

# **Section 90 of the *Evidence Act*: An Overview / Mechanics of the Provision**

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## **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/ an accused] to use the evidence.

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

## **Purpose**

1. The purpose of this paper is to provide the reader with a practical overview of s 90 of the *Evidence Act* 1995 (*Evidence Act*). The paper addresses the more common issues that arise in criminal hearings or trials regarding the admissibility of admissions, such as accused persons with mental health issues, admissions made in response to aggressive police questioning or made in the absence of a police caution.
2. Section 90 also deals with matters beyond the scope of this paper; for example, state agency (such as pretext phone calls at the behest of police), admissions made to non-police investigators (such as insurance investigators) and admissions made under compulsion of law (such as statutory forms of demand issued by the police under *LEPRA* 2002 or the *Road Transport Act* 2013).

## **Discretion**

3. Section 90 is a discretionary power that permits a court to not admit evidence of an admission made by an accused that, having regard to the circumstances in which it was made, would be unfair to the accused to use at trial.

## **Unfairness at trial**

4. The provision is directed to the unfairness the accused would suffer at trial, and not the unfairness of the circumstances in which the admission was made: *Em v*

*The Queen* (2007) 232 CLR 67; [2007] HCA 46 at [107] per Gummow and Hayne JJ; *R v Swaffield* (1998) 192 CLR 159; [1998] HCA 1 at [53] per Toohey, Gaudron and Gummow JJ; *Van der Meer v The Queen* (1988) 82 ALR 10; [1988] HCA 56 at 26 (ALR) per Wilson, Dawson and Toohey JJ

### **Criminal proceedings**

5. Section 90 applies to criminal proceedings only.

### **Onus on the accused**

6. The accused bears the burden to establish the requisite unfairness. Gleeson CJ and Heydon J in the decision of *Em v The Queen* (2007) 232 CLR 67; [2007] HCA 46 stated at [63]:

At common law, the onus of demonstrating that it would be unfair to accused persons to use the evidence lay on them. The onus lies in the same place under s 90.

### **What is unfairness at trial?**

#### [A] Right to silence impugned

7. The concept of unfairness will invariably be considered where the accused's freedom to speak or not to speak has been impugned: *Higgins v The Queen* [2007] NSWCCA 56 at [28] per Hoeben J (Sully and Bell JJ agreeing); *R v Fischetti* [2003] ACTSC 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) 192 CLR 159; [1998] HCA 1 at [91] per Toohey, Gaudron and Gummow JJ.
8. The inquiry is whether the circumstances surrounding the making of the admission “amount to an unfair derogation of the [accused's] right to exercise a free choice to speak or be silent”: *R v Burton* [2013] NSWCCA 335 at [128] per Simpson J (RA Hulme J and Barr AJ agreeing).
9. If so, the question is then whether admitting the admission into evidence will “render the [accused's] trial unfair”: *Bryant v The Queen* (2011) 205 A Crim R 531; [2011] NSWCCA 26 at [117] per Howie AJ (McClellan CJ at CL and Simpson J agreeing).

#### [B] Regard is to be had to community standards in determining whether the right to silence has been impugned

10. The common law discretion had regard to community standards in assessing whether the accused's right to silence had been impugned. In the decision of *R v Swaffield* (1998) 192 CLR 159; [1998] HCA 1 the High Court had the opportunity to consider the common law unfairness discretion under Victorian law but at a time when the *Evidence Act* had been enacted in other jurisdictions. Toohey, Gaudron and Gummow JJ in a joint judgment at [69] described the common law discretion as:

... an overall discretion which might take account of all the circumstances of the case to determine whether the admission of the evidence or the obtaining of a conviction on the basis of the evidence is bought at a price which is unacceptable, having regard to contemporary community standards.

11. In the context of s 90, in the decision of *R v Suckling* [1999] NSWCCA 36 the Court (McInerney, Ireland and Adams JJ) considered the notion of community standards at [40]:

We are of the view that to admit the recorded conversations upon the ground that they derogated from the appellant's right to silence or privilege from self-incrimination would, in all the circumstances of this case, be very far from seriously offending prevailing community standards. In saying this, however, we wish to point out that the reference by the High Court, as by this Court, to community standards in this respect is not to any notion of populist public opinion. Rather, this refers to community standards concerning the maintenance of the rule of law in a liberal democracy, the elements of the proper administration of justice and the due requirements of law enforcement.

[C] Forensic advantage to the Crown / Forensic disadvantage to the accused

12. The issue of unfairness at trial is related to the notion of “forensic advantage” to the Crown or “forensic disadvantage” to the accused. Either can be a basis of unfairness at trial. In *R v Swaffield* (1998) 192 CLR 159; [1998] HCA 1, Toohey, Gaudron and Gummow JJ wrote at [78]:

[T]he purpose of that discretion is the protection of the rights and privileges of the accused. Those rights include procedural rights. There may be occasions when, because of some impropriety, a confessional statement is made which, if admitted, would result in the accused being disadvantaged in the conduct of his defence. Thus, in *McDermott*, where the accused did not admit his guilt, but admitted making admissions of guilt to others, it was hypothesised by Williams J that it might have been unfair to admit his statement if the persons to whom the admissions were made were not called as witnesses. In *R v Amad*, Smith J rejected admissions which were voluntary and which the accused accepted were true because the manner in which he was questioned led to apparent inconsistencies which might be used to impair his credit as a witness. And the significance of forensic disadvantage is to be seen in *Foster* where the inability of the accused to have his version of events corroborated was taken into account.

13. Forensic disadvantage means the admission was made in circumstances of procedural irregularity, whereby the irregularity deprives the accused of legal safeguards. Such safeguards can include statutory protections (for example, the need for police officers to caution the accused), or community expectations of police conduct (for example, rude, offensive and/or denigrating treatment of the accused during the police interview).
14. The point is that admissions made in consequence thereof could place the accused at a forensic disadvantage, where that disadvantage has been obtained at a price which is unacceptable to the community, such that he/she is deprived of a fair trial.

15. The accused had been charged with manslaughter. After his arrest he was taken to the police station where his “hysterical” conduct led the police to contact a Ms Salmon, a clinical nurse specialist with the Mental Health Crisis team attached to the Royal Prince Alfred Hospital. She assessed him at the police station for mental illness and also for his risk of self-harm or suicide.
16. During the course of Salmon's assessment, the accused made the following admissions: that he and the deceased had been “arguing a lot, the last few weeks”; that he and the deceased had “argued last night”, that he and the deceased had “argued this morning”. Price J excluded the admissions under s 90.
17. Price J ultimately ruled at [24]:

[T]he accused would be placed in the position of having to give some explanation about what was said in the interview and would be unfairly forensically disadvantaged.

18. His Honour considered the circumstance that the accused had not been cautioned but was told that Salmon was at the police station solely for the purpose of assessing his mental health issues. Furthermore, his Honour noted at [21] that Salmon considered the examination to be confidential and routinely advised patients that their conversations were as such.
19. The unfairness for s 90 purposes was founded upon the resultant forensic disadvantage at which the admissions placed the accused. If the admissions were admitted, the accused would have been forced to explain the admissions by giving evidence (and therefore forego his right to not give evidence at trial). Alternatively, he could say nothing about the evidence, leaving the jury to draw the inevitable inference that he had an animus against the deceased and/or motivation to kill him.

[D] Admission made on false assumptions

20. An accused who makes an admission on a false assumption may have recourse to the s 90 discretion.
21. The ALRC Report 38 (1987) at para. 160(b) articulated why the common law discretion needed to be retained in the statutory scheme in the following way:

[T]he [common law] discretion has been used to deal with the situation where the accused has chosen to speak to the police but on the basis of assumptions that were incorrect, whether because of untrue representations or for other reasons ... The interim proposals included a discretion enabling the judge to exclude evidence obtained illegally or improperly. That discretion is capable of dealing with the matter but not in the way that the Lee discretion does. The Lee discretion focuses on the question whether it would be unfair to the accused to admit the evidence. The discretion to exclude illegally or improperly obtained evidence requires a balancing of public interests. It would, therefore, be less effective than the [common law]

discretion in the situation where the confession was obtained because the accused proceeded on a false assumption. There is a need for a discretion to enable the trial judge to exclude evidence of admissions that were obtained in such a way that it would be unfair to admit the evidence against the accused who made them.

22. In the decision of *Em v The Queen* (2007) 232 CLR 67; [2007] HCA 46 Gleeson CJ and Heydon J observed at [56]:

Whether or not the appellant was correct to submit that the primary focus of s 90 was on incorrect assumptions made by accused persons, there is no doubt that it is one focus of s 90, and it is one which is relevant to the way in which counsel submitted the appellant's incorrect assumption should be viewed. In any particular case, the application of s 90 is likely to be highly fact-specific.

**Common context 1: subjective circumstances / mental health / intoxication**

23. The potential unreliability of the admissions may be considered under s 90. In particular, the question arises as to whether the personal characteristics of the accused, such as his/her mental health, can be taken into account in assessing that unreliability. In the decision of *R v Phan* (2001) 53 NSWLR 480; [2001] NSWCCA 29, Wood CJ at CL (McClellan J and Smart AJ agreeing) stated at [56]:

Each case must be determined upon its own facts, and in particular by reference to the extent to which there is any unfair pressure placed upon the person being interviewed, or unfair advantage taken of his position, for example because of his age, vulnerability, lack of familiarity with the English language and so on.

*The decision of R v Nelson [2004] NSWCCA 231*

24. The appellant's intoxication and distress were raised as bases affecting the reliability of her admissions, giving rise to the alleged unfairness under s 90. The Court (Grove J, with Dowd and Sperling JJ agreeing) upheld the trial judge's decision to not exclude the admission under s 90. Sperling J remarked at [55] that the appellant's intoxication and distress were factors "which the jury was well able to assess and evaluate in weighing the evidence of statements". Notwithstanding the outcome on appeal, Grove J remarked at [23] that:

Unreliability is not synonymous with unfairness but it is a relevant indicator of whether admission of particular testimony might be unfair.

*The decision of R v Gallagher [2013] NSWSC 1102*

25. The accused made admissions to an undercover officer to killing the deceased. She had been diagnosed with an alcohol dependence and abuse disorder; a brain injury, both traumatic and alcohol related, and epilepsy. The psychiatrist at [134] also gave evidence that:

Ms Gallagher has a propensity to confabulate, which is to fill in gaps in memory with made up information, which is very characteristic of people who have alcohol related dementia. Hence her answers might be quite unreliable.

26. The psychiatrist' ultimate opinion was:

The pattern of intellectual impairment was consistent with damage to the frontal lobes of the brain which influences planning, emotional regulation, social judgment and impulse control. At the time of the ERISP and during the recent interview Ms Gallagher was inappropriately cheerful, emotionally labile, and was disorganised in her speech in a way that was consistent with frontal lobe injury ... Ms Gallagher was not thought to have a mental illness of a kind that might leave open the defence of mental illness. However, traumatic brain injury is an underlying condition that is likely to have resulted in impairment in Ms Gallagher's ability to control her actions, notwithstanding the effects of intoxication with alcohol, because her intoxication with alcohol would exacerbate the effects of her underlying brain injury.

27. Bellew J, following the decisions of *Em v The Queen* (2007) 232 CLR 67; [2007] HCA 46 and *Tofilau v The Queen* (2007) 231 CLR 396; [2007] HCA 39, found that the deception by undercover officers was not productive of unfairness (at [221]). However, his Honour found the accused's psychological and mental health issues extended far beyond a confused state of mind. The admissions were ultimately excluded under s 90 due to their unreliability (at [242]). Bellew J reasoned at [233]–[234]:

In the present case, although the evidence establishes that the accused had some capacity to comprehend questions put to her, it is clear that such capacity was impaired. It is also clear that her thought processes were disorganised, that her ability to effectively communicate was impaired, and that she had a propensity to become easily confused. In my view, all of these matters necessarily have a resultant effect upon the reliability of any answer she gave to any question put to her. In terms of reliability, they are conditions of substantially greater gravity than conditions of distress, intoxication or depression.

Moreover there is evidence, which for the reasons that I have previously outlined (at [183] – [184] above) I accept, that the accused's illnesses were productive of a propensity to confabulate. In other words, she had a propensity to fabricate some imaginary experience so as to compensate for a loss of memory.

### **Common context 2: police questioning and admissions obtained after the accused declines to be interviewed**

28. Persistent questioning by the interviewing police, which eventually elicits admissions, could place the accused at a forensic disadvantage at trial. However, in *R v Phan* (2001) 53 NSWLR 480; [2001] NSWCCA 29 Wood CJ at CL (McClellan J and Smart AJ agreeing) remarked at [54]:

There is no absolute rule that an interview conducted in the face of an objection by a suspect, or continued in the face of an indication that he or she does not wish to participate any further in it, should be rejected if tendered in evidence.

29. Whether police questioning, in spite of an accused's declination, produces unfairness is a matter of degree. In the decision of *R v Kerrie Anne Clarke* (1997) 97 A Crim R 414, Hunt CJ at CL (Smart J and Howie AJ agreeing) said at 419-420:

It should be kept in mind that a police officer is under a duty to ascertain the facts which bear upon the commission of a crime, whether from the suspect or not, and the officer is not bound to accept the first answer given; questioning is not to be regarded as unfair merely because it is persistent. It is a question of degree as to whether persistence has crossed the line so as to render it unfair to use the answers in evidence. No doubt the evidence will inevitably be excluded if there is any suggestion of intimidation, persistent importunity or sustained or undue insistence or pressure.

30. Smart J, agreeing with Hunt CJ at CL, in a brief separate judgment wrote at 431:

It is not uncommon for an accused to intimate that he does not wish to answer any questions and then to decide to answer some questions or to make a statement or explanation. There may be something in a police statement or summary of the situation which the accused regards as wrong and needs correction or something which needs explanation. There are many possibilities. It would be unwise to hold that every time an accused states that he does not want to answer questions, some further questions are put and answers are given or explanations or statements made such answers, statements or explanations are inadmissible. Everything depends on the circumstances.

31. In the decision of *R v Pitts (No 1)* (2012) 229 A Crim R 387; [2012] NSWSC 1652 Adamson J excluded certain admissions made during a police interview in circumstances where the accused stated multiple times that he wished to make “no comment” and had been advised by his lawyer to not give an interview. The interviewing police proceeded to ask seemingly innocuous questions and then continued into an interrogation which elicited the admissions (at [26]–[41]).

32. The decision of *R v LL* (unreported, Supreme Court of NSW, Smart J, 1 April 1996) concerned a juvenile charged with murder. Smart J excluded admissions made by the accused in response to the questioning of an interviewing officer who (at p 27):

transgressed permissible limits in that:

- (a) he has tried to break down the answers of the accused by way of denial or unfavourable replies;
- (b) there was searching questioning in which scepticisms was expressed and in which it was suggested that he was not telling the truth;
- (c) his account of his movements, his presence at the scene and his alibi were checked and challenged. His denials were tested.
- (d) when he indicated that he did not wish *[sic]* to comment upon the allegations in the audio/visual demonstrations [of witnesses] further questioning continued;
- (e) he was pressed to give reasons why [other witnesses] would say he was the stabber when they were “friends” of his. In their settings these were not enquiries but suggestions of guilt. It was not disclosed that [those witnesses] had been offered assistance with their own sentences for furnishing information that LL had been the stabber.