Excluding Admissions

(Handout)

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Purpose

My talk is on excluding admissions under the *Evidence Act*. It deals mostly with ss 84, 85 and 90, found in Part 3.4. It also touches on ss 138 and 139, found in Part 3.11.

The talk is divided into three parts:

> **Part 1**: some general points to keep in mind
>
> **Part 2**: how the *Evidence Act* deals with mischievous police questioning
>
> **Part 3**: how the *Evidence Act* deals with an accused suffering from mental illness or who is under the influence of drugs or alcohol

Part 1 is a short list of (what I think are) helpful points. Parts 2 and 3 are designed to assist you in identifying the:

1. types of questions;
2. manner of questioning, and
3. characteristics of the accused

which may predicate applications to exclude evidence of admissions under the relevant provisions.

Part 1: some general points to keep in mind

- ss 84, 85 and 90 pay no regard to the s 138(3) factors
- specifically, the probative value of the evidence is irrelevant to the exercise of the discretion under s 90[1]
- s 84 does not contain a discretion[2]

[1] *R v Sophear Em* [2003] NSWCCA 374 at [110] per Howie J (Ipp JA and Hulme J agreeing)
[2] *R v Heffernan* (unreported, NSWCCA, 16 June 1998) at 22 per Smart J (James and Sperling JJ agreeing); *R v JF* [2009] ACTSC 104 at [37] per Refshauge J; *R v Sumpton* [2014] NSWSC 1432 at [151] per Hamill J

- s 85 does not contain a discretion

- both ss 84 and 85 involve two burdens – the applicant's burden, followed by the respondent's burden which must be satisfied on the balance of probabilities: s 142

- when dealing with aggressive/oppressive questioning, s 84 is particularly useful because it leaves no room for the discretion to admit the evidence under s 138[3]

- s 138 and impropriety:

    - need to first establish the standards of propriety[4]

    - regarding the expected standards of propriety for law enforcement agencies generally: look to relevant training or operation manuals, legislative provisions or administrative guidelines[5]

    - regarding the expected standards NSW Police Force: *Code of Practice for CRIME (Custody, Rights, Investigation, Management and Evidence)*; *NSW Police Force Handbook; LEPRA*

- ss 138(2) and 139 are deeming provisions which provide that certain types of evidence shall be taken to have been obtained improperly or as a consequence of an impropriety where that evidence is obtained in particular, specified, factual situations[6]

- the giving of a caution may not be enough to satisfy s 139[7]

Part 2: how the *Evidence Act* deals with mischievous police questioning

- ss 84, 85, 90 and 138 (+139)

- the takeaway from Part 2 is if you think the questioning is improper, don't necessarily kick off with a s 138 argument

- look also to ss 84 and 85, which contain no discretion, and s 90 – the three provisions are not affected by the s 138(3) factors

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[3] *R v Sumpton* [2014] NSWSC 1432 at [151] per Hamill J.
[4] *Robinson v Woolworths Limited* [2005] NSWCCA 426 at [37] per Basten JA, at [102] per Hall J
[5] *Director of Public Prosecutions v Am* [2006] NSWSC 348 at [42] per Hall J; *DPP v Carr* [2002] NSWSC 194.
[6] *R v Cornwell* [2003] NSWSC 97 at [18] per Howie J.
[7] *The Queen v Taylor* [1999] ACTSC 47 at [19]-[20] per Gray J; *R v Pitts (No 1)* [2012] NSWSC 1652 at [14] per Adamson J.

- s 138(2) – admissions made in response to coercive or misleading questions

- the categories of mischievous questioning advanced by defence counsel in the decision of *R v Sumpton* [2014] NSWSC 1432 were:

    1. questions assuming the guilt of the accused

    2. questions asking the accused to comment on the evidence of other witnesses and, in particular, asking him to comment on why those other witnesses might have said things they allegedly said

    3. questions reversing the onus of proof

    4. questions involving misrepresentations of the evidence

    5. questions belittling the accused or ridiculing his/her account

    6. questions tending to undermine the accused's right to silence

- *Regina v L L* (unreported, NSWSC, Smart J, 1 April 1996)

- *R v Ye Zhang* [2000] NSWSC 1099

- *R v Sumpton* [2014] NSWSC 1432

<u>When police questioning is tantamount to cross-examination</u>

- *R v Ul-Haque* [2007] NSWSC 1251

- *Regina v L L* (unreported, NSWSC, Smart J, 1 April 1996) – Smart J cites *R v Amad* [1962] VicRp 75; 1962 VR 545 at 547-548 per Smith J

- *R v Fischetti & Sharma* [2003] ACTSC 9 at [11] per Gray J – reference to *R v Pritchard* [1991] 1 VR 84 at 93

Part 3: how the *Evidence Act* deals with an accused suffering from mental illness or who is under the influence of drugs or alcohol

<u>Section 85</u>

- *The Queen v Taylor* [1999] ACTSC 47

- *R v Braun* (BC9708080, SCNSW, Hidden J, 24 October 1997, unreported)

- *R v McLaughlan* [2008] ACTSC 49

- will usually require:

- psychological / psychiatric evidence of the accused's mental condition

- evidence from the accused as to his/her level of understanding of the caution and right to silence + experience of the interview and level of understanding of what was happening

- a review of the accused's demeanour in the videotaped interview

- an assessment of the accused's fluency or lucidity of speech in the videotaped interview[8]

Section 90

- mental illness / sobriety may be considered under s 90 in two ways:

    1. whether the accused understood the caution and therefore the right to silence – keeping in mind s 90 ultimately deals with whether the accused's right to silence has been impugned[9]

    2. issues regarding reliability

Can issues of reliability be considered under s 90?

- the common law discretion in *Lee v The Queen* (1998) 195 CLR 594 considered whether the unreliability of the admission, or the circumstances of its making were such as to infer unreliability, could be productive of unfairness

- the two majority judgments in *Em v The Queen* (2007) 232 CLR 67 split on whether reliability still has a role to play under s 90

- Gleeson CJ and Heydon J in a joint judgment observed that insofar as s 90 codified the common law *Lee* discretion, the reliability of the admission was relevant to the statutory discretion: at [72]-[73]

- Gummow and Hayne JJ in a joint judgment took a different view at [109]:

> The questions with which those other sections deal (most notably questions of the reliability of what was said to police or other persons in authority, and what consequences follow from illegal or improper conduct by investigating authorities) are not to be dealt with under s 90. The consequence is that the

[8] *R v Esposito* (1998) 45 NSWLR 442 at 458 and 460 per Wood CJ at CL (James and Adams JJ agreeing); *R v Helmhout and Ors* [2000] NSWSC 185 at [40] per Bell J; *Soteriou v The Queen* [2013] VSCA 328 at [28] per Ashley JA (Priest JA and Lasry AJA agreeing)

[9] *Higgins v Regina* [2007] NSWCCA 46 at [28] per Hoeben J (Sully and Bell JJ agreeing); *R v Fischetti & Sharma* [2003] ATSC 9 at [11] per Gray J; *R v Suckling* [1999] NSWCCA 36 at [33] per the Court (McInerney, Ireland and Adams JJ); *R v Swaffield* [1998] HCA 1; 192 CLR 159 at [91] per Toohey, Gaudron and Gummow JJ

> discretion given by s 90 will be engaged only as a final or "safety net" provision.[10]

- the trend in the decisions appears to favour the Gleeson CJ and Heydon J's more expansive approach

- it is worth noting that the NSW Bench Books, published by the Judicial Commission of New South Wales, state at [4-0900]:

> [U]ntil some binding decision expresses a contrary view, it is suggested that *Em v The Queen* should be taken as holding that:
>
> (a) s 90 may be relied on as an alternative to reliance on any of the other specified sections; and
>
> (b) the interpretation of s 90 is not affected by the more particular or specific provisions of the Evidence Act.

- *R v Patricia Anne Gallagher* [2013] NSWSC 1102

- *R v Simmons; R v Moore (No 2)* [2015] NSWSC 143

[10] Which is to say if the accused raises an arguable point under s 85, but the Crown can discharge its burden under s 85(2), then the same facts and factors can not be considered on a s 90 application. However, if the facts or factors can not be raised under s 85 – because the context requirement in s 85(1) is not satisfied – then issues as to reliability can be considered under s 90.

84 Exclusion of admissions influenced by violence and certain other conduct

(1) Evidence of an admission is not admissible unless the court is satisfied that the admission, and the making of the admission, were not influenced by:

(a) violent, oppressive, inhuman or degrading conduct, whether towards the person who made the admission or towards another person, or

(b) a threat of conduct of that kind.

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

85 Criminal proceedings: reliability of admissions by defendants

(1) This section applies only in a criminal proceeding and only to evidence of an admission made by a defendant:

(a) to, or in the presence of, an investigating official who at that time was performing functions in connection with the investigation of the commission, or possible commission, of an offence, or

(b) as a result of an act of another person who was, and who the defendant knew or reasonably believed to be, capable of influencing the decision whether a prosecution of the defendant should be brought or should be continued.

Note : Subsection (1) was inserted as a response to the decision of the High Court of Australia in *Kelly v The Queen(2004) 218 CLR 216* .

(2) Evidence of the admission is not admissible unless the circumstances in which the admission was made were such as to make it unlikely that the truth of the admission was adversely affected.

(3) Without limiting the matters that the court may take into account for the purposes of subsection (2), it is to take into account:

(a) any relevant condition or characteristic of the person who made the admission, including age, personality and education and any mental, intellectual or physical disability to which the person is or appears to be subject, and

(b) if the admission was made in response to questioning:

(i) the nature of the questions and the manner in which they were put, and

(ii) the nature of any threat, promise or other inducement made to the person questioned.

90 Discretion to exclude admissions

In a criminal proceeding, the court may refuse to admit evidence of an admission, or refuse to admit the evidence to prove a particular fact, if:

(a) the evidence is adduced by the prosecution, and

(b) having regard to the circumstances in which the admission was made, it would be unfair to a defendant to use the evidence.

Note : Part 3.11 contains other exclusionary discretions that are applicable to admissions.

138 Exclusion of improperly or illegally obtained evidence

(1) Evidence that was obtained:

(a) improperly or in contravention of an Australian law, or

(b) in consequence of an impropriety or of a contravention of an Australian law,

is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

(2) Without limiting subsection (1), evidence of an admission that was made during or in consequence of questioning, and evidence obtained in consequence of the admission, is taken to have been obtained improperly if the person conducting the questioning:

(a) did, or omitted to do, an act in the course of the questioning even though he or she knew or ought reasonably to have known that the act or omission was likely to impair substantially the ability of the person being questioned to respond rationally to the questioning, or

(b) made a false statement in the course of the questioning even though he or she knew or ought reasonably to have known that the statement was false and that making the false statement was likely to cause the person who was being questioned to make an admission.

(3) Without limiting the matters that the court may take into account under subsection (1), it is to take into account:

(a) the probative value of the evidence, and

(b) the importance of the evidence in the proceeding, and

(c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding, and

(d) the gravity of the impropriety or contravention, and

(e) whether the impropriety or contravention was deliberate or reckless, and

(f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the *International Covenant on Civil and Political Rights* , and

(g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention, and

(h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.

Note : The *International Covenant on Civil and Political Rights* is set out in Schedule 2 to the *Human Rights and Equal Opportunity Commission Act 1986* of the Commonwealth.

139 Cautioning of persons

(1) For the purposes of section 138 (1) (a), evidence of a statement made or an act done by a person during questioning is taken to have been obtained improperly if:

(a) the person was under arrest for an offence at the time, and

(b) the questioning was conducted by an investigating official who was at the time empowered, because of the office that he or she held, to arrest the person, and

(c) before starting the questioning the investigating official did not caution the person that the person does not have to say or do anything but that anything the person does say or do may be used in evidence.

(2) For the purposes of section 138 (1) (a), evidence of a statement made or an act done by a person during questioning is taken to have been obtained improperly if:

(a) the questioning was conducted by an investigating official who did not have the power to arrest the person, and

(b) the statement was made, or the act was done, after the investigating official formed a belief that there was sufficient evidence to establish that the person has committed an offence, and

(c) the investigating official did not, before the statement was made or the act was done, caution the person that the person does not have to say or do anything but that anything the person does say or do may be used in evidence.

(3) The caution must be given in, or translated into, a language in which the person is able to communicate with reasonable fluency, but need not be given in writing unless the person cannot hear adequately.

(4) Subsections (1), (2) and (3) do not apply so far as any Australian law requires the person to answer questions put by, or do things required by, the investigating official.

(5) A reference in subsection (1) to a person who is under arrest includes a reference to a person who is in the company of an investigating official for the purpose of being questioned, if:

(a) the official believes that there is sufficient evidence to establish that the person has committed an offence that is to be the subject of the questioning, or

(b) the official would not allow the person to leave if the person wished to do so, or

(c) the official has given the person reasonable grounds for believing that the person would not be allowed to leave if he or she wished to do so.

(6) A person is not treated as being under arrest only because of subsection (5) if:

(a) the official is performing functions in relation to persons or goods entering or leaving Australia and the official does not believe the person has committed an offence against a law of the Commonwealth, or

(b) the official is exercising a power under an Australian law to detain and search the person or to require the person to provide information or to answer questions.