Reckless Conduct and Section 138 of the Evidence Act

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[A] Introduction

1. The purposes of this paper are to:

    i. explore the formulations of the test for *reckless* as found in s 138(3)(e) of the *Evidence Act* (NSW) 1995 (the ***Evidence Act***) developed by the case law;

    ii. demonstrate that the test for *reckless* sets the bar high in terms of the mental state that must be established to underpin the impropriety or contravention before it can tilt the s 138 discretion in favour of excluding the subject evidence, and

    iii. suggest a number of features that could, individually or in combination, assist defence submissions on establishing the recklessness of police misconduct.

[B] Section 138 of the *Evidence Act*

2. Section 138 of the *Evidence Act* provides:

> 138 Exclusion of improperly or illegally obtained evidence
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> (1) Evidence that was obtained:
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> (a) improperly or in contravention of an Australian law, or
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> (b) in consequence of an impropriety or of a contravention of an Australian law,
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> 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.
[Emphasis added]

[C] Why *Reckless* in the Context of s 138(3)(e) is Important

Recklessness is an Express Factor for Consideration

3. Misconduct that is deliberate or reckless tilts the s 138 discretion towards exclusion. The factor is clearly significant if the mental state can be made out.

4. The ALRC Report 26, Vol. 1 at para 964 states:

> *Mental State*. The mental state of the officer is relevant from a disciplinary perspective if the illegality or impropriety was the result of a mistaken belief that he was entitled to do what he did this would tend to reduce the **seriousness of misconduct** and therefore lessen the need for disciplinary action. Similarly, if misconduct is less culpable because it was inadvertent, then the **moral imperative to avoid judicial taint** is reduced, since the taint itself is not so serious.
> [Emphasis added]

5. Deane J in the pre-*Evidence* Act decision of Pollard *v The Queen* (1992) 176 CLR 177 at 203-204 wrote:

> At the opposite extreme are cases where the incriminating statement has been procured by a course of conduct on the part of the law enforcement officers which involved deliberate or reckless breach of a statutory requirement imposed by the legislature to regulate police conduct in the interests of the protection of the individual and the advancement of the due administration of criminal justice. Such cases manifest "the real evil" at which the discretion to exclude unlawfully obtained evidence is directed, namely, "**deliberate or reckless disregard** of the law by those whose duty it is to enforce it". **In such cases, the principal considerations of public policy favouring exclusion are at their strongest and will ordinarily dictate that the judicial discretion be exercised to exclude the evidence**.
> [Emphasis added]

Relationship between Recklessness and the Seriousness of Misconduct

6. There is a positive correlation between recklessness and the seriousness of misconduct, what s 138(3)(d) of the *Evidence Act* expresses as "*the gravity of the impropriety or contravention*". The more wanton or reckless the attitude of law enforcement agencies in obtaining the subject evidence, the greater the departure from proper procedure and therefore the more serious the misconduct.

7. The seriousness or gravity of misconduct therefore lies not only in the significance of the standards or laws breached, the extent to which they are breached or the consequences flowing from such breach. The seriousness or gravity of misconduct lies also in the officer's attitude (i.e. deliberateness or recklessness) at the time of committing the breach. Smart AJ in *DPP v Carr* [2002] NSWSC 194 at [82] stated:

> The fact that a police officer has acted lawfully, honestly and with integrity does not prevent the impropriety being serious. In the present case the officer's failure to consider the issue of a summons and his predisposition to FCANs for reasons

> of expediency was ill-advised and led predictably, to arrest and the deprivation of liberty of Mr. Carr. That impropriety was serious.

8. It follows that an absence of honesty and/or integrity could increase the seriousness of misconduct and, a fortiori, a reckless attitude would compound that increase.

9. The determination of mental state therefore becomes increasingly significant in the exercise of the discretion under s 138 of the *Evidence Act* as it impacts on two of the enumerated factors falling for consideration.

Relationship between Recklessness and the Imperative to Avoid Judicial Taint

10. Judicial taint varies directly with culpability. Inverting the ALRC's statement at para 964 cited in this paper at para 4: *if misconduct is more culpable because it was reckless, then the moral imperative to avoid judicial taint is amplified, since the taint itself is serious.*

11. Although judicial taint is not an express factor falling for consideration under s 138(3), the factors enumerated are not exhaustive. Stephen and Aickin JJ in *Bunning v Cross* (1978) 141 CLR 54 at 75, a pre-*Evidence Act* decision that influenced the later s 138 codification, recognised that the balancing exercise involves a striving to avoid:

> … the undesirable effect of curial approval, or even encouragement, being given to the unlawful conduct of those whose task it is to enforce the law.

Caution: Recklessness is not determinative of the Exercise of the Discretion

12. It is important to appreciate that the recklessness of the misconduct is only one factor among many required to be considered.

13. The weight that recklessness will have in the exercise of the discretion will vary depending on the nature of the misconduct and the surrounding circumstances.

14. Evidence can certainly be excluded in circumstances where the misconduct is entirely innocent, unknowing or ignorant.

15. Nonetheless, a finding that the impropriety or contravention was deliberate or reckless will generally weigh heavily in the exercise of the s 138 discretion to exclude evidence.

[D] The Test for *Reckless*

16. In 2001 the NSW Supreme Court and the NSW Court of Criminal Appeal made three decisions in quick succession formulating the test for reckless in the context of s 138(3)(e) of the *Evidence Act*.

17. Adams J in *DPP v Nicholls* [2001] NSWSC 523 (22 June 2001); [2001] 123 A Crim R 66 at [23] wrote:

> "reckless" within the meaning of s 138(1)(3)(e) of the *Evidence Act* 1995 requires a serious disregard of the relevant procedures amounting to a **deliberate undertaking of the risk** that the rights of a suspect will be substantially prejudiced.
> [Emphasis added]

18. James J in *DPP v Leonard* [2001] NSWSC 797 (14 September 2001); [2001] 53 NSWLR 227 at [103] stated:

> [I]t would be necessary, in order for a police officer's conduct to be "reckless", to find that the police officer failed to give any thought to whether there was a risk of

a search being illegal, in circumstances where, if any thought had been given, it would have been obvious that there was such a risk.

19. Hulme J (Ipp AJA and Sperling J concurring) in *R v Helmhout* [2001] NSWCCA 372 (19 September 2001); (2001) 125 A Crim R 257 at [33] said:

> It is not necessary for the purposes of this appeal to attempt to define exhaustively the meaning or operation of the term "reckless" in paragraph (e) of s138(3). In the context of "improperly or in contravention of an Australian law" the concept "reckless" must involve as a minimum some advertence to the possibility of, or breach of, some obligation, duty or standard of propriety, or of some relevant Australian law or obligation and a **conscious decision** to proceed regardless or alternatively a "**don't care**" attitude generally…
> [Emphasis added]

20. The formulations in *Nicholls* and *Helmhout* are stricter than the test in *Leonard* as they involve a deliberate undertaking of a risk. Recognition of that risk, prior to acting on it, is vital. The expansive formulation espoused by James J in *Leonard* is more akin to negligence, as it does not require a consciousness of risk, but merely a failure to consider whether there was a risk. In any event, earlier at [103] of his judgment James J applied the stricter test laid down in *Nicholls* and wrote:

> [U]nless the Magistrate was prepared to make a finding that a police officer **acted in the knowledge that he might be acting in breach of a statutory duty but nevertheless deliberately decided to proceed with the action and undertake the risk**, the Magistrate could not, according to the meaning given to "reckless" in s 138(3)(e) by Adams J in paragraph 20 of his Honour's judgment in *Director of Public Prosecutions v Nicholls*, have found that the breach of the statutory duty was "*reckless*".
> [Emphasis added]

21. Hulme J (Whealy JA and Hidden J concurring) in *R v Sibraa* [2012] NSWCCA 19 at [23] implicitly conceded that the more expansive formulation in *Leonard* is not the correct test for reckless in the context of s 138 of the *Evidence Act*. Following *Nicholls* and *Helmhout*, his Honour stated in clear terms at [23] "*the requirement that there be recognition of a risk*" by the police.

22. In summary, the courts require:

    i. a standard or law prescribing or proscribing certain conduct (**governed mischief**);

    ii. a recognition of a risk that that standard or law could be breached by acting or omitting to act in a particular manner (**consciousness of risk of mischief**), and

    iii. a deliberate disregard of that risk by nevertheless proceeding in that manner (**conscious mischief**),

    to ground a finding that the impropriety or contravention was reckless.

23. Critically, recklessness requires an act of the will; the making of a choice in the face of an acknowledged risk. The formulation takes recklessness beyond criminal or tortious formulations of negligence, whereby a person does not avert to the risk but a reasonable person would have done so and thus had acted or omitted to act in a manner that would mitigate that risk (on this issue see Part [F] of this paper).

[E] Applications of the Test for *Reckless* in the Courts

24. The cases discussed below involve either the exercise of, or appellate review of the exercise of, the s 138 discretion.

25. It is important to appreciate that the exercise of a judicial discretion is reviewable only in accordance with the principles expounded in *House v The King* (1936) 55 CLR 499 at 504-5, i.e. where error in the exercise of the discretion is demonstrated.

26. In circumstances where such error is found, often the appellate court will exercise the discretion afresh. An exercise of discretion will generally not, so far as it represents an application of the law to a certain set of facts, constitute binding authority.

27. Similarly, in circumstances where an appeal court upholds the exercise of discretion by a lower court it should not necessarily be inferred that the court is holding that the decision was the only one available on the facts. Often the decision, read closely, is only an affirmation that the decision was made within the legitimate confines of the discretion of the decision-maker at first instance and was unaffected by legal or factual error. That is not the same as saying the appellate court agreed with the decision at first instance.

DPP v Nicholls [2001] NSWSC 523 – evidence admitted, not reckless

28. Nicholls was arrested in 2000 for an assault alleged to have occurred in 1997. He agreed to participate in an identification parade. The parade did not take place as sufficient people could not be found. It was agreed that a further attempt at a parade would be made one week later. He was released from police custody without charge.

29. One week later Nicholls voluntarily returned to the police station at which point he was placed in a dock area, away from the public foyer, and informed

of his rights under Part 10A of the *Crimes Act* (NSW) 1900[1]. The officer did this because he believed he was required to do so in order to comply with the provisions of Part 10A. Notwithstanding this belief, the police officer himself did not consider Nicholls under arrest and gave evidence that Nicholls would have been free to leave whenever he wished.

30. Attempts at holding an identification parade failed once more. Nicholls was interviewed and the police took a photograph of him to use in a photographic identification parade in the future. The police informed him that if the alleged victim identified him he would be summonsed. Nicholls was subsequently identified from the photograph and charged with assault.

31. Applying s 138, the magistrate excluded the identification evidence. He found that although Nicholls consented to his photograph being taken, the photograph was obtained while he was unlawfully held in custody in circumstances where the police acted "*in a reckless manner*." Recklessness was found despite a further finding by the magistrate that the police had at all times intended to act fairly with respect to Nicholls. The DPP appealed the decision.

32. Adams J allowed the appeal. His Honour held that Nicholls had properly consented to the taking of the photograph. Therefore the question of detention was not at issue. Adams J went on to state that in the event that Nicholls was detained, as the magistrate had found, then such detention was lawful and taking the photo was authorised by and in compliance with the provisions of Part 10A.

33. Nevertheless, Adams J thereafter made observations about s 138. His Honour wrote:

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[1] The precursor provisions to Part 9 of the *Law Enforcement (Powers and Responsibilities) Act* (NSW) 2002

> [23] It is important to bear in mind that, accepting the Magistrate's finding that the detention of the defendant was unlawful… [t]he detention **could not have been characterised as serious or grave**. **Nor, in my respectful view, was there a basis for concluding that Detective Sergeant Hardie had acted recklessly**. In this latter respect, "reckless" within the meaning of s 138(1)(3)(e) of the *Evidence Act* 1995 requires a serious disregard of the relevant procedures amounting to a deliberate undertaking of the risk that the rights of a suspect will be substantially prejudiced. **The learned Magistrate's finding that Detective Sergeant Hardie intended at all times to act fairly was not only correct but, in the circumstances, should have been decisive**. There was no basis for a finding of recklessness, for all that **the officer was possibly not as familiar as he ought to have been about the requirements of Part 10 of the Act**, a matter about which there must be considerable doubt.
> [Emphasis added]

DPP v Leonard [2001] NSWSC 797 – evidence admitted, not reckless

34. Leonard was driving a hired motor vehicle on the Sturt Highway. His vehicle was stopped for the purposes of a random breath test. The test proved negative. The police then sought consent to search the vehicle. The following conversation ensued:

> **Officer**: Sir, we have a lot of illegal substances that are being transported along the Sturt Highway, particularly in hire vehicles such as these. What I would like to do is conduct a search of the vehicle in your presence to check for any such substances or illegal drugs.
>
> **Leonard**: Go for it, there is nothing in here mate.

35. Cannabis was found in the vehicle during the search.

36. The magistrate excluded the evidence. He found that:

i. there was no reasonable suspicion for the purposes of s 37(4) of the *Drug Misuse and Trafficking Act* (NSW) 1985;

ii. Leonard had not given *informed consent* to the search, and

iii. the consent that was given constituted an admission for the purposes of s 108 of the *Criminal Procedure Act* (NSW) 1986 and should be excluded as the conversation had not been recorded.

37. In light of the preceding, the magistrate concluded:

> "So far as s 138 is concerned, it is clear that the police officers here, whilst perhaps not consciously deciding to act in the knowledge they were in breach of a statutory duty, nevertheless consciously decided to instigate a search which search was in fact illegal and which in fact involved a "deliberate or reckless breach of a statutory requirement imposed by the legislature to regulate police conduct ..." (Deane J, *Pollard's case* [1992] HCA 69; 176 CLR 177 at 203).

38. James J allowed the appeal by the Crown. His Honour held that the three improprieties/contraventions identified by the magistrate were not open on the facts. The search had been consented to; reasonable suspicion was therefore not required and evidence of the consent was not evidence of an admission. There being no impropriety or contravention, the discretion contained in s 138 was not enlivened. Notwithstanding, regarding s 138 his Honour made the following remarks:

> [102] If the Magistrate was not prepared to make a finding that a police officer **consciously** decided to act in the knowledge that he would be acting in breach of a statutory duty, the Magistrate could not find that the breach of the statutory duty by the police officer was "deliberate".

> [103] Likewise, unless the Magistrate was prepared to make a finding that a police officer acted in the knowledge that he might be acting in breach of a statutory duty but nevertheless deliberately decided to proceed with the action and undertake the risk, the Magistrate could not, according to the meaning given to "reckless" in s 138(3)(e) by Adams J in paragraph 20 of his Honour's judgment in *Director of Public Prosecutions v Nicholls*, have found that the breach of the statutory duty was "reckless". **That a police officer consciously decided to instigate a search, which was in fact illegal, does not show that any contravention by the police officer of the statutory requirements for a lawful search was "deliberate" or 'reckless"**.
> [Emphasis added]

39. Relevantly, a conscious decision to act in a manner that later proves improper or unlawful does not of itself demonstrate a conscious disregard of a risk of that very outcome by acting in that manner. Put another way, a *conscious decision to act* is not equivalent to *consciousness of a risk in making that decision to act*. The latter instance is required to ground a finding of recklessness.

R v Helmhout [2001] NSWCCA 372 – evidence admitted, not reckless

40. Helmhout was arrested on a charge of murder. He was a juvenile aboriginal person. He made admissions whilst in custody in the Queanbeyan Police Station. Clause 28 of the *Crimes (Detention after Arrest) Regulation* 1998 required that the custody manager notify an Aboriginal legal aid organisation that Helmhout was in custody. No such organisation was contacted. At trial his in-custody confessions were admitted into evidence over objection.

41. On appeal, Helmhout challenged the decision to admit that evidence, submitting that the trial judge erred in concluding that the contravention was not reckless vis s 138(3)(e) and merely involved the custody manager "*overlooking*" his obligations under the regulations.

42. The CCA dismissed the appeal, holding that the findings made by the trial judge were open to her and that her discretion had not miscarried.

43. Relevantly, Hulme J (Sperling J concurring) wrote:

> [32] Her Honour said that Sergeant Dagwell impressed her as an officer who would faithfully carry out each function he was required to perform…
>
> [33] … The mere failure to comply with clause 28 on one occasion cannot, without more, demonstrate [recklessness]. There is no other evidence to suggest the failure was reckless and her Honour's findings referred to in the preceding paragraph – findings which were well open to her on the evidence – are inconsistent with any suggestion along these lines.
>
> [34] And once the conclusion was reached that Sergeant Dagwell had the qualities to which her Honour referred, that he was aware and had complied with clause 28 on other occasions, that conditions at the police station on the occasion the Appellant was there were somewhat chaotic and that Sergeant Dagwell's failure to comply with clause 28 was not deliberate – all of which conclusions were both open to, and found by, her Honour, the statement that he "*overlooked*" the requirement of the clause was reasonably open.

44. Hulme J further stated in obiter:

> [52] I would go further. Even without her Honour's decision that it was not unfair under s 90 to admit the document, once one accepts her findings – unchallenged by the Appellant in the appeal – as to the probative value of the evidence - "very high", as to the importance of the evidence – "critical", as to the nature of the offence – murder, that it had not been suggested that the contravention was contrary to or inconsistent with a right recognised by the International Covenant on Civil and Political Rights, together with the conclusion that the contravention

was not deliberate or reckless, and her view of the Appellant's circumstances at the time of the interview, her Honour's decision under s138 was clearly correct.

DPP v Carr [2002] NSWSC 194 – evidence excluded, found recklessness

45. Rocks had been thrown at a police vehicle. The police officer approached Carr on the street to inquire as to the identity of the person who had thrown the rocks. Believing he was suspected of throwing the rocks, Carr became agitated and commenced using offensive language towards the officer as well as swearing loudly in the public street. He was asked to stop swearing but continued to do so as he walked away from the officer.

46. The officer announced an arrest for offensive language. He took Carr by the arm. Carr pushed the officer away and attempted to flee. The officer caught up with Carr and tackled him. He was charged with offensive language, resist arrest and assault police. Based on some threats Carr is alleged to have later made in police custody, he was also charged with intimidate police.

47. The magistrate held that the arrest for the offensive language, whilst lawful, was improper and evidence of the subsequent offences should be excluded under s 138.

48. As it involved a fine only offence, the arrest was improper because the officer knew Carr's identity; his residential address and that he had been a resident of the town for several years. He could have proceeded by way of summons or Field Court Attendance Notice ("*FCAN*") and by doing so he could have prevented the situation escalating.

49. There was evidence before the court that the officer proceeded to arrest because it was expedient. Proceeding by summons or FCAN would have required service and thus involved more work. It was also found that the

arresting officer had not read the *NSW Police Service Handbook*, which made it clear that arrest is a course of last resort.

50. Applying s 138, the magistrate stated: "*I previously found that the impropriety was not deliberate – the officer had not read the handbook and clearly believed he had acted properly. The concept of recklessness is apparent*."

51. The DPP appealed the decision to exclude evidence to the Supreme Court.

52. Smart AJ dismissed the relevant grounds of appeal. His Honour concluded that it was open to the magistrate to exclude the evidence. On the DPP's submissions regarding recklessness, his Honour wrote:

> [77] … Mr. Carr pointed out that the magistrate's finding of recklessness should not be divorced from the other findings he had made and should be seen in the light of them. These included his finding that the impropriety was serious, the amount of the permissible fine was at the lowest end of the criminal calendar, arrest for a matter where the maximum penalty is a fine was in a very special category and means that a suspect suffers a greater penalty by being deprived of his liberty than he could possibly get by going to court and being found guilty. The magistrate then repeated his earlier findings of fact:
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> "*1 The officer did not consider a summons*
> *2 The officer had not read the NSW Police Service Handbook*
> *3 The officer knew the defendant's name and address*
> *4 The officer placed the defendant under arrest for the purpose of giving him a field court attendance notice at the vehicle and/or for the purpose of stopping him continuing to swear*
> *5 There is no clear explanation as to why the FCAN issue required an arrest*
> *6 The officer did not attempt any other method of effecting the issue of a field court attendance notice apart from arrest - including asking the defendant to stop, or telling him that he would be reported etc*

7 A process not requiring arrest was not chosen because it was 'far quicker' to arrest and then issue a field court attendance notice."

[78] The magistrate continued:

"*This was **more than merely a technical breach**. It was inconsistent with the view repeatedly expressed by the higher courts of this State as to what are regular, permissible standards of acceptable police conduct with respect to the decision to arrest. Further, it was inconsistent with the police guidelines, in an unexceptional case, as to appropriate use of the arrest power. Further still, the arrest is inconsistent with the purpose of FCAN's as intended by parliament and the Police Service itself*."

[79] On the evidence and his findings the magistrate was entitled to hold that the impropriety was reckless. Without traversing all the materials Cons Robins did not consider a summons when that was the course which should have been taken. That was time consuming and troublesome. It was **far quicker** to issue an FCAN. Cons Robins **carelessly disregarded** both the use of the appropriate procedure and the possible consequences of the actions which he proposed to take and took when these were obvious and he must have realised these as an officer of five years experience dealing with a person who was moderately intoxicated.
[Emphasis added]

53. Relevantly, the arresting officer knew of and had available to him alternative, as well as more appropriate, means of commencing proceedings against Carr. He consciously disregarded those means for reasons of expediency, thereby grounding a finding of recklessness.

R v Dalley [2002] NSWCCA 284 – evidence admitted, not reckless

54. Dalley was charged with murder. He made significant admissions during an electronically recorded interview. Prior to conducting the interview, the

custody manager had not provided Dalley with a written or oral summary of his rights under Part 10A of the *Crimes Act*, contrary to s 356M(1)(b).

55. The admissions were admitted into evidence over objection and Dalley was convicted. Applying s 138, the trial judge was satisfied the contraventions of the relevant provisions of Part 10A were not deliberate or reckless. Rather, he found the contraventions were attributable to the inexperience of the police officers in the application of those provisions as well as insufficient training for the custody manager as to his legal obligations. Dalley appealed the conviction.

56. The CCA dismissed the appeal finding no error and no basis to upset the exercise of discretion undertaken by the trial judge. Simpson J (Spigelman CJ and Blanch AJA concurring) wrote:

> [93] … [A] distinction is to be drawn between wilful or reckless disobedience of such provisions, and contraventions which come about, as did these, by reason of **inexperience with new statutory provisions**, and **lack of training** in their implementation. Her Honour made it plain that she accepted the police officers as truthful witnesses and that they were **neither reckless nor dishonest in their approach to this investigation**. That is, in my opinion, a significant matter affecting the s138 judgment.
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> [98] … the **relative innocence** with which the statutory contraventions were brought about is important.
> [Emphasis added]

R v Loc Huu Phan [2003] NSWCCA 205 – evidence admitted, not reckless

57. LHP was arrested at the rear of his house and charged with the supply of cocaine. Police had received an anonymous tip-off that some illegal immigrants, who had escaped from the nearby Villawood Detention Centre,

were living in a shed at the rear of the property. Five officers attended the premises and entered without a search warrant. Two officers proceeded to the front door and three to the backyard. The three officers in the backyard saw LHP exit the shed. From their vantage point, they could see on a table in the shed a spoon, a box of bi-carbonate of soda and a number of re-sealable plastic bags, which were the indicia of the supply of drugs. They also observed a plastic bag and a fifty dollar note sticking out of LHP's trousers' pocket. He was searched and cocaine was discovered on his person.

58. In the meantime, the other two officers were met at the front door by LHP's wife. They explained who they were and why they were there. She consented to them entering and searching the premises. This consent was granted moments after the three officers in the backyard (unbeknownst to the two officers at the front door) had seized the drug related paraphernalia and arrested LHP.

59. The trial judge held that the three officers in the backyard were on the premises unlawfully at the time they saw the incriminating items and searched LHP. He excluded the evidence of the search and seizure under s 138. The trial judge reasoned that the officers' acts amounted to an unlawful invasion of property, the gravity of which he gauged as unlawful conduct "*of a high order*" (c.f. s 138(d)).

60. The trial judge, however, did concede that the breach was "*unconscious*" and that the police "*were acting in good faith and responding to what they saw as a need for prompt investigation*..."

61. The DPP appealed the trial judge's decision to exclude the evidence under section 5F of the *Criminal Appeal Act* (NSW) 1912. On appeal, Meagher ACJ, Hulme and Hidden JJ admitted the evidence. In a joint judgment their Honours wrote:

> [14] … Given his Honour's finding that the police acted in **good faith** in response to a report which they saw as requiring prompt attention, it is difficult to see how their unlawful entry onto the property deserved the censure which was visited upon it. Moreover, the respondent was searched only a very short time before his wife legitimised the presence of the police by allowing them to enter the premises.
>
> [16] … Of course, it would have been preferable for the police to have sought a warrant before they went to the premises (although, as they had no more than an anonymous tip-off, they might not have obtained one). Nevertheless, whether or not their conduct might fairly be described as "**merely accidental non-compliance**" with the law, it falls well short of "**calculated disregard**" of it.
> [Emphasis added]

62. The expression *calculated disregard* is a reference to the formulation of recklessness contained in the pre-*Evidence Act* decision of *Bunning v Cross* at 78. Most importantly, a finding of good faith effectively precluded a finding of recklessness. Further, it also diminished the gravity of the impropriety or contravention involved.

R v Camilleri [2007] NSWCCA 36 – evidence admitted, not reckless

63. Camilleri had been drinking at a country hotel. His wife and two young children were with him. They left the hotel in a motor vehicle with Camilleri driving. The motor vehicle rolled off the road and crashed. A nearby resident drove Camilleri, his wife and one child to the hospital. His wife was admitted into hospital care for her injuries. Camilleri was also injured but declined treatment at the hospital. His wife was pronounced dead shortly after.

64. Sister Finnerty, the nurse in charge of the Accident and Emergency section at that time, noticed that Camilleri had a laceration to his head. She informed

him it was her legal duty to obtain a sample of his blood. Camilleri accepted this and provided a sample. A subsequent blood analysis of his blood showed an alcohol reading of 0.153. Camilleri was charged with murder.

65. Section 20 of the *Road Transport (Safety and Traffic Management) Act* (NSW) 1999 empowers a medical practitioner to take a blood sample if the person attends, or is admitted into, hospital for examination or treatment in consequence of an accident on a road. Camilleri did not attend the hospital for examination or treatment and was never admitted. He was there to support his injured wife. Sister Finnerty therefore had no power to take a blood sample from him.

66. The trial judge excluded the evidence of the blood sample under s 138. He held that significant prejudice would flow to Camilleri should the blood sample have been admitted into evidence.

67. Critically, the trial judge characterised Sister Finnerty's impropriety as "*very grave*" (c.f. s 138(3)(d)) whilst appreciating that she had acted in good faith (c.f. s 138(3)(e)).

68. The Crown appealed under section 5F of the *Criminal Appeal Act*. The CCA allowed the appeal, finding that the trial judge's discretion had erred when he took into account the prejudice to the individual accused said to be occasioned by admission of the evidence.

69. McClellan CJ at CL (Bell and Howie JJ concurring) considered the exercise of the discretion afresh and held that the blood sample should have been admitted into evidence. His Honour emphasised that Sister Finnerty's innocent mental state disposed of the question of recklessness and significantly, diminished the seriousness of the impropriety. His Honour wrote:

[27] … It could not be doubted that the taking of blood was not authorised by law and was a **serious invasion** of the respondent's personal rights…

[28] However, s 138 requires consideration not only of the effect of the action but also the **motivation** of the person who carries out that action. Section 138 operates in relation to evidence that was obtained improperly or in contravention of a relevant law or in consequence of an impropriety (subs (1)). Subs (3) directs the court to consider the gravity of the impropriety or contravention s 138(3)(d) and whether the impropriety or contravention was deliberate or reckless s 138(3)(e).

[29] The respondent was present in the Emergency Department of the hospital following a motor vehicle accident with obvious signs of head injury. The Sister acted in the belief that he was a patient and that she was obliged to take the blood sample. Her actions would have been lawful if, as she believed, he had attended at the hospital for treatment or examination. Notwithstanding that the taking of blood is a significant invasion of a person's privacy… [w]here, as in this case the blood sample was obtained by the sister, in the **innocent**, **but mistaken belief**, that she was obliged to obtain it, only a **minimal level of impropriety was involved**…

[34] In these circumstances, in my view, the balance which s 138 requires to be struck inevitably leads to the conclusion that, if otherwise admissible, evidence of the blood alcohol level of the respondent at the time of the accident obtained from the blood sample taken by Sister Finnerty should be admitted into evidence.

[35] This case is to be distinguished from a situation where evidence is obtained by police in knowing breach of the law or, where they may be reckless as to whether or not it has been lawfully obtained. **Where the breach of the law is innocent, and the alleged offence serious there must be powerful countervailing considerations before the evidence should be rejected**. The fact that the evidence is of high probative value will weigh in favour of its admission.
[Emphasis added]

70. Thus an innocent motivation vitiated the gravity of the misconduct, notwithstanding that the misconduct constituted "*serious invasion*" of Camilleri's personal rights.

Re Lee [2009] ACTSC 98 – evidence excluded, found recklessness

71. This case involved an application under s 138 of the equivalent ACT legislation to exclude from evidence a photograph of Lee and the identification evidence of two police officers, which was partly based on that photograph.

72. In 2004 the police searched Lee's person and home. The search was conducted pursuant to a search warrant which intended to authorise the same. The police discovered heroin on Lee's person. He was charged with drug offences. A photograph of Lee was also taken pursuant to the warrant operation.

73. At the hearing the magistrate excluded the evidence obtained through the operation because of defects in the warrant. The case was dismissed.

74. Relevantly, after the hearing, the photograph was not destroyed by the police as required by s 231 of the *Crimes Act* (ACT) 1900.

75. In 2006 the police undertook a surveillance operation in relation to Lee. Officers involved were provided a surveillance brief, which included Lee's vehicle details (a white Ford Telstar), home address and a photograph. The photograph was a copy of the one taken of him in 2004 pursuant to the defective search warrant.

76. On the night of the surveillance police observed an Asian man in a white car sell heroin to an individual.

77. During the surveillance operation a Constable Richards observed a white Ford Telstar and identified the driver as Lee. He claimed that the identification was based both on the photograph he had been given and on "*my previous association working with the subject*."

78. Another officer, a Senior Constable Knight, observed a white Ford Telstar from 20 to 25 metres away and "*recognised*" the driver as Lee. Knight claimed that his recognition was based on the photograph and the fact that he had "*sighted the person on previous occasions.*"

79. Penfold J excluded the photograph and the two police identifications from evidence under s 138. As to the photograph, Her Honour held that the photograph was evidence obtained in consequence of an impropriety, namely, the defective warrant operation from 2004. Her Honour identified a "*clear chain of causation*" between the taking of the photograph in 2004, its retention and its use in the 2006 surveillance operation.

80. Penfold J also found that retention of the photograph contravened the requirement to destroy it under s 231 of the *Crimes Act*.

81. Her Honour further held that the two police identifications, which were in part based on that photograph, were also obtained in consequence of the preceding misconduct.

82. Penfold J considered each factor contained within s 138(3). Regarding recklessness, her Honour wrote:

> [59] I am prepared to accept that the impropriety affecting the photograph, to the extent that it resulted from the original reliance on a defective warrant, was not deliberate or even reckless. It is possible that the retention of the photograph after Mr Lee was discharged because of the defects in the warrant was inadvertent rather than deliberate or reckless. However, the **use of the photograph** in the surveillance operation, which appears to have begun more than a year after that discharge, was clearly a **deliberate** act by police officers, and that **use of the photograph without considering its provenance seems to have been reckless** at best.
> [Emphasis added]

83. Her Honour grounded recklessness on the basis that the officers did not consider the provenance of the photograph. This would suggest that Penfold J was of the view that the police *should have* checked its provenance but did not. If this interpretation is correct, her Honour's formulation of reckless would be more akin to that of negligence – a duty of care to check the provenance of the photograph, which was not done (i.e. *the police should have known that they were required to do better*).

84. This authority would not seem to represent good law in New South Wales.

R v Sibraa [2012] NSWCCA 19 – evidence admitted, not reckless

85. Sibraa was charged with using a carriage service to make available child abuse material and possessing child pornography. The subject evidence consisted of material seized from his home when police executed a search warrant. The warrant included the following terms:

> THIS WARRANT MAY BE EXECUTED AT ANY TIME
>
> THE TIME AT WHICH THIS WARRANT EXPIRES IS MIDNIGHT AT THE END OF THE SEVENTH DAY AFTER THE DAY ON WHICH THE WARRANT IS ISSUED
>
> GIVEN under my hand at Sydney
>
> in the State of New South Wales this
>
> day of December 2009.
>
> .....
>
> A Magistrate in and for the State of New South Wales

86. Although the magistrate had signed the warrant, he had omitted to fill in the date. The warrant was therefore invalid.

87. The trial judge excluded the seized materials under s 138. He was critical of the police for not satisfying themselves that the warrant was valid. He considered this failure reckless for the purposes of s 138(3)(e), remarking that the police should have checked the veracity of the warrant. He remarked in his judgment:

> I am satisfied that in the circumstances where the Federal agent who sought the warrant, placed before the issuing Magistrate the document without the date included, the failure to ensure that it was validly issued with a date of issue inserted into the space provided and left blank for that purpose, and the failure thereafter by the other agents to ensure that the warrant under which they were intruding into this home was a valid warrant, **was reckless** within the meaning of that term as it is used in s 138(3)(b) *[sic]* of the Evidence Act . I would expect that the law enforcement official purporting to exercise such powers would, at the

very least, ascertain that they had the authority to do so by examining the warrant issued for that purpose to satisfy themselves that the document was valid, at least to the extent that it included all of the information required of it. **The failure to do so must always involved** *[sic]* **the risk that the document might be deficient**.

… I could not come to the view that the evidence established a 'don't' care attitude' in the group of agents or any one of them in particular, but for them to proceed as they did without ensuring that they had a warrant to do so assuming, without examining the document, that it was valid was, in my judgment, reckless. [Emphasis added]

88. The prosecution appealed the decision. The CCA allowed the appeal. Hulme J (Whealy JA and Hidden J concurring) held that the officers' conduct in not checking the warrant did not involve the taking of a risk which amounted to recklessness. His Honour wrote:

[18] … Whether in this case the offending conduct be characterised as an impropriety or contravention of an Australian law, it essentially consisted of trespassing upon the land and house occupied by the Respondent…, asserting an entitlement to do so, and to seize and carry away documents and other items, in fact doing so, and demanding that the Respondent… not interfere. The conduct may fairly be said to be a serious intrusion upon the rights of the occupiers.

[19] However, it does **not** seem to me that that the gravity of that impropriety was, as his Honour's references to the topic seem to indicate he thought, worsened by the failure of the Federal agents involved to appreciate the contents of the warrant or ensure that the warrant was valid. Those failures were no doubt factors that led to the impropriety constituted by the agents acting without lawful authority **but it was the purported execution of the warrant when it was invalid that constituted the impropriety, not the failure of the officers to check first** - c.f. *Parker v Comptroller-General of Customs* [2009] HCA 7; (2009)

252 ALR 619 at [87], [136]. **Had that purported execution not occurred, the officers' dealings with the warrant would have constituted no impropriety**. [Emphasis added]

[F] Some Observations

Recklessness v Negligence

89. The decisions of *Sibraa* and *Carr* should be contrasted with that of *Re Lee*.

90. In *Sibraa* the CCA rejected the trial judge's position that the police should have checked the veracity of the warrant at [26]:

> Nor is it necessarily unreasonable for individual police officers engaged in executing a warrant to not themselves feel obliged to check that all "i"s have been dotted and "t"s crossed, as some of his Honour's remarks suggest.

91. To have found otherwise, in support of the trial judge's position, would be to replace the proper test for reckless (*the police knew that they were required to do better*) with the test for negligence (*the police should have known that they were required to do better*).

92. Yet in *Re Lee*, Penfold J seems to have done just that. Her Honour appears to have been of the view that the police *should have* checked the provenance of the photograph, and having not done so, were reckless in subsequently using it to underpin the 2006 surveillance operation (i.e. *the police should have known that they were required to do better*).

93. In *Carr* the arrest was *reckless* because, in short, the officer did know of more appropriate alternatives to an arrest in the relevant circumstances (i.e. *he knew that he was required to do better*).

94. The approach taken in *Carr* and *Sibraa* are consistent and accord with the proper test for reckless. The decision in *Re Lee* would appear to stand on its own insofar as it tends towards a formulation more alike to negligence (c.f. the more expansive formulation posited by James J in *Leonard* in obiter, which was not adopted in that decision and was not followed in *Sibraa*).

Does Misconduct Involving Good Faith Preclude a Finding of Recklessness?

95. In the decisions of *Nicholls*, *Loc Huu Phan*, *Camilleri* and *Sibraa* the court found that the relevant misconduct was taken in good faith or involved innocent mistake. In each of those cases, such a finding effectively precluded a finding of recklessness for the purposes of s 138(3)(e).

96. It would appear that such a finding, by definition, is not compatible with a finding of recklessness.

97. However, a distinction must be drawn between good faith or innocence on the one hand, and incompetence on the other. Although the boundary is at times difficult to demarcate, there is authority to suggest instances where the focus must shift from accidental non-compliance that is innocent to non-compliance that is incompetent. This shift in focus is explored in the following section of this paper in the context of police training/knowledge.

Do Insufficient Training and/or Unawareness Preclude a Finding of Recklessness?

98. The decisions of *Nicholls* and *Dalley* traverse insufficiency of police training and/or an inadequate understanding of their legislative obligations. In each case, police unawareness weighed heavily against a finding that the subject misconduct was reckless. This was because recklessness firstly required

recognition of a risk that certain conduct would be improper or unlawful; and only secondly that the actual conduct gave rise to the impropriety or unlawfulness. An officer's unawareness of proper procedure would preclude the recognition of a risk. Absent that recognition, the impropriety could not be conscious. It thus would not be reckless.

99. The logic would appear to provide a free pass to police who are amateurish.

100. However, there are limits and in some circumstances recklessness will be a necessary incident of a lack of training and/or incompetence. In *Carr* the arresting officer had not read the *NSW Police Service Handbook* but was aware of alternatives to arrest and, relevantly, had been an officer for five years. Smart AJ remarked at [79]:

> Cons Robins carelessly disregarded both the use of the appropriate procedure and the possible consequences of the actions which he proposed to take and took when these were obvious and he **must have realised** these as an officer of five years experience dealing with a person who was moderately intoxicated. [Emphasis added]

101. The preceding passage suggests that incompetence (something worse than amateurish) can ground a finding of recklessness. Specifically, the expression "*must have realised*" presumes knowledge and therefore recognition of a risk. Thereupon the misconduct could be reckless. That same expression takes conduct produced by incompetence beyond *the police should have known that they were required to do better* (negligence) and into the realm of *the police knew that they were required to do better* (recklessness).

102. On a separate point, it is conceivable that police misconduct underpinned by ignorance could be a factor tending in favour of exclusion where, for

example, a court finds that the ignorance rests on a systemic failure of training, which in turn is worthy of sanction.

103. In this regard, the ALRC Report 26, Vol. 1 at para 964 addresses potential use of the discretion to combat "*a wider pattern of misconduct*". Although the ALRC's point is made in the context of the gravity of misconduct and not with respect to mental state, the need to combat systemic failure is equally valid in the context of the latter.

104. The decision of *Helmhout* is instructive. Helmhout's in-custody admissions were admitted into evidence, notwithstanding the fact that Sergeant Dagwell did not contact an Aboriginal legal aid organisation as required by Clause 28 of the *Crimes (Detention after Arrest) Regulation* 1998. This failure was found to be not reckless.

105. Underpinning this finding was evidence before the court that Sergeant Dagwell "*had complied with clause 28 on other occasions*" and "*mere failure to comply with clause 28 on one occasion cannot, without more, demonstrate [recklessness]*": at [32] – [33]. The inverse of this proposition would suggest that systemic failure by the police to comply with legal obligations, whether the result of ignorance, incompetence or insufficient training, could at most establish recklessness or at least help establish it.

[G] Features that could Assist Defence Submissions on Recklessness

<u>Features of the Police Officer</u>

106. Matters effecting the determination of what a police officer knew or "*must have realised*" (adopting the language from *Carr*):

i. *years of experience* – longer serving police officers can be presumed to know better and therefore be conscious of certain risks;

ii. *rank* - more senior police officers can be presumed to know better and therefore be conscious of certain risks;

iii. *level and content of training* – greater training could presuppose increased consciousness of certain risks;

iv. familiarity with and the existence of police manuals – for example, *Code of Practice for CRIME (Custody, Rights, Investigation, Management and Evidence)* and the *NSW Police Force Handbook*. Such manuals outline proper procedure as well as the risks attached to certain forms of police conduct. In *Carr*, there was evidence before the court that the *NSW Police Service Handbook* made it clear that arrest is a course of last resort and should not be used for trivial offences, and

v. *local area command postings* – this may involve officers interacting with certain ethnic or Aboriginal communities or dealing with a high incidence of certain types of crime, for example. Such features could presuppose more specialised knowledge and therefore consciousness of certain risks.

107. Effective cross-examination of the police on the above could raise the mental state behind the misconduct from *the police should have known that they were required to do better* to "*must have realised*" (i.e. *the police knew that they were required to do better*).

108. Specifically, attributing greater knowledge, training and/or awareness to an officer could help displace a finding of good faith on that officer's part and effectively shift the focus from innocent mistake to incompetence.

Features of the Accused, Suspect or Witness

109. Matters relevant to establishing recklessness arising from the accused, suspect or witness:

i. *sobriety of interviewee* – are the police aware that the interviewee is under the influence of alcohol or drugs, or sleep-deprived, but nevertheless proceed to interview, and

ii. *Vulnerable Person* – is the accused a vulnerable person pursuant to clause 24 of the *Law Enforcement (Powers and Responsibilities) Regulation* (NSW) 2005. These include persons who are children; of impaired intellectual or physical functioning; who are Aboriginal or Torres Strait Islanders, or who are of non-English speaking background. Vulnerable persons are a special category of persons recognised by the NSW Parliament. The s 138 exercise can take into account the degree of vulnerability of the accused: Ipp AJA in *Helmhout* at [9] and Wood CJ at CL in *R v Phung and Huynh* [2001] NSWSC 357 in at [49]. The s 138 exercise must commence from some assumed vulnerability with respect to vulnerable persons (independent from degree of vulnerability). Police officers who do not account for the same, when it must be assumed, could be found to be reckless in the manner they deal with or interview the accused, suspect or witness.