Section 8 of the 1978 Act.

The net result is that the Northern Ireland courts will have to continue to apply different tests of admissiblity depending on whether they are dealing with scheduled or non-scheduled offences although in practical terms the differences are slight. [3]

Notes

1. supra, particularly chapters 6.6, 6.7, 8.2 and 8.3
1. T. Gibbons *Questioning and Treatment of Persons by the Police* (1989) 40 NILQ 386 at 399
2. See generally D. Birch *The Evidence Provisions* (1989) 40 NILQ 411 especially pp412-413 and 427-429

Chapter 10 Inquisitorial and Adversarial Systems - A Comparative View.

10.1 Introduction

The procedure followed in the criminal courts of the western countries is conventionally divided into two types, inquisitorial and adversarial. This division, although convenient, is never absolute (and is probably overrated anyway) since every legal system displays some characteristics of both types of procedure. Indeed one respected French commentator, A. Esmein, claims "mixed" procedure, in which he includes the procedure of his own country, as a third distinct system. [1] More recently the suggestion has been made that the appropriate terms are "adversary" to denote the Anglo-American model and "non-adversary" to denote the continental European one. [2]However in this work the traditional nomenclature is retained and the modern systems are referred to as inquisitorial or adversarial and it is accepted that they will be only predominantly of the one type or the other.

The essential difference between the two systems is, as Lord Devlin has pointed out, apparent from their names - adversarial procedure is a trial of strength, inquisitorial is an inquiry:

> "The question in the first is: are the shoulders of the party on whom is laid the burden of proof ... strong enough to carry and discharge it? In

> the second the question is: what is the truth of the matter?" [3]

The traditional view is that under inquisitorial procedure the inquiry is a continual process. There is, at least in the case of serious crimes, supervision of the investigative process by a judicial official who is responsible for the preparation of a *dossier* embodying the results of his inquiries, including the questioning of the accused and the witnesses, which is then used as the basis of the case at the trial stage. The trial itself is seen an the culmination of the investigation and it follows that the judge will be "in the driving seat" to a much greater extent than his adversarial counterpart, assuming responsibility for the calling and questioning of the witnesses in a way which is entirely alien in adversarial procedure.

The French system is, despite Esmein's view, often regarded as the classic model of modern inquisitorial procedure, and indeed the French *Code d'Instruction Criminelle* of 1808 was the prototype for the rest of the continent.

Under adversarial procedure, the trial is the centrepiece and everthing that goes before it is a preparation for the battlefield. The preparation and presentation of evidence lies with the parties and the judge acts as a neutral referee in a contest. He has little or no concern with the evidence-gathering process and will generally know nothing about the case other than

the evidence which the parties lead before him, his right to call or examine witnesses on his own initiative being very limited.

Modern English procedure is almost wholly adversarial, while Scottish procedure is adversarial at the trial stage but displays definite features of inquisitorial methods, particularly judicial examination and the practice of the Procurator Fiscal, the public prosecutor, conducting a confidential investigation in serious cases culminating in the submission of a "precognition" to Crown Office before a case is indicted.

The earlier discussion of the proposals for the interrogation of suspects before a neutral third party [4] leads naturally to a consideration of the inquisitorial system of procedure. Even though there may be no foreseeable prospects of the wholesale introduction of continental methods into British courts, the growing importance of the European dimension, as well as the outcry which followed the Guildford and Birmingham scandals, means that such method should not be ignored. Indeed, on the contrary, they should be examined to see what lessons can be learned. The writer would, however, recall the cautionary note sounded earlier in this work - a system which works well in one country will not necessarily work equally well when exported.

Outside continental Europe, the French system is the best known, and the best documented in English. The German system, although stemming from a common root with the French has atypical features

of its own which render it less suitable for comparative discussion, particularly the abolition in 1975 of the *Untersuchungsrichter*, the office equivalent to the French *juge d'instruction*, the latter being one of the most characteristic and widely discussed elements in modern inquisitorial procedure. Germany law also has the so-called *LegalitÄtsprinzip* or "principle of legality" whereby the German public prosecutor "is obligated, unless otherwise provided by law, to take action against any activities which may be prosecuted ... to the extent that sufficient factual particulars may be obtained." [5] Accordingly in this chapter the model is largely the French system.

In preparing an analytical model for the purpose of comparing four highly disparate systems of procedure, B.J. Ingraham makes the pertinent point that despite their diversity all the systems of procedure share the same essential skeletal structure comprising intake, screening, charging the accused and safeguarding his rights, adjudicating, sanctioning, and appeal. Nonetheless there are important practical and philosophical differences and differences of emphasis between the two types of procedure, not least in the position of the accused and the manner in which the court may treat him. Inquisitorial systems emphasise abstract truth and substantive justice, believing that justice is impossible without the truth. Adversarial systems on the other hand stress the autonomy and dignity of the litigant (even if he is morally in the wrong) and insist on a fair fight

under procedural rules that are so devised that there is a fair distribution of wins and losses regardless of merit. [6]

However it has been argued that the theory is becoming increasingly separated from the reality, that there is in fact very little difference between modern inquisitorial and adversarial systems and in particular that the notion of judicial supervision of the investigative process is a myth. Although this point of view had previously been advanced [7] its clearest and most unequivocal statement was by Goldstein and Marcus in 1978.[8] Their views received a sharp response from Langbein and Weinreb, [9] and a detailed refutation from Volkmann-Schluck. [10] Goldstein and Marcus can rightly be criticised for at least apparently assuming "that the French *procureur* and German *Staatsanwalt* are simply district attornies who speak a foreign language; that the French *police judiciaire* and the German *Polizei* are just the homicide squad of an American city dressed in different uniforms; that the *juge d'instruction, the Richter* and the American trial judge are, beneath the robe, one and the same." In particular they seem to miss the vital point that the continental prosecutor will be a person of judicial status who, as a state official, will be expected to be neutral and bound to ascertain not only incriminating but also exonerating circumstances.

Nevertheless, Goldstein and Marcus's essential thesis, that in France and other continental countries ordinary criminal matters are routinely investigated only by the police and that

prosecutorial decisions usually rely entirely on evidence gathered by the police, has not been convincingly refuted. Indeed, Scottish practice would appear to offer support to their thesis since, despite the theoretical supervision of the police by the Procurator Fiscal, the vast majority of summary complaints are initiated on the basis simply of a police report with no further inquiry. ''

The views of Goldstein and Marcus are also to an extent supported by two English writers, Lidstone and Early, who, in an article written before the passing of PACE, attributed the erosion of the distinction between adversarial and inquisitorial methods to the activities of the police:

"In fact it is arguable that the patterns of policing are the same in either system and it is police practices which shape or change the shape of the system producing a different system in practice whether in theory it be accusatiorial or inquisitorial. It follows that both systems are converging, following a similar pattern of police illegalities being condoned by and absorbed into the system despite running counter to central elements within those systems. In both systems the single most important pressure producing change is the need to interrogate suspects and the increasing recognition of this need by the judiciary and/or the legislature which facilitates

> interrogation by the police by granting greater powers of detention or arrest for questioning and allos the police to exert a measure of autonomy from judicial supervision." [12]

The authors argued that various developments in France in the early 1980s, together with the power of detention under Section 2 of the 1980 Act in Scotland and the general erosion of suspects rights in England before PACE

> "may cause us to consider whether the label 'accusatiorial' or 'inquisitorial' has any meaning at the pre-trial stage and to ask whether the right to silence, although in theory defined differently in those systems, does not also in practice converge so as to mean as little to the accused whatever his nationality and however one describes the system into which he is drawn."

It is a simple and inescapable fact that whatever provisions are made in Codes or statutes, the initial investigation of criminal matters, (if not the entire inquiry) will, in all procedural systems of which the writer is aware, be carried out by the police.

This aspect will be considered further later but before doing so, the modern French system and its historic development will be described.

Notes

1. A. Esmein *A History of Continental Criminal Procedure* (trans Simpson) (London 1914) p11. See also K.W. Lidstone and T.L. Early *Questioning Freedom; Detention for Questioning in France, Scotland and England* (1982) 31 ICLQ 489
2. See T. Volkmann-Schluck *Continental European Criminal Procedures; True or Illusive Model* (1981) 9 Am J Crim L 1 at 3
3. *The Judge* (Oxford, 1979) p54
4. supra chapter 8.4
5. For a comprehensive discussion see H-H Jescheck *The Disretionary Powers of the Prosecuting Attorney in West Germany* (1970) 18 American Journal of Comparative Law 508
6. B.J. Ingraham *The Structure of Criminal Procedure* (New York, 1987) pp.24 & 25
7. S. Hrones *Interrogation Abuses by the Police in France - A Comparative Solution* 1969 Crim LQ 68
8. A.S. Goldstein and M.Marcus *The Myth of Judicial Supervision in Three "Inquisitorial" Systems; France, Italy and Germany* (1978) 87 Yale LJ 240
9. J.H. Langbein and L.L. Weinreb *Continental Criminal Procedure; "Myth" and Reality* (1978) 87 Yale LJ 1549 at 1550
10. op cit note 2 supra
11. S Moody and J Tombs *Prosecution in the Public Interest* (Edinburgh, 1982)
12. Lidstone and Early op cit note 1 supra at p489

10.2 The Development of the French System of Inquisitorial Procedure

(1) Early History and the *Ordonnance Criminelle* of 1670[1]

Adversarial procedure is known to have developed earlier than inquisitorial, and it certainly existed in a fairly sophisticated form in Republican Rome, involving popular accusation and oral, public proceedings before courts consisting of a presiding praetor and between 32 and 75 jurymen who rendered the decision when the speeches of the parties had been completed and all the evidence was in. The exact details of the procedures followed are not entirely clear, and there was never a general system of criminal procedure since each law contained special provisions relative to the formal accusation, the proof and the prosecution of the particular crime concerned. However it appears that there was considerable concern for the defence of the accused, and there was nothing calculated to bring about a confession. Esmein suggests that even where the accused confessed in open court there still had to be a trial before judgment could be entered against him. Although under certain conditions a slave might be tortured, a freeman could not.

Although Roman procedure always remained predominantly adversarial, even to the time of Justinian, inquisitorial elements began to develop under the emperors. As Esmein puts it, inquisitorial procedure "agrees with a centralising and despotic power." The judge had to take a more active part in the

discovery of the truth, the accused was now subjected to torture and the examination by the magistrate was now directed more towards the procuring of a confession.

With the decline in liberty and the emergence of imperial despotism, Roman adversarial procedure began to decay and eventually matters degenerated to the point where the system of popular prosecution became little more than legalised blackmail. Such strong measures had to be taken against professional accusers that all private complaints were effectively discouraged and official involvement in the discovery of crime increased greatly.

Up to the thirteenth century, procedure throughout Europe, including England, remained primarily adversarial in nature. However, from the latter part of that century, inquisitorial procedure as a system in its own right began to spread through the Continent. The system can be said to have begun in Canon criminal procedure in 1215 when Innocent III persuaded the Lateran council to make modifications in Church procedure, which until then had been modelled on early Roman adversarial methods. After 1215 it became the duty of the judge to make a secret investigation of the facts in every case in which he received a complaint that an offence had been committed and also in every case in which there were rumours that an individual subject to the ecclesiastical courts had committed a crime. The accused could be examined in secret and on oath and he did have a limited

opportunity to defend himself since the names and depositions of the witnesses (who would also be examined on oath) were communicated to him. If the judge's investigation indicated that the accused was guilty, he could be punished.

Inquisitorial procedure was first introduced into lay courts in Northern Italy and from there it spread to France, Germany and other European courts, England alone avoiding its advance. By the sixteenth century, adversarial procedure was, for practical purposes, extinct in Continental Europe.

Esmein identifies the two predominant features of inquisitorial procedure at this time as (a) the secret inquiry to discover the culprit and (b) the employment of torture to obtain his confession. As noted above, the use of torture to extract confessions had begun in the Roman Empire. It underwent a revival at the end of the twelfth century when it began to replace ordeals as a method of proof. By the end of the fourteenth century torture for this purpose had become general practice and virtually a fundamental institution of inquisitorial criminal procedure

There were also a number of other typical features. Detection and prosecution were both performed by the state. The character of the judge had shifted from that of an arbiter chosen by the parties to a representative of the ruler with an exclusive right to administer justice. The judge was not limited to deciding on

evidence laid before him by the parties . He proceeded with the inquiry of his own accord and following certain rules. In other words, within the limits set by the law, it was the function of the judge to search for evidence and the inquiry was not a confrontation between two parties. To quote Esmein again, "The open duel between accuser and accused is replaced by the insidious attack of the judge."

Inquisitorial procedure also produced the idea of the right of appeal to a higher judge and led to the system of legal proofs, both seen as counterbalancing the powers of the judge. In the case of legal proofs, the judge could not convict unless he had before him certain kinds and quantities of evidence, but on the other hand, if he did have such evidence before him he was required to convict, irrespective of his personal opinion.

In France inquisitorial procedure was enacted into law by *ordonnances* in 1498 and 1539 and definitively codified by the *Ordonnance Criminelle* of 1670. Although this latter statute is one of the greatest watersheds in European criminal procedure, it legitimised the continuation of practices of quite horrifying barbarity. A trial court which was in doubt about its verdict could order the "preparatory" torture of an accused. "In the perplexity in which judges find themselves, when they see very strong presumptions against the accused, and when all the means of proof are exhausted, they are driven to the resource of the preparatory torture." The *Ordonnance* did restrict this power

somewhat, Title XIX, Article 1 provided that the *corpus delicti* must have been established and there must have been "considerable proof". If the accused did confess under torture he had to be interrogated again, without torture, to see if he stuck to the confession. There were also provisions permitting appeal and preventing the repetition of torture. On the other hand the system of torture "under reservation of proofs" was allowed to continue. Under this system, in effect, an accused who had successfully resisted torture without confessing, and thus could not be convicted of the offence with which he was charged, could again be tortured to justify the infliction of a lesser penalty.[2]

However, the 1670 *Ordonnance* is the ultimate statement of pure inquisitorial procedure and it governed French practice down to the Revolution, some of its elements still being relevant today.

The core of the procedure under the *Ordonnance* was the preliminary phase, the *instruction*. Its object was *de preparer, rechercher, ordonner et composer tout ce qui est necessaire pour parvenir a la condamnation ou a l'absolution de l'accusé*. The whole purpose of the *instruction* was to obtain sufficient evidence in order to satisfy the system of legal proofs, by which, as previously noted, the trial court was required to convict, irrespective of personal opinion, if presented with a sufficient *quantum* of proof. [3]

Offences were usually brought to the attention of the *lieutenant criminel*, as the examining magistrate was then known, either by private individuals or by the *procureur du roi*. Once the *lieutenant* was satisfied that a crime had taken place, he would begin a secret investigation to discover the person responsible. Witnesses were heard secretly and separately and whatever they said would be taken down in writing. During the *instruction* the intersts of the prosecution were represented by the *procureur du roi* who had access to the case papers at any time and who was consulted in all important decisions.

Once the identity of the likely culprit was established, he would be brought before the *lieutenant criminel* for interrogation. This would usually be the first he heard of the accusation against him. The interrogation would be under oath and was one of the most important parts of the entire *instruction*. The *lieutenant* was directed to give special attention to it "in order to obtain the truth through the fog with which the guilty individual seeks to surround it." Moreover, in most cases, the heavier sentences could not be pronounced unless the accused had confessed. The interrogation took place in secret, with only the magistrate, his clerk and the accused being present. The accused was prohibited from consulting counsel at this stage and, in the case of capital crimes, at any other stage of the proceedings. The interrogation could be repeated as often as the *lieutenant* though necessary. The result of the interrogations was reduced to writing.

Once the accused had been interrogated, the witnesses were again brought before the magistrate for *recollement* when their prior depositions would be read to them and they would be asked if they persisted in their testimony or had anything to add or change. After *recollement*, the accused would be confronted with the witnesses and the *lieutenant* would read the depositions to the accused in the witnesses' hearing. This was the accused's only chance to object to the witnesses or their depositions, although witnesses were unlikely to change their evidence after *recollement* since they would then be liable to proceedings for perjury.

Once the preliminary procedure was finished, the case was said to be *instruit* and in theory it passed from the hands of the *lieutenant criminel* to the *procureur du roi* for any final motion he might make, and then to the reporting judge whose duty it was to analyse the proceedings and exhibit the results to the trial court. In practice, however, cases were frequently reported by the *lieutenant* himself which, of course, meant that the accused was left entirely at the mercy of the magistrate who had conducted the entire investigation and without the benefit of any impartial evaluation of the results of the *instruction*.

Under the system of legal proofs there was, as Ploscowe puts it, no life in the trial procedure. Apart from a final interrogation of the accused by the presiding judge, the trial court neither saw witnesses nor heard evidence. All it was required to

determine was whether the evidence gathered during the *instruction* satisfied the legal requirements of a complete proof. If it did the judges were required to convict the accused. If the requirements for a complete proof were not satisfied, but the evidence was nonetheless substantial, the accused might, as already noted, with some very limited safeguards, be subjected to "preparatory" torture with a view to extorting a confession.

Notes

1. See generally A. Esmein (trans. Simpson) *A History of Continental Criminal Procedure* (London, 1913), M. Ploscowe *The Development of Present Day Criminal Procedures in Europe and America* (1935) 48 Yale LJ 433
2. See Esmein op cit note 1 supra p234-236
3. For the development and history of the system of legal proofs see Esmein op cit note 1 supra Chapter III

(ii) Criticisms and Reforms of the 1670 Procedure [1]

Although the 1670 *Ordonnance* had, as Esmein points out, the vital but incidental benefit of furnishing a solid foundation for criminal law, laying a basis for learned commentaries and making a scientific study of criminal procedure a possibility, it is hardly surprising that the procedure outlined in the previous section produced appalling miscarriages of justice and began to attract criticism and adverse comment from philosophers, clerics and sometimes from judges themselves. Indeed, criticism of the brutality of the procedure had been voiced shortly after the promulgation of the *Ordonnance*.

Initially, criticism tended to be directed towards the use of torture rather than the inquisitorial system *per se*. By the eighteenth century, however, the whole system was under attack from the philosophers of the age of enlightenment, notably Montesquieu, Beccaria and Voltaire. The secrecy of accusations, the abuse of pre-trial detention, the use of torture and other weaknesses in the system were all condemned.

The reformers sought models for a new and better system and two particular systems attracted attention, that of republican Rome and that of England. For the philosophers the main attraction of the latter system was the use of the jury which determined the guilt or innocence of the accused on the basis of the evidence led before. The public nature of the trial and the idea of

committal proceedings by a grand jury before a person could be brought to trial were also attractive features.

By the late eighteenth century the spirit of reform was abroad and change was inevitable. Preparatory torture was abolished in 1780 and preliminary torture went in 1788. In 1789 the Constitutional Assembly, in anticipation of further reforms, passed a provisional law which *inter alia* required laymen of good repute to assist the investigating magistrate in his preliminary operations prior to the interrogation of the accused and permitted the accused the assistance of counsel who was present at the interrogation of the witnesses and had access to all the documents in the case.

In 1791 English procedure was imported virtually wholesale into France but it was an early example of the unwisdom of attempting simply to import into one country a system which, while operating successfully in its country of origin, was not necessarily suited to conditions elsewhere. Out went the *lieutenant criminel* and the *procureur du roi*, the office of justice of the peace was introduced as was the grand jury and the idea of public jury trial.

Post-revolutionary France was in a state of chaos with disorder and widespread criminality and the new system was unable to provide the necessary repression of crime or social protection and was short-lived. Laws of 1795 and 1801, particularly the

latter, showed a distinct tendancy towards the old methods, resurrecting the *lieutenant criminelle* and his secret examinations as well as the public prosecutor.

Notes

1. See generally Esmein Part II Title II Chapter II

(111) The *Code d'Instruction Criminelle* of 1808

In 1808 there was promulgated the *Code d'Instruction Criminelle* combining elements of the earlier procedure under the 1670 *Ordonnance* and the English procedure introduced in 1791. The *Code* survived virtually intact in France for a hundred and fifty years and was the dominant influence throughout Europe in the nineteenth century.

It had become evident that confessions obtained by the threat or use of force were not freely made and tended to be lacking in trustworthiness, and the reforms now incorporated in the Code had their roots in the desire to avoid any danger of a return to the brutalities of the old procedure, especially interrogation under torture, for the purpose of extracting a confession.

The Code also provided that the accused could no longer be required to take the oath and to answer questions, and since there were no longer any effective legal means of forcing an accused to answer questions, the Code effectively gave the privilege against self-incrimination. [1]

Esmein, who, as already noted, considered the 1808 French system to be "mixed" rather than inquisitorial, lists its main characteristic features:

1. Accusations must now be made by a special functionary, a public prosecutor acting in the name of the state; judges can no longer take cognisance themselves of criminal denunciations by secret informers,

2. The judgment is rendered by magistrtates and/or lay jurors.

3. The proceeding is divided into two stages: the first, the preliminary investigation, is entrusted to an investigating magistrate (the *juge d'instruction*) and results in an official evidentiary record (*dossier*) which becomes the basis of the prosecutor's accusation; the second, the public trial, in which the evidence is presented orally or in documentary form and the defendant is given the opportunity to confront his accusers and to submit evidence of innocence as well as evidence of justification.

4. The system of legal proofs is abolished and replaced with a system of free evaluation of the evidence by the triers of fact, subject to the standard of their being "thoroughly convinced by it" before finding guilt. However, the judge or jury is no longer required to state the evidentiary basis of his or their judgment.[2]

Since 1808 the aim of French procedure has been to lay before the court all the facts concerning both the offence and the person alleged to have committed it so that it may judge the accused.

There are three main steps to achieving this aim:

1. the making of detailed pre-trial inquiries

2. by examining the personality of the accused and

3. by placing the onus of eliciting the evidence at the trial on the judge rather than on the parties to the case.

Great emphasis is laid on the pre-trial inquiries which allow an investigation into anything which may have a bearing on the case. Prosecution is essentially public in nature although the *partie civile* has certain rights to instigate proceedings which are not enjoyed by the victim of a crime in Britain. As in Scotland the vast majority of cases in France are first reported by the police to the public prosecutor who enjoys a broad discretionary power not to prosecute no matter how serious the offence. [3]

There were a number of gradual reforms of procedure from 1897 onwards mainly directed towards strengthening the accused's rights, notably the law of 1897 giving the right to legal representation during the *instruction*, and in 1958 the *Code de Procédure Pénale* was promulgated to replace the 1808 *Code*. It made various alterations of detail, but as far as investigative and trial procedure are concerned, they are still recognisably based on the 1808 model. [4]

At the time when the 1958 *Code* was being considered, the question was raised whether the traditional system should be abandoned. The reasoning behind this suggestion was that although the

Instruction was nominally under the charge of the *Juge d'Instruction* most of the practical work of the investigation was done by specialised officers of the *police judiciare* who disliked any too close supervision of their work by the *juge* and often obtained from him a delegation of powers amounting virtually to a blank cheque. It was suggested that this situation might be regularised by increasing the powers of the police and limiting the role of the *juge* to the judgment of incidents in the course of the *instrucion*. However, this idea was rejected as tending too much towards the adoption of adversarial methods and, on the contrary, the 1958 *Code* increased the control of the *juge* over the police. [5]

More recently the *juge d'instruction* has again been under attack, and in 1985 a law was passed under which his functions would have been performed by a collegiate body of three judges, in order to avoid the inconsistencies, errors and abuses occasionally attributable to individual magistrates. However this law, which would, at the very least, have been highly costly to implement was repealed some two years later without having been brought into effect. [6]

Modern French criminal procedure is complex and a detailed exposition is outwith the scope of this work. However it is noteworthy that depending on the type of procedure followed the accused is liable to be questioned by the police, by the prosecutor *(procureur)*, by the *juge d'instruction* and by the

president of the trial court. Although he cannot be compelled to answer questions, is never placed on oath and has no liability to prosecution for perjury, the accused only enjoys the privilege against self-incrimination and not the wider right to silence as it is has been defined and discussed earlier in this work, since adverse comment may be made and adverse inferences drawn.

Notes

1. M, Pieck *The Accused's Privilege Against Self-Incrimination in the Civil Law* (1962) 11 American Journal of Comparative Law 585,
2. A,Esmein *History of Continental Criminal Procedure* pp,11 & 12, Also B,J, Ingraham *The Structure of Criminal Procedure* pp,31 & 32
3. Sheehan pp41-42
4. J, Patey *Recent Reforms in French Criminal Law and Procedure* (1960) 9 ICLQ 383; A,E, Anton *L'Instruction Criminelle* (1960) 9 American Journal of Comparative Law 441
5. Patey op cit note 4 supra p390
6. R,S, Frase *Comparative Criminal Justice as a Guide to American Law Reform* (1990) 78 California Law Review 539 at 667,

10.3 Modern French Procedure Under the 1958 Code

(1) Preliminary Investigation and Questioning by the Police

(a) General Principles

It should be noted that in France there are two separate bodies of police, the *police judicaire* and the *police administrative*. The *police judiciare* are subject to the control of the *Procureur de la Republique*, although if the *juge d'instruction* is in charge of the inquiry, the *police judiciare* are answerable to him. Within the *police judiciare* there is a further division into *agents* and *officiers*, the latter having much greater powers. Unless otherwise specified, this chapter refers to powers exercised by *officiers* of the *police judiciaire*. In passing it is noteworthy that for certain purposes *officiers* of the *police judiciaire* appear to include such improbable candidates as local mayors and forestry officials. '

Article 14 of the 1958 Code requires the *police judiciaire* to "investigate breaches of the penal law, collect evidence and seek out the perpetrators, even if a judicial investigation has not been opened" and Article 75 requires them to "undertake preliminary investigations either on the instructions of the *procureur* or on their own authority."

In order to avoid falling into the same trap as Goldstein and Marcus, it should also be remembered that the French *procureur* is

part of the magistrature with the status and authority which that entails. [2]

To an outside observer, one of the most striking features of French criminal methods is the paucity of formal rules of evidence, and particularly the absence of anything equivalent to the exclusionary rules in regard to involuntary or unfairly obtained confessions which operate in England and Scotland. All evidence which is reasonably probative, whatever it may be, is admissible in criminal proceedings because for the French there is one supreme proof which overshadows all others and alone decides the issue - the *intime conviction* or profound personal conviction of the judges and jurors.

This principle is set out in Article 353 of the *Code* which requires the president of the trial court to read the following instruction, which must also be posted prominently in the retiring room of the court:

> "The law does not ask an accounting from judges of the grounds by which they become convinced; it does not prescribe for them rules on which they must make the fullness and sufficiency of a proof particularly depend; it requires of them that they ask themselves, in silence and reflection to seek out, in the sincerity of their conscience, what impression the evidence reported against the accused and the ground of his defence have made on

> their reason. The law asks them only the single question, which encompasses the full measure of their duties: 'Are you thoroughly convinced?'"

There is in French law no "legal" evidence as opposed to evidence which would be forbidden and if the court admits all types of evidence it is because each item of proof has value insofar as it produces this personal conviction.[3] In other words if a French court admits evidence which a Scottish court would regard as having been obtained unfairly, it does so on the basis that its probative value is diminished by the manner in which it was obtained. Although the French do not operate what one would regard as an exclusionary rule, they do have an important rule that evidence must be lawfully secured and any evidence secured in breach of the law must be excluded from the judicial hearing under pain of nullity.[4]

Although in France everyone is under a legal requirement to identify himself to the police, France recognises the privilege against self-incrimination in the sense that, apart from matters of identity, a French accused is entitled to remain silent in the face of questioning by the police, the *procureur* and the *juge d'instruction*. However only at the stage of examination by the *juge d'instruction* need the accused be informed that he is free not to make a statement. There would not appear to be anything in French methods equivalent to the police caution in Britain. Instead of the indirect control of an exclusionary rule, French

law, at least in theory, relies on judicial supervision as a means of controlling the police. Historical attachment to the idea of judicial examination of the accused would appear to militate against police attempts to secure a confession of guilt. However, as will be explained, this may well be an illusion.

The general French view appears to be that the procedure of *instruction criminelle*, the "patient preliminary examination of the evidence, which is sifted and studied, heard and reheard, until as far as possible all inconsistencies have been eliminated and until those which have not been eliminated have been thrown into sharp relief" [5] must be conducted, not by the police, but by a person of judicial status. Sheehan comments that French courts are suspicious of confessions made to the police particularly if retracted during the *instruction* or the trial and such will only be regarded as part of the evidence against the accused, the trial court having, in accordance with the principle of the *intime conviction*, complete discretion as to what it makes of the confession. [6]

At the time when the Code of 1808 was framed it would never have occurred to anyone to allow the preliminary investigation of a crime to be carried out entirely by the police who, at that time lacked the independence, impartiality, knowledge of the law, and sometimes even the intelligence necessary for the conduct of the procedure. As in Britain the quality of the police in France has improved enormously since the early nineteenth century, but the

Freench still take the view that in criminal matters, where the liberty of the subject is at issue, the process of investigation should not be left to the police who are *prima facie* unlikely to be impartial, but to a judge whose independence and impartiality are beyond question. The purely investigative functions of the *juge d'instruction* could be taken over by the police, but the police are generally thought to be too anxious to secure convictions and the procedure of *instruction*, involving as it does an independent judicial officer, is seen as shielding innocent persons from over-zealous police interrogation. [7] As previously noted, the possibility of departing from the traditional system and limiting judicial control of the police was considered and rejected at the time when the 1958 Code was under consideration.

Nevertheless the fact remains that when a breach of the criminal law occurs, it will normally be reported in the first instance to the police. The police may, in the course of normal preliminary inquiries, detain in custody persons who, they believe, can help them with their inquiries. There would not appear to be any requirement for "reasonable suspicion" or a similar test. This period of detention, or *garde à vue* may last for up to twenty four hours although it may be extended on the written authority of the *procureur* to a total of forty eight hours. [8] Police brutality and coerced confessions are as strongly prohibited in France as in any other country, and there are detailed requirements for the keeping of careful records of all that

happens during the *garde à vue*. These records form a document known as a *procès-verbal* which will in turn become part of the *dossier*. In addition the accused may request a medical examination which must be granted if the detention is extended beyond twenty four hours. [8]

However good the protection of the accused may be, it does not alter the fundamental point that, as one writer delicately puts it, "There is no doubt that the possibility of detention has some intimidating effect on a person who is faced with a request by the police to give information." [9]

The French police are required to inform the *procureur* "without delay" of offences brought to their notice. Where the matter is a *crime*, the *procureur* is obliged to request an investigation by the *juge d'instruction* and where the matter is a *délit* he has a discretion to do so. [10] This issue is clouded by the possibility that the *procureur* may, with the consent of the accused "correctionalise" serious crimes, ie reclassify *crimes* as *délits*. This is likely to happen because the *procureur* believes that the powers of punishment available in the *Cour d'assises* is disproportionately severe in relation to the seriousness of the offence and that the facts of the case do not justify the elaborate and costly trial procedures of that court. One effect of correctionalisation, whether intentional or not, will be to free the police from the constraints of control by the *juge d'instruction*. In 1980, for example, only 0.4% of all cases

reported to French prosecutors were referred to *juges d'instruction*. [11] This figure alone suggests that Goldstein and Marcus may have been justified in describing pre-trial judicial supervision in France as a "myth". [12] Even allowing for their misinterpretation of the role of the *procureur*, they argue, convincingly, it is submitted, that whether it is a magistrate or prosecutor who conducts the formal investigation, most investigative work will have been carried out by the police before any other official enters the picture, because the police learn about the crime first, are better trained than prosecutors or judges to use the technology of factfinding, and often wish to avoid the formal procedures of the *instruction*. This latter point is thought to be of particular importance in France since it is only when the accused is brought before the *juge d'instruction* that he has any right to legal advice and the right to be told of his right of silence.

Even when the *juge* has begun an investigation, there may not be much supervision of the police. In most cases the *juge* will issue a *commission rogatoire* in favour of a named police officer, authorising him to carry out most of the routine tasks of criminal investigation. Professor Vouin comments "Thus it frequently happens that an examining magistrate, seised of a crime committed the day before, delegates the examination - and hears no more of the crime for several months! This is clearly dangerous for the accused." [13] Under the *commission rogatoire* the police have powers to cite witnesses, to put them on oath and to

require them to testify, a power which is normally otherwise unavailable, although even under a *commission rogatoire* the police may not question a person who has been formally charged.'[14]

If in the course of their inquiries the police discover that the evidence is pointing with force and consistency, *des indices graves et concordants de culpabilité*, towards the guilt of a particular person, they are bound not to question him, or to desist from questioning him further. Thereafter he may only be interrogated by the *juge d'instruction* in person. However, the sole arbiters of when the crucial point arrives appear to be the police themselves, '[15]

In fact the interrogation of a person as a witness under oath, despite evidence which creates a strong suspicion against him, is only wrong if its purpose and result is to evade the rights of the defence. Moreover it has been held that since the *juge d'instrucion* and any official acting by virtue of a *commission rogatoire* from him is under a duty to discover whether the person being interrogated actually participated in the crime being investigated, continuing the interrogation of that person as a witness under oath after he confesses, without formally charging him is not regarded as being for the purpose and with the result of eluding the rights of the defence. '[16]

Even if the police do acknowledge the situation, Anton notes that in practice they will merely advise the suspect of his right

to be brought before the *juge* and will ask him whether he consents to waive his right, which is not infrequently done. Anton observes that while it is possible to argue that this is within the letter of the (1958) Code, it is hardly within its spirit and it can only be justified on the basis of the urgency of police investigations. [17]

Notes

1. Sheehan p19
2. Sheehan p11; for a detailed discussion see R. Vouin *The Protection of the Accused in French Criminal Procedure* (1956) 5 ICLQ 1 at p8 et seq.
3. R.Vouin op cit note 2 supra p15
4. ibid p16; T.E. Towe *Criminal Pre-trial Procedure in France* (1964) 38 Tulane L.R. 469 at 477
5. A.E. Anton *L'Instruction Criminalle* (1960) 9 American Journal of Comparative Law 441 at 442; R.Vouin *The Role of the Prosecutor in France* (1970) 18 American Journal of Comparative Law 483 at 486
6. Sheehan pp27-28
7. Anton op cit note 5 supra p441
8. This power is an example of what Lidstone and Early describe as a "police illegality being condoned and absorbed into the system" (supra p361). Initially it was only available in flagrant offences but the police arrogated to themselves a general power to detain and the position was homologated by the 1958 Code. See J. Patey *Recent Reforms in French Criminal Law and Procedure* (1960) 9 ICLQ 383 at 390. *Garde à vue* is discussed further infra
8a. See generally Towe op cit note 4 supra
9. G.E.P. Brouwer *Inquisitorial and Adversarial Procedures - a Comparative Analysis* (1981) 55 Aust. LJ 207
10. In French law crimes are classified in descending order of seriousness as *crimes*, *délits* and *contraventions*.
11. R.S. Frase *Comparative Criminal Justice as a Guide to American Law Reform* (1990) 78 California Law Review 539 at 614
12. (1978) Yale LJ 240.
13. op cit note 2 supra at p14
14. Anton op cit note 5 supra p446-447; M. Pieck *The Accused's Privilege Against Self-Incrimination in the Civil Law* (1962) 11 American Journal of Comparative Law 585
15. K.W. Lidstone and T.L. Early *Questioning Freedom; Detention for Questioning in France, Scotland and England* (1982) 31 ICLQ 488 at 491-492
16. M. Pieck *The Accused's Privilege Against Self-Incrimination in the Civil Law* (1962) 11 American Journal of Comparative Law 585 at 593
17. Anton op cit note 5 supra at p447

(b) *L'Enquête Flagrante* - a Special Case

In cases which are classified as a *crime* or *délit* and where the offence has been discovered either as it was being committed or having "recently" been committed, there is a procedure known as *L'Enquête Flagrante* which affords wide powers to the *police judiciare* and the *procureur* to investigate the offence as one of urgency and in certain circumstances without the intervention of the *juge d'instruction.* [1]

The procedure known as *garde à vue* has already been mentioned, but under *l'enquête flagrant* the powers available to the police are somewhat greater than in routine preliminary inquiries and in certain limited circumstances the possibility of detention for ninety six hours exists. [2]

A person detained under this procedure is not considered an accused and may be questioned by the *police judiciaire* although he does not appear to be under a legally enforcable obligation to answer questions not related to the issue of his identity. [3] He is not entitled to legal advice or representation during his detention. In order to prevent abuses the *police judiciaire* are required to state in their report the duration of the interrogations and the length of the intervals between them. However there has been a long series of decisions to the effect that procedural irregularities in the *garde à vue*, while possibly

giving rise to criminal or disciplinary sanctions, do not render inadmissible statements obtained as a result. "

This system would, like "correctionalisation", appear to be open to the objection that it invites the *procureur* to delay the involvement of the *juge* in order to allow the police a free run at the suspect. However Sheehan, whose views on the point are more sanguine than certain other commentators, suggests that this criticism is without foundation

> "... bearing in mind the frequent refusal of accused persons to answer the police while giving full explanations to the *juge d'instruction*, the reserve placed by the courts on confessions made to the police, and the general attitude of the *magistrats* of the *Ministère public*. Furthermore, unless substantial incriminating evidence already existed against a suspect it would be pointless for the police to arrest him in the hope of gaining a confession, since failure to do so would only result in the accused's release at the end of the period of detention." [5]

Lidstone and Early take a very different view, and quote an article by a senior French judge who was critical of the role of the *procureur* in deciding to extend the period of *garde à vue*. The judge, M. Arpaillange, argued that in many instances prolongation to forty eight hours is automatic, allowing

extensive police contact in an environment created for no other purpose than to subjugate the will to that of the interrogator. Under *l'enquête flagrante* the suspect is liable to questioning by the *procureur* and prolonged police involvement with him while in custody will diminish the importance of the examination. [6]

A suspect who has been detained under *garde à vue* will be brought before the *procureur* who has the right, which is usually exercised, to question him. During the questioning the accused may not be legally represented. At the time Sheehan carried out his research, he noted that the attitude of the *procureur* generally was that the purpose of the examination was to ensure that there was a reasonable case to answer and that proceedings were not taken against an innocent person. The identity of the accused will be confirmed and he will be asked a few questions about the main facts of the case. The accused has the right to put forward any explanation and if this is accepted by the *procureur* he may drop proceedings against the accused and liberate him there and then. The examination is not intended to extract a confession or obtain further evidence against the accused and the *procureur* will generally not enter into any form of cross examination. If the accused makes a statement or answers any questions, the *procureur* will dictate this in narrative form to a clerk or typist and the resulting statement will be signed by the suspect and the *procureur* Thereafter the *procureur* will decide how to dispose of the case.

Notes

1, Sheehan pp34-40
2, Lidstone and Early *Questioning Freedom* (1982) 31 ICLQ 488 at 492-494
3, M, Pieck *The Accused's Privilege* (1962) 11 American Journal of Comparative Law 585 at 591-592
4, Lidstone and Early op cit note 2 supra at p494
5, Sheehan p38
6, Lidstone and Early op cit note 2 supra at p493

(ii) Questioning by the *Juge d'Instruction*

As already noted, in all cases classified as *crimes* (ie the most serious matters) the *procureur* is obliged to request an investigation by the *juge d'instruction* and in cases classed as *délits* he has a discretion to do so.

If it takes place, the investigation will be secret in the sense that only the accused, the *procureur* and any *partie civile* will be informed of the progress and content of the inquiry. The secrecy is intended to protect the interests of the accused by preventing harmful publicity. All steps taken by the *juge* and any statements by the accused or witnesses will be recorded in a *dossier* to which the *procureur* and the accused's legal representative have a right of access.

The function of the *juge d'instruction* is to collect, examine and investigate all the evidence relating to the case and thereafter to decide whether the case should be remitted for trial and, if so, to which court. The *juge* is only concerned with sufficiency of evidence and is not required to decide on issues of credibility. His decisions must be motivated in law and thus issues of credibility or his personal view of the guilt or innocence of the accused are irrelevant. His powers are clearly inquisitorial and it is his duty to ascertain the facts rather than leaving the matter in the hands of the parties.

The *juge d'instruction* has the right to interrogate the accused, something which the French consider a normal part of the investigation. Apart from being conducive to the ascertainment of the truth, the questioning allows the accused to put his point of view and, since he becomes aware of the case against him it assists him to organise his defence. It ensures that the *dossier* is balanced and does not merely represent the prosecution's case.

Examination by the *juge d'instruction* will take place in his office and will be less formal than a trial. Nevertheless, French law recognises that precautions are necessary to ensure that the interrogation is conducted in conditions which safeguard the rights of the accused at all times and that there is no attempt to extract a confession by any means or at any cost.

The accused will not normally be interrogated on his first appearance, although the *Code* does permit this "if urgency results either from the condition of a witness in danger of death or from apparent preparation for disappearance." It is also permitted in the investigation of a flagrant delict when the *juge d'instruction* is present at the scene. The report of the interrogation should mention the reason for the urgency.

More commonly, however, at the time when the accused first appears before him the *juge* will establish his identity, acquaint him expressly with each of the acts that are imputed to him and advise him that he is free not to make a statement. The minute

of the interrogation must include a record of the accused having been advised that he need not make a statement.

If the accused does wish to make a statement, the *juge* will receive it, and at this stage questioning will normally be limited to clearing up ambiguities in the statement, although the accused may also be asked if he admits the accuracy of any prior statements made to the police. Professor Anton notes that, "It is highly probable that the suspect, now formally an accused person, will wish to make a statement, for French criminals in the vast majority of cases exhibit a quite spontaneous desire to confess all."

The clerk of court will take down, at the *juge's* dictation a minute of the proceedings. At the end of this dictation the *juge d'instruction* must advise an unrepresented accused of his right to legal representation and this advice and the accused's reply are incorporated into the minute of the proceedings which will be signed by the accused and the clerk. Counsel may be designated for the accused if he desires, irrespective of his financial situation.

Failure to inform the accused of his right not to make a statement or of his right to legal advice will nullify both the instant and any subsequent proceedings.

The final step at the first appearance will be for the *juge* to decide whether the accused should be detained in custody (*detention preventive*). The Code declares that this should be exceptional, but it appears to be widely used, particularly in the case of serious crime, and it is conceded, even by some French commentators, that abuses occur. [2] Manfred Pieck [2a] describes the *juges d'instruction* as being "unsparing" in their use of this power, particularly if the accused refuses to speak.

After the first examination, the *juge d'instruction* may examine the accused on as many occasions as he wishes, for example to take account of new evidence discovered in the course of interviewing the witnesses, although prior to each interrogation he must summon counsel for the accused to enable him to be present at each interrogation. The accused can only be heard in the presence of his legal representative unless he expressly waives this right. The *dossier* must be placed at the disposal of counsel at least twenty four hours before each interrogation, but in practice the *juge* will allow counsel access to the *dossier* whenever he wishes it. It has been pointed out that this means that the accused will be in a position to know the precise evidence against him before he is first interrogated on the facts, and thus an astute criminal can devise a defence compatible with the evidence for the prosecution. [3]

The *procureur* and any *partie civile* may also be present at subsequent interrogations and although the *juge* has the exclusive

right actually to ask the questions, the *procureur* and the legal representative of the *partie civile* have the right to suggest questions for him to put.

At these subsequent examinations, the *juge d'instruction* will question the accused in great depth, in the same way as the accused would be cross-examined in a British trial. There is no restriction on the nature, content, form or number of the questions but the accused always has the right not to answer. However the *juge* may make "appropriate comments" whenever the accused refuses to answer his questions and unfavourable inferences will undoubtedly be drawn by the *juge* and all subsequent judges or jurors. It is probably for this reason that accused persons rarely refuse to make any reply at all to the questions put to them. [4]

The *juge* will dictate the accused's answers in the form of a statement either at the end of the examination or in the course of it if it is lengthy. At the end of the examination the *juge* will read the statement over to the accused who can correct any inaccuracies. Thereafter it is signed by the *juge* and the accused.

At these subsequent interrogations, if there are discrepancies between the accused's statement and evidence from witnesses, the *juge* may elect to hold a *confrontation*. In this procedure he will interrogate the accused again, and if he maintains his

version, the *juge* will introduce the witness and ask him to repeat his version in the hearing of the accused and vice-versa. He will then ask each to comment on the evidence of the other and will cross-examine both parties closely on any points of difference. [5] It is hoped that the accused will thus be induced to admit facts which he has hitherto denied, and the process can be regarded as a partial substitute for cross examination. A *confrontation* is subject to the same procedural safeguards as any other interrogation and the usual minute of the proceedings will be prepared for the *dossier*.

One step beyond *confrontation* is *reconstruction* of the offence whereby the *juge*, his clerk, the *procureur* and counsel for the parties proceed to the scene of the crime and an attempt is made to re-enact what actually happened at the time of the crime. The accused and the witnesses are asked to repeat, as far as possible, their actual words and movements. In serious crimes the *procureur* will always ask for a *reconstruction* since it is a practical way of proving, as nearly conclusively as possible, the truth or otherwise of a particular version of the facts. As Anton puts it, "It is based upon the familiar truth that, while a person may tell one or two lies with an appearance of verisimilitude, he will find it difficult to tell many successfully, and still more difficult to rehearse a whole course of conduct which is false." [6]

Sheehan, sanguine as always, comments,

> "While each individual *juge* has his own style, many feel that the informality of the proceeding - as opposed to the trial itself - is more conducive to the accused speaking freely. In that way an innocent person has nothing to lose and has a better chance to establish his innocence since the *juge* will investigate any defence evidence with the same resources, thoroughness and impartial approach which he brings to bear on the prosecution evidence." [7]

He also observes that any unjustifiable attempt by the accused to reserve his defence until the trial while finding out the strength of the case against him in advance is liable to be looked upon with suspicion. [8]

In complex or important cases the *juge* will hold a final examination of the accused recapitulating the main points of the case and the accused's answers thereto.

Since the purpose of a French criminal trial is to judge the accused, *"on juge l'homme, pas les faits"*, and also because guilt and penalty are determined simultaneously by the trial court, it is regarded as fundamental that the triers of the facts should be fully informed as to the evidence, or absence of evidence, of criminal propensities on the part of the accused. Accordingly

the *juge d'instruction* will also prepare a section of the *dossier* including exhaustive detail about the accused's life history. This "*Dossier du Personnalité*" will include all possible information about the accused whether favourable or unfavourable, including his *casier judiciaire* or criminal record, and will be available to the trial court.

Once the *instruction* is complete and the *juge* has come to provisional conclusions, the *dossier* is sent to the *procureur* for his views. Representations may also be made to the *juge* by the accused's counsel and counsel for any *partie civile*. Thereafter the *juge* will pronounce an interlocutory order formally closing the *instruction*.

If the *juge* considers that a case has been established against the accused he will refer the case to the appropriate court. If the case is appropriate to the highest court, the *Cour d'assises*, the *dossier* must be studied by the *Chambre d'accusation*, or indicting chamber which considers matters anew, examines the regularity of the procedure and comes to a definite decision as to what proceedings should follow. Parties and counsel will be summoned to an oral hearing by the *Procureur Général*.

After the *Chambre d'accusation* has considered the matter, its decision will be communicated to the parties. It may order further steps to be taken to elucidate the facts and it may refer the dossier back to the *juge d'instruction*; it may also alter or

vary in any way the *juge's* findings, but if it finds that the facts appear to disclose a *crime*, it will order the accused to be arraigned before the *Cour d'assises*.

Notes

1. A.E. Anton *L'Instruction Criminelle* (1960) 9 American Journal of Comparative Law 441 at 448
2. R.Vouin *The Protection of the Accused in French Criminal Procedure* (1956) 5 ICLQ 1 at 20; J. Boothroyd *A year on remand and no trial in sight* The Independent 11 January 1991

2a. *The Accused's Privilege Against Self-incrimnation in the Civil Law* (1962) 11 American Journal of Comparative Law 585 at 598

3. Anton op cit note 1 supra p449, quoting L. Lambert
4. Anton op cit note 1 supra p449
5. *Confrontation* may also be used to reconcile differences of testimony between witnesses. On *confrontation* generally see Sheehan pp55-56 and Anton op cit note 1 supra at p451
6. Anton op cit note 1 supra at p452
7. Sheehan p54
8. Sheehan p24

(iii) The Trial

This section relates only to conventional French trials, the simplified procedure available in the *Tribunal de Police* is not further considered. [1] It is at the trial stage that French procedure is at its least inquisitorial and most adversarial, and consequently of least interest in the present discussion. There are several points of similarity with British procedure, particularly the public nature of the proceedings, the presumption of innocence and the burden of proof on the prosecution. Nevertheless the procedure followed at the trial differs in several important respects from that followed in Scotland or England.

In the first instance it should be noted that the French system does not recognise a plea of guilty by the accused and accordingly all proceedings take the form of a trial. The court will only give its decision after an examination of the evidence although this will obviously be fairly cursory if the accused does not intend to challenge it and the proceedings will be shorter. [2] There are also provisions for trial in the absence of the accused which are much wider than those available in Scotland, although yet again the court will consider the evidence carefully before reaching a verdict. [3]

In cases which have been remitted for trial in the *Cour d'assises* the accused will have a preliminary private interview in chambers with the president of the court. This interview will usually be

confined to the establishment of the accused's identity and procedural matters such as legal representation. The facts will not normally be explored, although there is nothing to prevent the president from hearing the accused on the fundamentals of the case. The inevitable record of the proceedings will be made and signed by the clerk of court, the president and the accused. [4]

The president has a rarely exercised power to adjourn the trial and order a supplementary investigation if he considers that the case is not ready for trial. Professor Vouin explains that, "Thus the examination (*instruction*) is continued even after the judgment for committal, right up to the opening of the hearing in the Court of Assize. ... French law will not countenance the opening of the trial at assize and its pursuance to a final judgment except at the end of a completed examination which guarantees the validity of the judgment which will ensue."[5]

At the trial the proceedings will normally commence with the president of the court examining the accused, having first studied the *dossier*, or the police report if there has been no *instruction*. This examination was not provided for in the 1808 Code. Under that statute the proceedings were to begin with the prosecutor presenting his case and the president was only to put possible questions to the accused after each witness had given evidence. However the custom was quickly established that it was the presiding judge who opened the proceedings by making the accused undergo an examination with the object of revealing his

past, his personality and the nature of his defence. The 1958 Code decided that the president was to examine the accused and take note of his declarations but he was under a duty not to disclose his opinion as to guilt.

> The president will ask the accused about his personal background, including previous convictions, the charge will be read to him and excerpts from the witnesses' statements will be put to him. If the accused disagrees with a statement made by a witness or gives evidence contrary to it the president will frequently cross examine him vigorously, in the same manner as cross-examination at a British trial. He will certainly do so if he thinks the accused is lying or withholding evidence. The president's role is that of an investigator and not an arbiter, although to the outsider his actions can give the impression that he is more of a prosecutor than a judge. [6]

The accused is not on oath and may at any time refuse to answer which sometimes reduces the president's examination to nothing more than a monologue. However the accused cannot avoid being interrogated and his demeanour and attitude are adminicles of evidence which the court may take into consideration. Accordingly although silence does not amount to a tacit confession of guilt, it will not only result in the court drawing an adverse inference, but it will also reinforce the prosecution evidence. In any event the prosecution, who are not subject to any restriction on comment, will make the most of the accused's

silence. [7] It follows that there is considerable pressure on the accused to answer the president's questions.

The trial court may also consider any statement made by the accused to the police or *juge d'instrucion* and once again the right of the court to what Professor Pieck terms "uncontrolled evaluation" [8] means that it can consider the refusal of the accused to explain himself when reaching its verdict.

Once the president has concluded his examination, the prosecutor may question the accused and then the lawyer for the *partie civile* and the accused's own counsel may suggest questions which will be put to the accuced at the president's discretion, although if the examination has been thorough it is unlikely that many such questions will be necessary.

After the questioning of the accused has been completed, the president will examine the witnesses who have been cited. [9] The witness will be asked to give his evidence in narrative form, not by question and answer. If the witness's evidence conflicts with that of the accused, the president may interrupt the witness and question the accused further. Generally there is an absence of rigid procedural rules, the court being given as much freedom as possible to obtain all the facts about the case.

After all the evidence has been heard, the parties will address the court, the defence having the last word, and the court will

give it verdict, possibly after an adjournment. There is virtually no reliance on precedent, each case being decided on its merits. The court, as already noted requires to have a profound personal conviction of the accused's guilt before it can convict him.

Notes

1. Sheehan pp77-80. In certain minor cases the accused is presumed guilty until he proves his innocence - ibid p80
2. Sheehan p26
3. Sheehan p72 and Appendix 7(10) p210
4. Sheehan p81
5. R.Vouin *The Protection of the Accused in French Criminal Procedure* (1956) 5 ICLQ 157 at 166. The power now exists under Article 283 of the 1958 Code
6. Appendices 7 and 8 of Sheehan's book contain some fascinating excerpts from trials in the *Tribunal Correctionnel* and the *Cour d'Assises*
7. M. Pieck *The Accused's Privilege Against Self-incrimination in the Civil Law* (1962) 11 American Journal of Comparative Law 585 at 598
8. ie the court is not obliged to account for the grounds on which it achieves its *intime conviction* - 1958 Code Article 353
9. In the *Cour d'assises* all evidence must be given orally but in the other courts this is not necessary and reliance may be placed on the *dossier* - Sheehan p74

10.4 Discussion and Evaluation

It would be an exercise in futility and sterility to compare inquisitorial and adversarial methods with a view to proving that one was in some way superior to or better than the other. It is impossible to view any system of criminal justice in isolation from its origins and the nature of the society which it serves. A system of criminal justice is strongly related to its underlying historical, social and political environment, as well as the structure of authority on which it is based. Dr Volkmann-Schluck, while noting that the same categories of actors with roughly similar functions appear in both procedural systems, viz police, prosecutors, defence lawyers and judges, points out that they "differ in the way they perform, in their self esteem, in their social position in society and in their behavioural expectations." ' Further and fuller reference will be made to this point later.

It is noticeable that commentators from one tradition tend to be critical of their own methods and to look to the other tradition to provide the solution to whatever problem is presently exercising them. Thus continental commentators faced with the delays and other problems of the *instruction* look towards the Anglo-American tradition for speed, efficiency and openness while Anglo-American jurists embarassed by some scandal such as the Guildford Four or alarmed by abuses of plea-bargaining in the United States are arguing in favour of inquisitorial methods and

particularly earlier judicial involvement. The article by Goldstein and Marcus is virtually the only work by Anglo-Americans which is seriously critical of continental procedures and while many of their criticisms were based on mistaken premises, one of the main burdens of their complaint appeared to be that modern continental methods were not *sufficiently* inquisitorial.

It was previously noted that the two systems have tended to converge, and it is probably fair to say that the systems which are fundamentally inquisitorial have tended to move further towards adversarial methods than vice-versa. The adoption of the jury in France and the introduction of cross-examination in Spain (in 1882) are but two of the many examples.

Certain criticisms which are levelled at inquisitorial methods are, it is submitted, more criticisms of the way in which such methods are presently applied. They are not necessarily criticisms of inquisitorial methods *per se* and they thus fall largely outwith the scope of this work and can be dealt with shortly.

Into this category falls the claim that judges, and principally *juges d'instruction*, are often young and inexperienced and, since they normally begin training straight from university, lacking in experience of the "real world." Sheehan points out that the <u>maximum</u> age for entry to the *Centre Nationale d'Études Judiciares*

is 27 although an *avocat* with ten years experience may apply for direct entry to the magistrature, which is considered desireable, partly because the *Centre Nationale* cannot produce enough candidates and partly because it widens the spectrum of candidates to the magistrature. Inquisitorial methods clearly require a substantial number of prosecutors and judges, and it would appear that there is probably less interchange with the mainstream legal profession than there is, say, between the solicitor branch of the profession in Scotland and the Procurator Fiscal service, France tending very much towards a career magistracy. [2] A related criticism is that French training methods tend to produce stereotype magistrates with little scope for individuality. Sheehan observes that even if this criticism were justified, it would also presumably ensure a more uniform application of justice.

Likewise the criticism that inquisitorial methods result in undue delay before accused persons are brought to trial is, it is submitted, a criticism of the application of the methods rather that the methods themselves. To say this is not, of course, to minimise the seriousness of the problem. It is accepted that it is quite insupportable to have a person who is presumed innocent incarcerated for for an extended period before guilt has been proved, and French law provides several unhappy examples, despite the explicit requirement in Article 137 of the 1958 Code that pre-trial detention is an exceptional measure. The most extreme example known to the writer is the case quoted by Professor

Hamson of a woman detained on a murder charge for four years before her first trial which then turned out to be abortive because of the inadequate preparation of the case, which had to be sent back for an *instrucion supplémentaire*, although mercifully the accused was allowed bail at that point. *

Clearly the process of *instruction* is liable to take time, but the writer would suggest that there does not appear to be any reason why, if the political will existed, the situation could not be improved by an increase in the resources available to the *police judiciare*, an increase in the number of *juges d'instruction* and the imposition of an absolute maximum time limit for proceedings, akin to the Scottish 110-day rule. Alternatively, German experience shows that the system can still operate and retain its fundamentally inquisitorial character even if the entire *instruction* procedure is abolished, albeit at the expense of a greater burden on the public prosecutor, whose status and integrity must necessarily be high. *

The German experience has been controversial and it has to be admitted that the *juge d'instruction* is a figure who is demonstrably independent from the police and who has the power to direct their inquiries. Any prosecutor is bound to be much more closely identified with the police than a truly independent judicial figure and this can lead to the suspicion (possibly well founded) that the police are less subject to supervision than they ought to be. Goldstein and Marcus say that in Germany "Pre-

trial investigation follows Code requirements only as much as the police choose to adhere to them. They take their force through the degree of obligation felt by the police to follow legal rules, rather than through on-the-spot judicial supervision or after-the-fact remedies for breach of the Code." [5] However Dr Volkmann-Schluck points out that the German Code does contain an exclusionary rule in respect of evidence extorted from the accused by physical abuse, drugs, torture, weariness, hypnosis, deceit or unlawful threats or promises and the German courts have expanded this notion to the concept of *Rechtskreistheorie*, an untranslatable German concept only approximately rendered as the doctrine of the sphere of individual rights, which allows evidence to be excluded if the police intrude into the constitutionally protected sphere of fundamental civil rights. [6]

To return to the French model, even commentators who are sympathetic to French methods concede that there is probably some force in the argument that, notwithstanding the existence of a theoretical presumption of innocence, the procedure of *instruction* by its nature leads to a presumption of guilt at the trial stage. One of the main aims of the *instruction* is to prevent persons against whom there is insufficient evidence being placed on trial and it is only a short logical step from that point to the assumption that a person who is placed on trial must be guilty.

Sheehan comments that in the *tribunal de police* and *tribunal correctionnel* the presumption of innocence may sometimes be "more theoretical than practical" since the president of the court, having read the police report or *dossier* before the trial must often find it difficult not to pre-judge the case. In the *cour d'assises* jurors likewise may sometimes be influenced by the knowledge that the accused has only been committed for trial after exhaustive pre-trial inquiries. At the time when Sheehan did his research, the acquittal rate of the *tribunal correctionnel* was around 5%, but some of this was due to extraneous factors such as prescription and amnesty and the overall conviction rate was "exceedingly high". Sheehan acknowledges that it is virtually impossible to form any firm conclusion as to the reason for this situation and contents himself with the observation that it "may prove the efficacy of pre-trial inquiries in ensuring that no innocent person is wrongly sent for trial, or alternatively it may be taken to prove that such inquiries do effectively pre-judge the case." [7]

Anton, who regards French procedure properly applied as "scrupulous in the interests of the accused," makes a similar point when he comments that, "The immensely careful preliminary investigations of the *juge d'instruction* make it unlikely that persons who in France are sent for trial are guiltless. While they are still in law presumed to be innocent, a common sense appreciation of the situation suggests that they are in fact more likely than not to be guilty. That in France acquittals do from

time to time take place seems to be more a reflection of the French juryman's traditional generosity of sentiment and suspicion of authority than a reproach to the quality of work of the *juges d'instruction*." [8]

There would not appear to be any easy answer to this problem, if indeed it is a problem, other than to trust the intergity of those charged with adjudication at the trial. Nevertheless, the role which the presiding judge is required to adopt at the trial must make it difficult for all but the most detached individual to separate his "common sense" from his judicial function, and it must contribute to the blurring of the distinction between prosecution and judgment which is sometimes criticised. However, Professor Vouin, who is never slow to criticise his own country's institutions, thinks that the role of the presiding judge, and particularly his discretionary power to take any step which he believes of value for discovering the truth, is as likely to be of benefit to the accused as to be a threat to him. [9]

The presiding judge's role also means that the accused is less dependent on legal representation the quality of which may be poor, that evidence is less likely to be distorted by unfair or manipulative cross-examination, and that the outcome of the trial is less likely to be influenced by the suppression of evidence or ability of pleaders to influence the jury. Whether any or all of these points are "good" or "bad" is of necessity a matter on

which differing views can sincerely be held and little would be gained by discussing them further in the present context.

Of much more interest in the present discussion is the French attitude towards the questioning of the accused. At the start of this work the right to silence was defined as "the right of the accused not to testify at his trial and the right of the suspect to refuse to answer police questions without incurring adverse consequences such as a penal sanction, a presumption of guilt or adverse comment at the trial." It is clear that while a French accused is not liable to a penal sanction if he refuses to speak, any such refusal, certainly before the *juge d'instruction* or at the trial, will result in adverse comment being made and an unfavourable inference, if not a presumption of guilt, being drawn, and therefore a French accused does not enjoy the right to silence as it is understood in Britain.

It is important to appreciate that the French attitude stems at least in part from the fact that, unlike the British position where the pre-trial and trial phases of the process are clearly separate entities, with the latter being virtually self-contained, the French view the whole procedure as a *continuum* with the trial being simply the final stage in a continuous process, rather that an end in itself. The French accused is brought into the process at a much earlier stage that he would be in Scotland or, even more so, in England. Professor Hamson suggests that it would, in France, be thought "most grossly

improper" if the inquiry were conducted *ex parte* without the presence of the person principally interested in its outcome. The presence of the suspect during the process of *instruction* is regarded as an important right. "That an official should be allowed to gather together evidence against a citizen and to construct a case against him without his knowledge and without a right in him to make representations to that official and to put forward his own view of the situation from the start - that would generally be judged in France to be monstrous." [10] It follows from this that the accused is expected to participate in the *instruction*, in order that the truth may be determined, and if he does not, adverse conclusions are inevitable. In fact it appears that few French accused remain completely mute. An important reason for this, which is absent in Britain, is that there is no separate hearing or procedure for determining sentence and an accused who totally refuses to respond will forfeit the opportunity of being heard on the question of punishment.

The distinction between the pre-trial and trial phases of the case which is so noticeable in British procedure is, it is submitted, largely artificial and considerably disadvantageous. In Britain things done (or not done) by the police without judicial supervision, or, at the most, under theoretical supervision by the Procurator Fiscal, can have a profound effect on the outcome of the trial. This can work both ways and can produce results which are undesireable from the point of view of

ascertaining the truth. On the one hand, evidence can be obtained irregularly and the means of obtaining it can be suppressed leading to a wrongful conviction such as that of the "Guildford Four." Even where there is no deliberate intention to mislead, the tendency of the police to assume that a suspect is *ipso facto* guilty can blind them to alternative views of the facts and lead to the under-estimation, or possibly even suppression, of important evidence pointing to a conclusion which does not fit the established police view. Factors such as these played important parts in the miscarriages of justice in the Timothy Evans [11] and *Confait* [12] cases. It is submitted that it is both unreasonable and illogical to expect the police, particularly in England where they are by long tradition much closer to the prosecution process than in Scotland, to act at all times in a "quasi-judicial" spirit. Such a role is theoretically unsound and to borrow Lord Devlin's colourful expression, "Undoubtedly a practical, resourceful and adaptable man can fly quite a long way contrary to theory, but theory, if it is sound, must in the end get him down." [13]

On the other hand, a technical infringement of an exclusionary rule, which may in itself be obscure or complex, can lead to the exclusion of important evidence and the collapse of the case against a person who is, on any objective criterion, guilty of the crime with which he is charged. The Australian writer G. E. P. Brouwer puts this point succinctly when he says, "The common law system's evidentiary rules are quite distinctive in the way in

which they exclude evidence which, although logically relevant, is regarded as unfair or as dangerously misleading. Ironically many of the rules themselves are often misleading on account of their subtlety and the refined sophistry with which they are imbued." [14] Even if the transgression is blatant or the result of something other than ignorant inadvertance, it is not necessarily self-evident that the acquittal and release of a dangerous criminal is an appropriate response. In a sense the courts are in a no-win situation since the repeated acquittal of guilty persons as the result of the exclusion of evidence can lead public opinion to conclude that the courts are "soft on criminals" and failing to protect the public. On the other hand the repeated condoning of police illegalities would inevitably tend towards an erosion of civil liberties. Such a development would be liable to be particularly sinister since the ordinary person is unlikely to feel that he requires protection from the police by means which allow dangerous criminals to go free until the police illegalities cease to be tolerable, by which time the situation may be beyond redemption.

Problems of this nature are at their most acute in the United States where the legitimate efforts of the police and other law enforcement agencies can come close to being frustrated by exclusionary rules. Nevertheless the Scottish test of "fairness to the accused", while being less rigid than the rules applied in some other jurisdictions, may be subject to the criticism that it is vague and lends itself to capricious application by the

courts. A. A. S. Zuckerman has, in a different but related context, described the notion of "fairness" as "unhelpful since it can refer to a multitude of aspects and merely furnishes an excuse for achieving whatever result is wanted without rigorous justification" [15] and Lord Scarman, a most eminent judge, has referred in scathing terms to the "last refuge of legal thought, that each case depends on its facts." [16] The present writer would submit that these comments are eminently applicable to the present state of Scottish law, and it is unsatisfactory that the question of guilt should be determined on the basis of a test which defies analysis and which can vary at the whim of the triers of the facts.

Such issues simply do not arise in French procedure where, for most practical purposes, all evidence is admissible and subject to evaluation by the court on a *quantum valeat* basis. Indeed it is no exaggeration to say that the present work, consisting as it does of lengthy discussion of admissibility of evidence and sufficiency of proof, could not have been written about the French legal system since such concepts are unknown there. It also follows that since French law does not have to cope with concepts of admissibility or the problems posed by the prohibition of inferences from silence, French courts are spared the need to wrestle with the type of illogical rule condemned by Professor Cross as "gibberish." [17]

In practical terms, the French police are, of course, likely to be heavily involved in evidence gathering before the *instruction* has commenced. As in any other country it is necessary to strive for a balance between controlling the pre-trial activities of the police and ensuring that they are not hampered in their investigations. The French approach allows the police wide but carefully regulated powers in the early stages of the case when they are most likely to be needed, the results of which are then subject to scrutiny by the *procureur* and in more serious cases by the *juge d'instruction* and the *chambre d'accusation*. Nevertheless, the police can operate secure in the knowledge that only evidence obtained by methods of outright illegality will be excluded.

Opinions differ as to whether the system leads the French police to press for a confession. Brouwer argues that the fact that French law does not attach any particular importance to a confession correspondingly places less pressure on the police to obtain one [18] and Sheehan takes a similar view. [19]

On the other hand we have seen how, even when they are acting within the law the police themselves are left to take certain crucial decisions themselves, particularly the point at which they should stop questioning a suspect. Stephen Hronas argues that the system itself almost invites abuse:

> "In general, however, a coerced confession is not rejected *per se* if, after analysing all the

evidence, the court feels that the confession is sincere and true. Thus the rights of suspects in France, to a large degree, depend on the subjective evaluation of very difficult issues - the sincerity of a confession, the substantiality of the infringement of the rights of the accused, and the motives of the interrogator. The police abuse is not the focal point of the review. Furthermore the accused's right to be informed by the *juge d'instruction* of his right to remain silent and to have a lawyer may become meaningless, ... since the suspect may be interrogated before appearing for the first time in front of the *juge d'instruction*. ... [T]he confession made to the police ... goes into the suspect's dossier and, in effect, can be used against him regardless of whether he claims the privilege against self-incrimination later in the proceedings." [20]

At the end of the day one comes back to the point that systems of policing and criminal justice cannot be seen in isolation from the nature of the societies in which they have developed. Professor Lloyd Weinreb puts it thus:

> "Unless one starts (and finishes) with a view of man according to which his nature is not determined much at all by his surroundings, it is

implausible that criminal process should be everywhere alike. The particular forms that it takes are much more a reflection of society's ground rules, its social and political philosophy and institutions, than is generally remarked.

> French *procédure pénale* for example is profoundly affected by the concept of *L'État*, the state as an entity whose authority is not to be questioned (even when it is not precisely obeyed)".[21]

There is a particular danger in assuming that what is irregular or illegal in one society is or ought to be equally irregular or illegal in another. Thus the interrogation of the accused by the presiding judge which would be simply unthinkable in Scotland or England is a normal and accepted part of French procedure and fully justifiable on the norms and philosophies on which the French system proceeds. When one looks beyond the trial process, there are similar dangers in assuming that because the police in one country are required to behave in a particular way, the police in another country ought to behave similarly.

A particularly interesting light has been shed on this issue by Professor Mirjan Damaška of Pennsylvania University [22] who has constructed two models of authority which he calls the "hierarchical" and the "coordinate" and which represent continental and Anglo-American procedures respectively. He argues that by using these models, previously inexplicable

differences between the two systems can be understood once the conventional trial-centered models are displaced by another set of organising concepts. According to Damaška, systems which follow the continental "hierarchical" model have "a strong tendency to arrive at uniform policies through the centralisation of authority; the rigorously hierarchical ordering of agencies participating in the administration of justice; the preference for precise and rigid normative directives over more flexible standards; and finally the great importance accorded official documentation. This general bureaucratic style of exercising authority tends to be sustained everywhere by chosen methods of training, recruiting and promoting officials." [23]

On the other hand, "animating the coordinate model is the aim of reaching the decision more appropriate to the circumstances of each case. Certainty of decision making is recognised as an important value, but is less weighty than in the hierarchical model; what appears to be the best solution in a particular case will not be readily sacrificed to certainty and uniformity of decisionmaking. Consequently, the distinction between saying that a particular decision is just and that it is in accordance with the law cannot as easily be made as in the hierarchical model. The cast of mind underlying these value preferences attaches great importance to the rich variety of experience and is sceptical of attempts to impress general structures on the complexities of life." [24]

Applying his hierarchical model to continental police forces, Damaška points out that "a general feature of continental police forces is a high degree of regimentation and pervasive regulation. This feature escapes those observers who identify regulation with *external* normative constraint on police forces. However, both a strict hierarchy and a professional tradition favour a great deal of *internal* regulation; uniformity, consistency and internal review by superiors are routine. In fact the saturation of police forces with internal regulation bears a strong resemblence to that of the military. As a result, the police tend to assess situations with reference to existing internal regulations. Substantial discretion tends to gravitate to higher echelons of the police hierarchy; lower levels are guided by rules and subjected to extensive internal control." [25]

Damaška also points out that as far as external constraints on police behaviour are concerned "relatively few normative standards can be located in most continental codes of criminal procedure. In his view it is "startling, considering the importance of police work in all modern systems, to reflect on the meagre regulation of police inquiries as compared to that of prosecutorial or judicial investigation." However, in all but the most minor crime, continental countries generally deny the police themselves the right to institute criminal proceedings and the different position of the victim also acts as a check on unfettered police discretion.

Against this background it becomes easier to appreciate why continental systems are less in need of the exclusionary rules of evidence that British and American procedures find so vital. It is also much easier for the continental policeman to understand and appreciate the reasoning behind such exclusionary rules as do operate.

Notes

1. *Continental European Criminal Procedure; True or Illusive Model* (1981) 9 Am Jo Crim L 1 at p5
2. On training of French magistrates see Sheehan pp11-14.
3. [1955] Crim LR 272 at 273
4. D Krauss *The Reform of Criminal Procedure Law in the Federal Republic of Germany* 1979 JR 202; W. Zeidler *Evaluation of the Adversary System; As Comparison, Some Remarks on the Investigatory System of Procedure* (1981) 55 Aust. LJ 390
5. *The Myth of Judicial Supervision in Three Inquisitorial Systems; France, Italy and Germany* (1978) 87 Yale LJ 240 at 262
6. op cit note 1 supra p15
7. Sheehan p25 note 3
8. *L'Intruction Criminelle* (1960) 9 American Journal of Comparative Law 441 at 456
9. *The Protection of the Accused in French Criminal Procedure* (1956) 5 ICLQ 160
10. Hamson op cit note 2 supra at 277
11. See generally L.Kennedy *Ten Rillington Place* (London, 1961)
12. supra chapter 6,5 (iii)
13. *The Judge* p71
14. *Inquisitorial and Adversary Procedures - a Comparative Analysis* (1981) 55 Aust LJ 207 at 220
15. *Illegally Obtained Evidence - Discretion as a Guardian of Legitimacy* 1987 Current Legal Problems 55 at 60
16. R v Sang [1979] 2 All ER 1222 at 1245
17. supra
18. op cit note 14 supra at 222.
19. Sheehan p27.
20. *Interrogation Abuses by the Police in France - a Comparative Solution* 1969 Crim LQ 68 at 77
21. *Denial of Justice* (1977) pp11-12
22. *Structures of Authority and Comparative Criminal Procedure* (1975) 84 Yale LJ 480
23. ibid p487
24. ibid p509
25. ibid p502

Chapter 11 Conclusions

11.1 Silence, Admissiblity and Related Issues

The discussion in this work has ranged far and wide, indeed rather further and wider than the writer originally intended, but it is now proposed to return to return firmly to the Scottish law and to examine, in light of what has been learned both about the Scottish system itself and the problems and solutions in other jurisdictions, what changes might be made to the way that confession evidence is dealt with in Scotland.

Although certain bodies, notable the Scottish Council for Civil Liberties and the Glasgow Bar Association, are currently campaigning for changes in individual aspects of the law, there are, at present, no active governmental or other proposals for a major overhaul of the Scottish criminal justice system. Indeed it is somewhat depressing to reflect on how few of the many proposals made by the Scottish Law Commission actually find a place in the legislaive programme. With all due respect to the S.C.C.L and the G.B.A., they are first and foremost pressure groups and given the level of interest shown by the government in Scottish criminal law it seems probable that the systems of evidence and procedure described in this work will continue without significant change, certainly for the forseeable future. There is little likelihood of the wholesale introduction of the inquisitorial system into Scotland and experience has shown that attempts to isolate individual elements from one homogenous

system and transplant them elsewhere are unlikely to succeed. Although the analogy is not exact, this view is in part reinforced by the lack of success enjoyed by the trial-within-a-trial in Scotland.

However, this does not necessarily mean that, within limits, change either cannot or should not happen. It was pointed out at the start of this work that the structure and powers of the Scottish prosecution system meant that it was quite possible for the law to be materially altered in practice while remaining literally unchanged. It will also be apparent that the major pendulum swings in the admissibility of confession evidence and certain important procedural changes, notably the introduction of the trial-within-a-trial just mentioned, have come about, without any form of legislative intervention, simply as the result of judicial decisions. Whether this state of affairs is desirable or not is a matter on which the writer expresses no views but it is self-evident that if the judiciary were so minded major alterations could be made, virtually overnight, in the way in which Scottish law approaches confession evidence.

There would not appear to be any pressing reason or need for major changes in the right to silence as it presently exists in relation to the Scottish police. There is no sustainable argument for change in Scotland whether based on "sophisticated professional crime" or anything else. This view has uniformly been supported by all those Scottish commentators and others who

have considered the issue including Lord Cameron, the Thomson Committee, Sheriff Macphail and the Scottish Law Commission.

Indeed in the present writer's view there would be considerable dangers in moving away from the present position. If it is considered necessary to give the police powers to require answers in particular cases, this should be done by legislation tailored to the requirements of the specific issue. The right to expect an answer could so easily become the right to expect the expected answer and although tape recording is a major step forward in the protection of the accused, it is by no means a complete answer to possible police malpractice since it can only record what takes place in the tape-recording room. The fundamental weakness of tape-recording is that it still leaves open the problem which Lord Cameron referred to in relation to the judicial declaration in Manuel v H.M. Advocate [1] namely that it does not assist in determining "whether the accused or suspect had been brought to the point of emitting a statement by pressure or inducement exercised or offered by the police."

The writer would also repeat his previously expressed view that non-police government investigators whose activities are not specifically regulated by statute should, from the perspective of the right to silence, and indeed of fairness generally, be assimilated to the police. It seems to him illogical that the right to silence should exist only in respect of the police and not in

respect of others employed by the state to enforce compliance with the law.

It is submitted that different criteria apply in relation to the accused who is before the court and when one turns to consider judicial proceedings, both pre-trial and trial, the present Scottish law on the right to silence is a hotch-potch of legislative compromises and vague judicial discretions exercised on an ad hoc basis and in the writer's view it is simply a mess. In case the writer's views are though to be unduly hawkish, it should be borne in mind that the scales are already loaded two to one against the prosecution since Scottish law obstinately adheres to the historical anachronism of the not proven verdict.

The modern form of judicial examination is, in the writer's experience, in danger of becoming nothing more than an irrelevant waste of time and resources. This is largely due to the practice of many, if not all, solicitors advising accused persons simply to refuse to answer questions. While that is a perfectly proper position to take in terms of the current interpretation of the law, it is hardly in accordance with the intentions of the Thomson Committee who, as the result of representations made to them, considered that judicial examination would *inter alia* afford to an accused at the earliest possible stage in the judicial process an opportunity of stating his position as regards the charge against him. [2] Thomson also envisaged judicial examination as preventing the fabrication of a false line of

defence and also as protecting the interests of an accused who has been interrogated by police officers by ensuring as far as possible that any answers or statements had been fairly obtained and not distorted out of context. [3] On the current state of matters such aims are not even being addressed, let alone satisfied.

The first and most pressing need is for the High Court to state clearly and unequivocally that legal advice is not a legitimate reason for failure to answer proper questions at judicial examination. At a suitable opportunity it should be made clear that the decision in McGhee v H.M. Advocate [4] is purely on its own facts and does not derogate from Alexander v H.M. Advocate [5] and McEwan v H.M. Advocate. [6] Secondly it is submitted that there should be more robust use of judicial comment. While the trial judge in McGhee went hopelessly off the rails on a factual basis, it is submitted that the general tenor of his comments is quite appropriate in a situation where the accused is told expressly that adverse inferences are liable to be drawn if he fails to mention at judicial examination a fact which he later relies on in his defence. It is also thought that the High Court could, with advantage lay down some general format for the judicial admonition, possibly by Act of Adjournal.

Turning now to the trial stage, while the writer would not be in favour of the accused becoming compellable at his own trial, a position which would conflict with the principles of the advers-

arial system, he would respectfully suggest that a second look should be taken at the proposals of the Thomson Committee to permit the prosecution to comment on the failure of the accused to give evidence once a *prima facie* case has been established against him. This would do little more than homologate the present position. The question of whether inferences should be drawn from the accused's failure to give evidence is rather more difficult, but an explicit provision permitting the drawing of inferences along the lines proposed by Thomson would, once again, probably do little more than regularise what in fact already happens. While making no inroads into either the presumption of innocence or the burden of proof on the Crown, such a provision would have the result that the accused and his advisers would know that he remained silent at his peril and it would also materially simplify the judge's task in charging the jury.

When one turns to consider the issue of admissiblity, it is submitted that there are overwhelming reasons of policy against the unfettered admissiblity of all confessions. The extreme example of Northern Ireland shows just what can happen when the controls of the normal legal process are removed. Northern Ireland apart, the general record of the police policing themselves does not inspire great confidence.

Accepting then the need for the courts to have the power to exclude confessions, it has to be conceded that the fairness test is likely to remain the basis of the law for the foreseeable

future and a rigid exclusionary rule would be quite contrary to the history and spirit of Scottish law. However, it is submitted that the fairness test is in danger of moving too far in the direction of unfettered admissiblity, if indeed that point has not already been reached. One of the main reasons for this state of affairs is the failure of the High Court to articulate the policy or rationale of exclusion in Scots law. Mirfield has provided a masterly exposition of the principles behind exclusion in English law [7] but such an exercise would simply be impossible in Scotland. One of the few attempts to rationalise and expound the Scottish position was made by the Thomson Committee who noted that Scots law has

> "proceeded not so much on any fundamental constitutional or philosophic basis, such as the privilege against self-incrimination, as on a conception of fairness and a determination by the courts to control police activity in the interests of fairness. What has been in issue has been not so much the truth of the accused's statements as the propriety of the circumstances in which they were made. Statements improperly obtained are not evidence , however reliable or obviously true. They are excluded by the courts because an exclusionary rule is the only effective weapon possessed by the courts to control police interrogation. It is of course true that statements extorted by unfair means are for that

reason unreliable, but Scots law excludes not only those statements but also statements whose only taint is that they were made at a certain stage of the investigation." [8]

This statement brings Scots law close to what Mirfield calls the "disciplinary principle" and which he explains thus:

> "It looks to cases which have not yet arisen. If the police are denied the use of evidence in the present case because of their failure to achieve acceptable standards of conduct, they will be more likely to achieve acceptable standards in future cases. In the short term, both the policemen involved in the present case and other policemen who get to know about the decision of the court to exclude the evidence will be deterred. In the long term, perhaps, the courts will, by defining the boundaries of proper conduct in such a concrete fashion, educate policemen to respect those boundaries." [9]

This statement in a sense returns the present issue to its starting point. How can the police be expected to learn lessons if the courts do not articulate the reasons for exclusion beyond such an unhelpful statement as "means which place cross-examination, pressure and deception in close company" [10] the elements of which can mean what the courts want them to mean, [11]

and which begs more questions than it answers? When does it cease to be legitimate to "keep asking questions and probing and probing and probing" [12] and shade into "interrogation cross-examination and pressure"? [13] The answer will certainly not be found in any of the cases examined in this work.

To put the point the other way round, if the exercise of the exclusionary discretion is intended at least in part to send messages to the police, what lessons are the police likely to learn when the decision on fairness is effectively left to the jury with its inscrutable verdict? It might be argued that the jury are the arbiters of what is acceptable to society, but even if it were apparent that they had acquitted the accused because they held a confession to have been unfairly obtained, the conclusion that the police would most probably to draw is that the jury members were anti-police. In the writer's experience the last thing that the police are likely to do is to consider that they themselves were in some way at fault. The position would of necessity be different if the trial judge (or the appeal court) were to spell out clearly and unequivocally the reason for the exclusion as has happened in some of the cases on cautioning, notably H.M. Advocate v Docherty [14] and Tonge v H.M. Advocate. [15]

Accordingly, if the underlying rationale of Scottish law is indeed a desire to control police behaviour in the interests of fairness, it is respectfully submitted that the Scottish judiciary should look beyond the bare facts of the the case

before them and should explain clearly, and in a way likely to be understood by the police, exactly why a confession is excluded. In addition, judges should be encouraged, if not actually required, to give juries guidance as to what factors should be taken into account in assessing fairness.

The issue of legal advice during police questioning is another fraught area and a subject on which reasonable people may sincerely hold diametrically opposing opinions. The writer's view is that if the legitimacy of investigative police questioning is accepted, as it clearly is, and provided there is an accurate record of what took place, there is no pressing reason for a change in current Scottish practice. If there was to be a right to legal advice during police proceedings such a change could not, it is submitted, simply be introduced in isolation and many other aspects of the law would require reconsideration. At the most basic level, there is at present no provision for extending the six hour detention period under Section 2 of the 1980 Act. What would happen if the police legitimately and properly detained a serious criminal under Section 2 but his regular lawyer, no doubt for good and sufficient reason, was unable to attend the police station for three hours? Should the police have the power to extend the period of detention so that the six hours starts to run when the solicitor arrives? Could the suspect properly be interrogated in the presence of, say, a duty solicitor he had never met before? McGhee v H.M. Advocate appears to suggest that the absence of the

accused's "own" solicitor is a legitimate reason for failure to answer at judicial examination. Should the fact that the accused has been questioned in the presence of a solicitor lead the courts to comment adversely on his silence as appears to be happening in England? If so, the wording of the caution should surely be altered as it is clearly unfair to comment adversely when the accused has been told that he need not answer and this in turn throws the entire argument back to the collision between the right to silence and the need for investigative police questioning which, as was previously pointed out, is the basis of most of the problems in relation to confession evidence.

Notes

1. 1958 JC 41
2. para 8,14
3. ibid
4. 1991 SCCR 510
5. 1988 SCCR 542
6. 1990 SCCR 401
7. p61 es seq
8. para 7.02
9. pp70-71
10. Jones v Milne 1975 JC 16
11. cf Lewis Carroll; "When *I* use a word," Humpty Dumpty said in a rather scornful tone,"It means just what I chose it to mean - neither more nor less." *Through the Looking Glass* chapter 6
12. Thomson v H.M. Advocate 1968 JC 61
13. H.M. Advocate v Mair 1982 SCCR 471
14. 1981 JC 6
15. 1982 SLT 506

11.2 The Danger Areas - Sufficiency and Accuracy

It is no longer a logically tenable position to argue that nobody can be convicted in Scotland solely on the evidence of his own extra-judicial confession and the writer hopes that he has convinced any sceptics that as a practical issue Scots law offers no more protection to the accused against false or fabricated confessions than does English law, the consequences of which can be seen in the Timothy Evans and Guildford Four cases to name but two infamous examples. The lessons are not new - Dickson identified most of the potential danger areas over one hundred years ago. The writer has already made clear his opinion that the issue of sufficiency of confession evidence in Scotland requires urgent and complete reappraisal if this country is not to produce similar miscarriages. It is to be hoped that the recent comments of the Lord Justice-Clerk ' will mark the beginning of such a reappraisal.

Scots law will require to decide for once and for all whether an extra-judicial confession does or does not require to be corroborated and, if the latter, what level of supporting evidence will be necessary. The present parlous state of the law has come about entirely as the result of judicial decisions and it would be open to the High Court to reverse the trend without any need for legislative intervention.

In the writer's view no confession to the police which has not, at the very least, been tape recorded should be admissible unless the prosecution satisfies the court, beyond reasonable doubt, that there were compelling reasons for the failure to record. The requirement to tape record should be extended to all police interviews and not just those conducted by the C.I.D.. In particular it should be extended immediately to terrorist suspects. Experiments should be carried out with video recording with a view to establishing whether it offers material advantages over tape recording.

The special status of the confession as a source of evidence should be ended as should the assumption that a confession, being against the accused's interest, is likely to be true. It should become merely one source and as such should require corroboration consisting of a second wholly independent source. In other words the historic Scottish concept of corroboration should be reasserted.

While there is undoubtedly scope for the continued existence of the special knowledge rule, this should be returned to the true principle set out by Alison and restricted to, ideally, facts known only to the perpetrator of the crime and unknown to the police or, at the very least, to facts which are known only to the police and the perpetrator. Cases like Wilson and Murray v H.M. Advocate[2] and MacDonald v H.M. Advocate [3] fail entirely to address the issue of the protection of the accused and should be

reconsidered and overruled at the first opportunity. Where the facts are known to the police as well as the perpetrator, and the confession is denied, the judge should be required to warn the jury expressly of the dangers inherent in confession evidence, there being an existing precedent in the case of identification evidence. [4]

It is somewhat ironic that one of the judges most responsible for the current state of the law, Lord Justice-General Emslie, should have written the following:

> "In all our criminal courts in Scotland the object of the trial is to enable the Crown to secure the conviction of the guilty by proof beyond reasonable doubt upon evidence sufficient in law; and at the same time to ensure that the protection which the law seeks to afford to the innocent is denied to none. What is at stake in a criminal trial is the interest of the community, and it must never be forgotten that that interest requires of a civilised system of criminal law - which the law of Scotland undoubtedly is - that even if its administration results in the acquittal from time to time of the apparently guilty it should involve the minimum of risk at any time of the conviction of the innocent. Some may nowadays be heard to say that the protection which our law affords to the accused is too great and that it should be

reduced to simplify the conviction of the criminal. The arguments of the advocates of change are familiar but, in my opinion, no change deserves serious consideration, in spite of the laudable object, if the result of its adoption would be to increase to any significant extent the risk of the conviction of the innocent. If an increased risk of convicting the innocent is the price of a greater prospect of convicting the guilty, then as far as I am concerned it is a price which no sound and just system of law can seriously afford to pay."[5]

It is tempting to suggest (with respect, of course) that it might have been no bad thing had his Lordship and his bretheren borne these reflections in mind particularly when dealing with the issue of the special knowledge confession. Smith v H.M. Advocate, [6] decided a mere four years after the above passage was written, set off a trend which is only now being recognised as having indeed led to a real danger of the conviction of the innocent.

As in so many other areas of modern life, technology is now beginning to make its mark in Scotland's criminal justice system and the introduction of modern electronic methods in police stations will, it is hoped, lead to a considerable improvement in the accuracy of the record and hence enable prosecutors, courts

and ultimately the public at large, to have greater faith in confession evidence.

However, there is not, and never must be, any room for complacency. English and Northern Ireland experience have shown the terrible dangers which can arise from unsupervised and unrecorded police interrogation. Scotland appears so far to have avoided a major confession-based miscarriage of justice. It must never be allowed to happen.

Notes

1. Glasgow Herald 10 October 1991
2. 1987 SCCR 217
3. 1988 SLT(N) 85
4. McAvoy v H.M. Advocate 1991 SCCR 123
5. *The Role of Judges in Society in Scotland* (1974) 19 JLSS 205 at 208
6. (1978) SCCR Suppl 203

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