The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference

Volume 40 (2008) Article 9

The Common Law Confessions Rule in the Charter Era: Current Law and Future Directions

Lisa Dufraimont
ldufraimont@osgoode.yorku.ca

Citation Information

Dufraimont, Lisa. "The Common Law Confessions Rule in the Charter Era: Current Law and Future Directions." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 40. (2008).
https://digitalcommons.osgoode.yorku.ca/sclr/vol40/iss1/9

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference by an authorized editor of Osgoode Digital Commons.

The Common Law Confessions Rule in the Charter Era: Current Law and Future Directions

Lisa Dufraimont[*]

I. INTRODUCTION

The confessions rule stands out as something of an oddity among the procedural protections afforded to criminal suspects in Canada. In an age of constitutional safeguards, the common law rule excluding involuntary confessions remains the suspect's best protection against coercive interrogation. Admittedly, the confessions rule has attained some indeterminate constitutional status under the Charter.[1] The Supreme Court of Canada has suggested that the rule constitutes a principle of fundamental justice under section 7.[2] But that Court has also held that the Charter has not subsumed the confessions rule, which continues to apply as a matter of common law.[3] The constitutional aspect of the doctrine reflects the reality that protecting individuals from coercive police interrogation is a matter of fundamental rights.

In *R. v. Oickle*,[4] the Supreme Court compendiously restated the confessions rule for the first time since the advent of the Charter. Recently, in *R. v. Spencer*,[5] the Court amplified on *Oickle*, providing further guidance on when interrogation tactics vitiate a confession's voluntariness. Then,

---

[*] Queen's University, Faculty of Law. This paper draws in parts on my dissertation, *The Problem of Jury Error in Canadian Criminal Evidence Law*, which was completed in fulfilment of the requirements for the J.S.D. degree from Yale University. I gratefully acknowledge the institutional support of Yale Law School, and of the Social Sciences and Humanities Research Council of Canada, which funded the research with a Doctoral Fellowship.

1 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "the Charter"].

2 *R. v. Whittle*, [1994] S.C.J. No. 69, [1994] 2 S.C.R. 914, at 931 (S.C.C.); *R. v. G. (B.)*, [1999] S.C.J. No. 29, [1999] 2 S.C.R. 475, at para. 28 (S.C.C.).

3 *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at paras. 29-31 (S.C.C.).

4 [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3 (S.C.C.).

5 [2007] S.C.J. No. 11, 2007 SCC 11, 44 C.R. (6th) 199 (S.C.C.).

in *R. v. Singh*,[6] the Court clarified the relationship between the confessions rule and the pre-trial right to silence under section 7 of the Charter. This paper aims, first, to evaluate the current law and, second, to point to some possible directions for the future. It is argued that the confessions rule represents a modest but crucial safeguard for the criminal accused. The rule goes some distance toward preventing wrongful convictions based on unreliable confessions and ensuring fair treatment for interrogated suspects. But more can and should be done to reach these goals.

II. BACKGROUND ON THE CONFESSIONS RULE

The confessions rule provides that any out-of-court statement made by an accused person to a person in authority is inadmissible against the accused unless the prosecution proves beyond a reasonable doubt that the statement was voluntary.[7] Police officers are paradigmatic persons in authority, and the rule operates primarily to set "common law limits on police interrogation".[8] Since the origins of the rule in 18th-century English law,[9] debate has focused on two questions: What does voluntariness mean? And what policy does the confessions rule aim to promote?

The definition question gave rise, historically, to a long debate in Canadian law between those who argued that a voluntary confession meant one obtained without threats or promises from the authorities and those who contended that voluntariness had a more expansive meaning.[10] The former, narrower, view was based on classical English formulations of the rule, which defined voluntariness negatively by excluding confessions obtained by "fear of prejudice or hope of advantage exercised or held out by a person in authority".[11] Over time, some courts began to question whether the negative definition of voluntariness focused on the absence

---

6 [2007] S.C.J. No. 48, 2007 SCC 48 (S.C.C.).

7 *R. v. Hodgson*, [1998] S.C.J. No. 66, [1998] 2 S.C.R. 449, at para. 12 (S.C.C.); *R. v. Erven*, [1978] S.C.J. No. 114, [1979] 1 S.C.R. 926, at 931 (S.C.C.); *R. v. Sabri*, [2002] O.J. No. 2202, 166 C.C.C. (3d) 179, at 185 (Ont. C.A.).

8 *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at para. 1 (S.C.C.).

9 John H. Langbein, *The Origins of Adversary Criminal Trial* (New York: Oxford University Press, 2003) at 220-21.

10 See Allan C. Hutchinson & Neil R. Withington, "*Horvath v. The Queen*: Reflections on the Doctrine of Confessions" (1980) 18 Osgoode Hall L.J. 146, at 155.

11 *R. v. Ibrahim*, [1914] A.C. 599, at 609 (P.C.), adopted in Canada in *R. v. Prosko*, [1922] S.C.J. No. 6, 63 S.C.R. 226 (S.C.C.). See, generally, *R. v. Hodgson*, [1998] S.C.J. No. 66, [1998] 2 S.C.R. 449, at para. 15 (S.C.C.).

of threats and promises was intended to be exhaustive.[12] Increasingly, confessions were excluded not only when elicited by threats or promises but also when obtained in oppressive conditions, or from a suspect without an operating mind.[13] Voluntariness came to be seen not merely as a question of freedom from threats and promises, but as a broader, positive, concept.[14]

Like the definition of voluntariness, the policy basis for the confessions rule has shifted over time. The rule has traditionally been justified on two distinct grounds.[15] The first justification — the reliability rationale — is that involuntary confessions are excluded because they are often untrue. The second justification — the fair treatment rationale — is that the rule maintains standards of fairness and discourages official mistreatment of suspects by preventing the state from relying on coerced statements. Historically, the confessions rule arose primarily out of a concern that coerced confessions were untrustworthy and that relying on them could lead to convictions of the innocent.[16] Over time, the fair treatment rationale grew in prominence to the extent that "concern for the administration of justice and fundamental principles of fairness" came to be recognized as a key policy underpinning the rule.[17]

III. Overview of the Current Law

These debates about the meaning and justification of the confessions rule have largely been resolved. *Oickle*[18] established the reliability rationale as the primary policy basis for the exclusion of involuntary confessions

---

[12] See Allan C. Hutchinson & Neil R. Withington, "*Horvath v. The Queen*: Reflections on the Doctrine of Confessions" (1980) 18 Osgoode Hall L.J. 146, at 155.

[13] See, *e.g.*, *R. v. Hobbins*, [1982] S.C.J. No. 25, [1982] 1 S.C.R. 553, at 556-57 (S.C.C.) (discussing involuntariness arising from an "atmosphere of oppression"); *R. v. Ward*, [1979] S.C.J. No. 29, [1979] 2 S.C.R. 30, at 40 (S.C.C.) (recognizing an operating mind requirement under the voluntariness rule); *R. v. Whittle*, [1994] S.C.J. No. 69, [1994] 2 S.C.R. 914, at 941 (S.C.C.) (reaffirming the operating mind requirement).

[14] See, *e.g.*, *R. v. Hebert*, [1990] S.C.J. No. 64, [1990] 2 S.C.R. 151, at 166 (S.C.C.).

[15] See generally *R. v. Whittle*, [1994] S.C.J. No. 69, [1994] 2 S.C.R. 914, at 931 (S.C.C.); Allan C. Hutchinson & Neil R. Withington, "*Horvath v. The Queen*: Reflections on the Doctrine of Confessions" (1980) 18 Osgoode Hall L.J. 146; Edmund Thomas, "Lowering the Standard: *R. v. Oickle* and the Confessions Rule in Canada" (2005) 10 Can. Crim. L. Rev. 69.

[16] See, *e.g.*, *R. v. Hodgson*, [1998] S.C.J. No. 66, [1998] 2 S.C.R. 449, at para. 17 (S.C.C.).

[17] See *R. v. Hodgson*, [1998] S.C.J. No. 66, [1998] 2 S.C.R. 449, at para. 18 (S.C.C.).

[18] *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3 (S.C.C.).

in modern Canadian law.[19] For a majority of the Court, Iacobucci J. explained that the confessions rule needed to be restated in light of the developing understanding of the phenomenon of false confessions.[20] At the same time, the majority emphasized that the protections afforded the accused under the confessions rule must always be balanced against society's interest in effectively investigating crimes.[21]

Justice Iacobucci drew on social science research, accepting that hundreds of verifiably false confessions have been offered in real cases, cataloguing various types of false confessions, and discussing the police tactics that are prone to elicit these untruthful statements.[22] The majority stressed that the risk of eliciting a false confession may be heightened by a suspect's particularities and vulnerabilities, or when police confront suspects with fabricated evidence or offer inducements in the form of threats or promises.[23] Ultimately, a trial judge must determine whether a confession is voluntary, not whether it is true.[24] But since involuntary confessions are often unreliable, Canada's "common law confessions rule is well-suited to protect against false confessions".[25]

Oickle[26] confirmed that the confessions rule is concerned not only with inducements in the form of threats or promises but "with voluntariness, broadly understood".[27] The question is whether, taking all the circumstances into account, the statement was voluntary.[28] The voluntariness analysis is necessarily contextual,[29] and the trial judge's decision is entitled to deference on appeal.[30] Threats or promises still vitiate voluntariness where, alone or together with other factors, they "are strong enough to raise a reasonable doubt about whether the will of

---

19 See *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at paras. 32, 68 (S.C.C.); *R. v. Moore-McFarlane*, [2001] O.J. No. 4646, 56 O.R. (3d) 737, at 757 (Ont. C.A.).

20 *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at para. 32 (S.C.C.). Justice Iacobucci wrote for six of seven judges, with Arbour J. dissenting.

21 *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at para. 33 (S.C.C.).

22 *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at paras. 35-45 (S.C.C.).

23 *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at paras. 42-44 (S.C.C.).

24 *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at para. 47 (S.C.C.); *R. v. Hodgson*, [1998] S.C.J. No. 66, [1998] 2 S.C.R. 449, at paras. 19-20 (S.C.C.).

25 *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at para. 47 (S.C.C.).

26 *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3 (S.C.C.).

27 *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at para. 27 (S.C.C.).

28 *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at para. 68 (S.C.C.).

29 *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at para. 71 (S.C.C.).

30 See *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at paras. 22-23 (S.C.C.); *R. v. Spencer*, [2007] S.C.J. No. 11, 2007 SCC 11, at para. 17 (S.C.C.).

the subject has been overborne".[31] Justice Iacobucci recognized that confessions might be rendered involuntary by a variety of inducements, including threats of violence, promises of leniency, offers of psychological help, threats against friends and family, and implicit inducements.[32] The majority indicated that police may legitimately "offer some kind of inducement" to convince suspects to confess.[33] But they cross the line from appropriate persuasion to improper inducements when they offer suspects something in return for their confessions: "The most important consideration in all cases is to look for a *quid pro quo* offer by interrogators, regardless of whether it comes in the form of a threat or a promise."[34]

Alongside such inducements are other factors that can raise doubts about voluntariness. Justice Iacobucci confirmed that interrogating a suspect under oppressive conditions could make a resulting statement involuntary.[35] Oppression can result when necessaries like food, water, clothing or sleep are withheld; when interrogation is particularly hostile, intimidating or prolonged; or when police use fabricated evidence to make the case against the suspect seem overwhelming.[36]

A third component of the voluntariness inquiry identified in *Oickle*[37] is the operating mind test.[38] Confessions are involuntary when they are elicited from suspects who lack an operating mind in the sense that they do not know what they are saying or that they are saying it to police who may use it against them.[39] Confessions from injured or hypnotized suspects, for example, can be excluded on this basis.[40] Like inducements and oppression, the operating mind test forms a part of the overall voluntariness test.[41]

The majority observed that voluntariness is a broader concept than reliability and confessions will sometimes be excluded in order to uphold standards of fairness within the criminal justice system.[42] This

---

31 *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at para. 57 (S.C.C.).

32 *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at paras. 48-57 (S.C.C.).

33 *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at para. 57 (S.C.C.).

34 *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at para. 57 (S.C.C.).

35 *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at paras. 58-62 (S.C.C).

36 *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at paras. 60-61 (S.C.C.).

37 *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3 (S.C.C.).

38 *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at paras. 63-64 (S.C.C.).

39 *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at para. 63 (S.C.C.).

40 *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at paras. 26-27 (S.C.C.); *R. v. Whittle*, [1994] S.C.J. No. 69, [1994] 2 S.C.R. 914, at 941 (S.C.C.).

41 *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at para. 64 (S.C.C).

42 *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at paras. 69-70 (S.C.C.).

concern about the integrity of the justice system underpins the fourth and final branch of the confessions rule, which allows confessions to be excluded when they are obtained through police trickery.[43] Such confessions should be excluded, according to the majority, where the police conduct "is so appalling as to shock the community".[44] This community shock test constitutes a "distinct inquiry" from the main voluntariness test,[45] so shocking tactics may lead to the exclusion of a confession even when they do not "undermin[e] voluntariness *per se*".[46]

After explaining the voluntariness inquiry, Iacobucci J. applied this analysis to a series of confessions that formed the primary basis of Richard Oickle's conviction on seven counts of arson. Justice Iacobucci agreed with the trial judge that the statements were voluntary despite a number of troubling features of the interrogation that might, alone or taken together, have raised a doubt on that issue. For example, the police repeatedly suggested that if Oickle did not confess, they might subject his fiancée to interrogation or a polygraph test.[47] According to Iacobucci J., this threat was neither strong enough nor sufficiently connected to Oickle's confessions to render them involuntary.[48] Oickle's interrogators also referred continually to the polygraph test he took at the beginning of the interview, which the police said he had failed. The police took the position that the polygraph machine does not lie, and, therefore, that they already knew Oickle had set some of the fires.[49] On one view of the interrogation, espoused by Arbour J. in dissent, these incessant references to the infallible polygraph led Oickle to believe that his claims of innocence were futile and that, inevitably, he would have to confess to something.[50] However, the majority held that, while the police put some pressure on Oickle, his confessions were voluntary in all the circumstances.[51]

With its detailed explanation of the voluntariness inquiry, *Oickle*[52] remains the leading Canadian case on the confessions rule. In the two

---

43 *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at para. 69 (S.C.C.).

44 *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at para. 67 (S.C.C.).

45 *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at para. 65 (S.C.C.).

46 *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at para. 67 (S.C.C.).

47 *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at para. 82 (S.C.C.).

48 *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at para. 84 (S.C.C.).

49 *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at para. 94 (S.C.C.).

50 *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at para. 122 (S.C.C.), Arbour J., dissenting.

51 *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at para. 99 (S.C.C.).

52 *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3 (S.C.C.).

recent cases of *Spencer* and *Singh*,[53] however, the Supreme Court shed further light on the rule. *Spencer* concerned inducements to confess: on the facts, police refused to allow the accused to visit his girlfriend until he "cleaned his slate" by offering a statement implicating himself in several robberies.[54] According to Deschamps J., who wrote for a majority of the Supreme Court,[55] a confession may be admissible even when the police offer the accused an inducement to confess as a *quid pro quo*.[56] Stressing the contextual analysis mandated in *Oickle*, Deschamps J. held that the existence of a *quid pro quo* is only a factor, albeit an important factor, in the voluntariness analysis: "it is the strength of the inducement, having regard to the particular individual and his or her circumstances, that is to be considered" in assessing voluntariness.[57] Applying this principle to the case, Deschamps J. agreed with the trial judge that withholding the visit to the girlfriend until after the accused confessed was not a strong enough inducement to make the accused's statements involuntary.[58]

The Supreme Court's most recent comments on the confessions rule emerged in *Singh*,[59] which concerned scope of the section 7 pre-trial right to silence. The accused had been arrested in connection with a shooting death, and had consulted with a lawyer. Police subsequently interrogated the accused, who asserted his right to silence 18 times during the interrogation before making certain admissions. The accused argued at trial that the admissions were involuntary and that, in the alternative, they should be excluded because they were obtained in violation of the section 7 right to silence. The trial judge ruled the statements voluntary and rejected the section 7 claim, and the majority of the Supreme Court upheld the trial judge's decision and affirmed the accused's conviction for second degree murder. For the majority, Charron J.[60] held that, when a detainee is interrogated by known police, the section 7 pre-trial right to silence provides no protection to the accused beyond the protection offered by the confessions rule. In such

---

53 *R. v. Spencer*, [2007] S.C.J. No. 11, 2007 SCC 11 (S.C.C.); *R. v. Singh*, [2007] S.C.J. No. 48, 2007 SCC 48 (S.C.C.).

54 *R. v. Spencer*, [2007] S.C.J. No. 11, 2007 SCC 11, at para. 8 (S.C.C.).

55 Justice Deschamps wrote for five of seven judges, while Fish J. delivered the dissenting judgment.

56 *R. v. Spencer*, [2007] S.C.J. No. 11, 2007 SCC 11, at paras. 13-14 (S.C.C.).

57 *R. v. Spencer*, [2007] S.C.J. No. 11, 2007 SCC 11, at para. 15 (S.C.C.).

58 *R. v. Spencer*, [2007] S.C.J. No. 11, 2007 SCC 11, at para. 20 (S.C.C.).

59 *R. v. Singh*, [2007] S.C.J. No. 48, 2007 SCC 48 (S.C.C.).

60 Justice Charron wrote the majority reasons for five members of the Court; Fish J. delivered dissenting reasons for four Justices.

circumstances, "the confessions rule effectively subsumes the constitutional right to silence".[61]

The majority in *Singh*[62] explained that the Charter right to silence protects an accused's freedom to choose whether to speak with authorities but does not oblige police to stop questioning a detainee who asserts a choice to remain silent.[63] Police may continue to question an accused who has asserted the right to silence and may use "legitimate means of persuasion" to obtain a confession.[64] At some point, however, "police persistence in continuing the interview, despite repeated assertions by the detainee that he wishes to remain silent, may well raise a strong argument that any subsequently obtained statement was not the product of a free will to speak to the authorities."[65] Any statement that was not the product of the detainee's free will, will be involuntary and therefore inadmissible. *Singh* forecloses resort to section 7 as unnecessary: the confessions rule already protects the right to silence in interrogations by known police.[66]

IV. STRENGTHS AND LIMITATIONS OF THE CURRENT APPROACH

Taken together, *Oickle*,[67] *Spencer*[68] and *Singh*[69] provide a clear picture of the confessions rule as it currently exists in Canada. We have seen that the rule excluding involuntary confessions constitutes a safeguard for the accused that pursues two distinct goals: to exclude unreliable evidence and to ensure fair and decent treatment of interrogated suspects. The current rule seems reasonably capable of advancing the first goal by excluding false confessions and preventing wrongful convictions. By contrast, the rule appears relatively ill suited to advance the second goal, since it places only weak and indirect restraints on officials who interrogate suspects. In any event, the rule's capacity to advance either goal is limited by the balance that must be maintained between defensive safeguard on the one hand and effective investigation of crimes on the other.

---

61 *R. v. Singh*, [2007] S.C.J. No. 48, 2007 SCC 48, at para. 39 (S.C.C.).

62 *R. v. Singh*, [2007] S.C.J. No. 48, 2007 SCC 48 (S.C.C.).

63 *R. v. Singh*, [2007] S.C.J. No. 48, 2007 SCC 48, at para. 47 (S.C.C.).

64 *R. v. Singh*, [2007] S.C.J. No. 48, 2007 SCC 48, at para. 47 (S.C.C.).

65 *R. v. Singh*, [2007] S.C.J. No. 48, 2007 SCC 48, at para. 47 (S.C.C.).

66 *R. v. Singh*, [2007] S.C.J. No. 48, 2007 SCC 48, at para. 37 (S.C.C.) ("voluntariness . . . requires that the court scrutinize whether the accused was denied his or her right to silence").

67 *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3 (S.C.C.).

68 *R. v. Spencer*, [2007] S.C.J. No. 11, 2007 SCC 11 (S.C.C.).

69 *R. v. Singh*, [2007] S.C.J. No. 48, 2007 SCC 48 (S.C.C.).

1. Excluding Unreliable Evidence

Given that *Oickle*[70] emphasized the reliability rationale for the confessions rule, it seems unsurprising that the rule appears reasonably well calibrated to identify and exclude false confessions. Drawing on insights from social science, the Supreme Court has framed a rule that responds meaningfully to the false confessions problem.[71] For example, research suggests that the stresses of interrogation can cause false confessions when they are directed at vulnerable individuals or when anxiety-provoking tactics, such as questioning suspects aggressively or over long periods, are taken to extremes.[72] Suspects may offer "stress-compliant" false confessions, admitting guilt in order to escape the intolerable conditions of the interrogation, regardless of the long-term consequences.[73] In *Oickle*, Iacobucci J. recognized the risk of stress-compliant false confessions and explained that confessions elicited in intolerable conditions can be excluded under the doctrine of oppression.[74] Similarly, the psychological literature supports the majority's call for sensitivity to the particularities and vulnerabilities of the individual suspect.[75] Unusually suggestible or compliant individuals, including young people and those suffering from mental deficits, are especially likely to confess falsely under the pressure of interrogation.[76]

In many other areas, too, the confessions rule as explained in *Oickle*[77] responds to known risk factors for false confessions. Research supports the majority's assertion that special risks arise when police use fabricated evidence or make threats or promises.[78] Confronting innocent suspects with fabricated but apparently incontrovertible evidence of their guilt

---

70 *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3 (S.C.C.).

71 See, generally, Dale E. Ives, "Preventing False Confessions: Is *Oickle* Up to the Task?" (2007) 44 San Diego L. Rev. 477.

72 See Richard J. Ofshe & Richard A. Leo, "The Decision to Confess Falsely: Rational Choice and Irrational Action" (1997) 74 Denv. U.L. Rev. 979, at 998.

73 See Richard J. Ofshe & Richard A. Leo, "The Decision to Confess Falsely: Rational Choice and Irrational Action" (1997) 74 Denv. U.L. Rev. 979, at 997-98; Gisli H. Gudjonsson & James A.C. MacKeith, "Retracted Confessions: Legal, Psychological and Psychiatric Aspects" (1988) 28 Med. Sci. Law 187, at 191.

74 *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at para. 58 (S.C.C.).

75 *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at para. 42 (S.C.C.).

76 See Welsh S. White, "False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions" (1997) 32 Harv. C.R.-C.L. L. Rev. 105, at 108-109; Gisli H. Gudjonsson & James A.C. MacKeith, "Retracted Confessions: Legal, Psychological and Psychiatric Aspects" (1988) 28 Med. Sci. Law 187, at 191.

77 *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3 (S.C.C.).

78 *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at paras. 43-44 (S.C.C.).

can convince them that, since they are certain to be convicted, they have nothing to lose by confessing falsely.[79] Indeed, this tactic has been known to make innocent suspects so desperate and confused that they come to believe they must be guilty.[80] Threats and promises have been known to elicit many false confessions, especially when interrogators have instilled a sense of hopelessness in the suspect. Suspects who believe they have nothing to lose may confess falsely to obtain some promised advantage or avoid some threatened harm held out by interrogators.[81]

In short, *Oickle*[82] has the potential to sensitize trial judges to various risk factors and questionable interrogation tactics that are associated with false confessions. As judges incorporate these insights into the voluntariness inquiry, the confessions rule becomes a better vehicle for excluding false statements. Consequently, Canada's confessions rule appears reasonably well suited to exclude unreliable evidence.

2. Ensuring Fair Treatment of Interrogated Suspects

The rule appears less successful as a restraint on coercive interrogation. Of course, as discussed above, *Oickle*[83] identified a variety of interrogation tactics that could, in the right circumstances, render a confession involuntary. But, as propounded in *Oickle* and refined in *Spencer*[84] and *Singh*,[85] the modern confessions rule imposes few clear limits on police. Confessions resulting from "outright violence" and "imminent threats of torture" will always be involuntary.[86] But beyond these rather extreme examples, no police tactic is entirely off-limits under the rule.[87] In *Oickle*,

---

[79] See *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at para. 43 (S.C.C.); Richard J. Ofshe & Richard A. Leo, "The Decision to Confess Falsely: Rational Choice and Irrational Action" (1997) 74 Denv. U.L. Rev. 979, at 1009-1011; Welsh S. White, "False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions" (1997) 32 Harv. C.R.-C.L. L. Rev. 105, at 146.

[80] See *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at paras. 43, 58 (S.C.C.); Richard J. Ofshe & Richard A. Leo, "The Decision to Confess Falsely: Rational Choice and Irrational Action" (1997) 74 Denv. U.L. Rev. 979, at 999-1000.

[81] See *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at paras. 44, 49 (S.C.C.); Richard J. Ofshe & Richard A. Leo, "The Decision to Confess Falsely: Rational Choice and Irrational Action" (1997) 74 Denv. U.L. Rev. 979, at 990, 998-999.

[82] *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3 (S.C.C.).

[83] *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3 (S.C.C.).

[84] *R. v. Spencer*, [2007] S.C.J. No. 11, 2007 SCC 11 (S.C.C.).

[85] *R. v. Singh*, [2007] S.C.J. No. 48, 2007 SCC 48 (S.C.C.).

[86] *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at paras. 53, 48 (S.C.C.).

[87] See Steven Penney, "What's Wrong with Self-Incrimination? The Wayward Path of Self-Incrimination Law in the Post-Charter Era — Part II: Self-Incrimination in Police Investigations" (2004) 48 Crim. L.Q. 280, at 285 ("Courts have been reluctant to prohibit specific behaviours *ex ante*.").

Iacobucci J. strongly disapproved the practice of offering charge or sentence reductions in return for self-incriminating statements, but even such promises of leniency may be permissible "in … exceptional circumstances".[88] Under classical formulations of the rule, confessions elicited by threats and promises were involuntary by definition, and there was language in *Oickle* to suggest that *quid pro quo* offers by interrogators were *per se* improper, warranting exclusion of any resulting statement.[89] That interpretation of *Oickle* has been foreclosed by *Spencer*, which stands for the proposition that offering a *quid pro quo* does not necessarily render a resulting confession involuntary.[90] *Singh* similarly avoids placing any clear limits on interrogators; persistent interrogation of a detainee in the face of repeated assertions of the right to silence will not vitiate voluntariness unless the court determines that police deprived the detainee of the free will to choose whether to speak.[91]

The fact that the confessions rule imposes few clear limits on police reflects the Court's conscious avoidance of "hard and fast" rules under the voluntariness inquiry.[92] The contextual approach, which eschews categorical judgments about specific interrogation practices, gives police flexibility to use a wide range of tactics to pressure suspects to confess.[93] From the perspective of law enforcement, this flexibility is a desirable feature of the confessions rule.[94] But if the rule aims, in part, to put limits on interrogation, then the current doctrine can be criticized for failing to provide clear and useful guidance. Classical formulations of the rule had the advantage of clarity: police could easily understand a rule prohibiting them from making threats or promises. Police are unlikely to glean so much guidance from the current rule, which promises a nuanced analysis but places few discernible limits on interrogation practices.

To be sure, the confessions rule continues to restrain coercive interrogation indirectly through the voluntariness inquiry. Certain police

---

88 *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at para. 49 (S.C.C.).

89 *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at paras. 57, 78 (S.C.C.).

90 *R. v. Spencer*, [2007] S.C.J. No. 11, 2007 SCC 11, at paras. 13-14 (S.C.C.).

91 *R. v. Singh*, [2007] S.C.J. No. 48, 2007 SCC 48, at para. 47 (S.C.C.).

92 *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at para. 47 (S.C.C.).

93 See Don Stuart, "*Oickle*: The Supreme Court's Recipe for Coercive Interrogation" (2000) 36 C.R. (5th) 188, at 188-91; Don Stuart, *Charter Justice in Canadian Criminal Law*, 4th ed. (Toronto: Thomson Carswell, 2005), at 134-42; Edmund Thomas, "Lowering the Standard: *R. v. Oickle* and the Confessions Rule in Canada" (2005) 10 Can. Crim. L. Rev. 70; Steven Penney, "What's Wrong with Self-Incrimination? The Wayward Path of Self-Incrimination Law in the Post-Charter Era — Part II: Self-Incrimination in Police Investigations" (2004) 48 Crim. L.Q. 280, at 285.

94 See *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at para. 57 (S.C.C.).

practices will be deemed improper where, in a contextual analysis, they raise a reasonable doubt as to voluntariness. And of course, police can be expected to be careful in employing tactics — sleep deprivation, intimidating questioning, and veiled threats against family members to name a few — that the Court has said might, in all the circumstances, render a confession unreliable and involuntary. At the same time, the Supreme Court's focus on reliability means that, under the confessions rule, restraints on police behaviour *as such* are de-emphasized. As Don Stuart has pointed out, *Oickle*[95] permits "[a] free-standing inquiry into the legitimacy of police methods" only in the context of the community shock test, which the Court has segregated from the larger voluntariness inquiry.[96] Moreover, community shock represents such a high threshold that few police tactics will be ruled impermissible on this basis. In sum, the confessions rule provides only weak and indirect assurances that suspects will be treated fairly in the interrogation room.

3. Balancing Defensive Safeguard against Law Enforcement

In its approach to the confessions rule, the Supreme Court has sought to maintain a balance between safeguarding suspects' rights and allowing police scope to investigate crimes.[97] So long as the confessions rule reflects this balance, difficult questions about the fair treatment of suspects and the reliability of confessions are unavoidable. The law requires trial judges to draw the line between acceptable persuasion and improper coercion on a case-by-case basis. Despite its merits, this approach leaves open the door for coercive practices to be used by police and condoned by courts in individual cases.

It also seems inevitable that false confessions will sometimes be admitted into evidence under the voluntariness rule. Justice Iacobucci insisted in *Oickle*[98] that "proper police techniques" rarely give rise to false confessions.[99] But the very question before the Court — which was never clearly answered — was which interrogation techniques are proper. The notion that false confessions can be easily distinguished from true

---

[95] *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3 (S.C.C.).

[96] Don Stuart, "*Oickle*: The Supreme Court's Recipe for Coercive Interrogation" (2000) 36 C.R. (5th) 188, at 196.

[97] *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at paras. 33, 57 (S.C.C.); *R. v. Singh*, [2007] S.C.J. No. 48, 2007 SCC 48, at paras. 1, 45-46 (S.C.C.).

[98] *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3 (S.C.C.).

[99] *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at para. 45 (S.C.C.).

confessions, that the tactics that produce them differ in kind, is nothing but a comforting illusion. Under current law, police may continue to employ modern methods of psychological interrogation, which use pressure and manipulation to overcome suspects' resistance.[100] While they are meant to be used on guilty suspects, these techniques can also cause the innocent to confess.[101] Both false confessions and coercive practices will continue to arise as long as the confessions rule embodies a robust compromise between defensive safeguard and law enforcement.

V. FORTIFYING THE CONFESSIONS RULE

The confessions rule can be imagined as an edifice of defensive safeguard, built to shelter the accused from official mistreatment and from being prosecuted on the basis of unreliable evidence. As we have seen, this structure provides a basic level of protection against both of these dangers, though its construction is better suited to offer shelter from the risk of false confessions. We have observed, too, that this edifice stands under constant stress from the exigencies of law enforcement. It remains to be considered whether the doctrinal edifice of the confessions rule can be fortified.

Two kinds of fortification can be envisaged. First, the doctrine could be reinforced from within by refining the confessions rule itself. Alternatively, the doctrine could be buttressed from without by related legal rules that complement the confessions rule and advance its aims. The pages that follow present ideas for fortifications of both kinds. Some of these ideas are established or developing in Canadian law, while others are more speculative. What they all have in common is that they represent ways in which the law could better advance the goals of the confessions rule without compromising the ability of police to investigate crimes and enforce the law.

1. Developing Clearer Limits on Interrogation

One way the confessions rule might be reinforced is by adding further categorical limits on acceptable interrogation practices. The current

---

[100] See Gisli H. Gudjonsson, *The Psychology of Interrogations, Confessions and Testimony* (J. Wiley: New York, 1992), at 24, 47.

[101] See Gisli H. Gudjonsson, *The Psychology of Interrogations, Confessions and Testimony* (J. Wiley: New York, 1992), at 48.

approach to voluntariness imposes few firm boundaries on police tactics, but more such boundaries may develop in the future. Dale Ives has suggested that Canada's confessions rule could be improved by requiring continuous interrogations to be broken up with regular breaks and by prohibiting police from confronting suspects with fabricated forensic evidence to make the case seem overwhelming.[102] Steven Penney has offered similar prescriptions, suggesting that the length of interrogations be limited, that interrogation of vulnerable suspects be restricted and that police be prohibited from confronting suspects with false evidence or misrepresenting the strength of the evidence.[103] Innovations of these kinds, targeted at police methods that are unacceptably coercive or strongly associated with false confessions, could enhance the accused's protection against unfair treatment and unreliable evidence without unduly interfering with the police investigations. Such developments would provide clearer guidance to police on what interrogation practices will not be tolerated. *Oickle*,[104] *Spencer*[105] and *Singh*[106] all worked to sweep away categorical rules within the voluntariness inquiry, but this trend may not last forever. The contextual approach to voluntariness does not exclude the possibility that the courts, or indeed Parliament, may in future rule certain interrogation tactics out-of-bounds.[107]

2. Focusing on the Suspect's Vulnerabilities

Another way to reinforce the confessions rule would be to focus greater attention on the vulnerabilities of interrogated suspects. The research literature identifies two kinds of factors that contribute to false confessions: the vulnerabilities of the suspect and the coercion or manipulation

---

[102] Dale E. Ives, "Preventing False Confessions: Is *Oickle* Up to the Task?" (2007) 44 San Diego L. Rev. 477, at 498.

[103] Steven Penney, "What's Wrong with Self-Incrimination? The Wayward Path of Self-Incrimination Law in the Post-Charter Era — Part II: Self-Incrimination in Police Investigations" (2004) 48 Crim. L.Q. 280, at 297-98.

[104] *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3 (S.C.C.).

[105] *R. v. Spencer*, [2007] S.C.J. No. 11, 2007 SCC 11 (S.C.C.).

[106] *R. v. Singh*, [2007] S.C.J. No. 48, 2007 SCC 48 (S.C.C.).

[107] Steven Penney, "What's Wrong with Self-Incrimination? The Wayward Path of Self-Incrimination Law in the Post-Charter Era — Part II: Self-Incrimination in Police Investigations" (2004) 48 Crim. L.Q. 280, at 297, 303, Penney suggests that these "bright-line rules" be developed by appellate courts. Alternatively, Parliament could codify limits on police interrogation tactics; the best example of legislation of this kind is the *Police and Criminal Evidence Act 1984* (U.K.), 1984, c. 60, which regulates the conduct of police interrogations in England and Wales.

employed by police interrogators.[108] The Supreme Court's confessions rule jurisprudence deals more fully with the latter set of factors than the former. Thus, *Oickle*[109] has been criticized for offering insufficient guidance on evaluating confessions from vulnerable suspects.[110] This criticism may be somewhat unfair, given that Iacobucci J. emphasized "the need to be sensitive to the particularities of the individual suspect" and identified some of the personal characteristics that might make a suspect vulnerable.[111] Oickle himself was not, on the record, an especially vulnerable suspect, so it is not clear what more should have been said. Still, one hopes that future cases will offer fuller guidance on what vulnerabilities should be considered and how they affect the voluntariness inquiry. This enrichment of the vulnerability analysis could reinforce the safeguard provided by the confessions rule.

3. Recording Interrogations and Confessions

With the exception of the confessions rule itself, the most commonly suggested safeguard against coercive interrogation and false confessions is the recording — preferably on video — of police interrogations. Recording interrogations can deter police abuses, eliminate disputes about what police and suspects said and did in the interrogation room, and provide judges and juries with the best information on which to assess the voluntariness and reliability of confessions.[112] While most commentators agree that, ideally, police should record their entire interrogations along with the confessions themselves, there is less agreement over the consequences that should follow when such recordings are incomplete or never made at all. Some suggest that unrecorded confessions should be inadmissible at trial, but many would not go

---

[108] See, *e.g.*, Gisli H. Gudjonsson & James A.C. MacKeith, "Retracted Confessions: Legal, Psychological and Psychiatric Aspects" (1988) 28 Med. Sci. Law 187, at 191.

[109] *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3 (S.C.C.).

[110] See Christopher Sherrin, "False Confessions and Admissions in Canadian Law" (2005) 30 Queen's L.J. 601; Dale E. Ives, "Preventing False Confessions: Is *Oickle* Up to the Task?" (2007) 44 San Diego L. Rev. 477, at 483.

[111] *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at para. 42 (S.C.C.).

[112] See, *e.g.*, Richard J. Ofshe & Richard A. Leo, "The Decision to Confess Falsely: Rational Choice and Irrational Action" (1997) 74 Denv. U.L. Rev. 979, at 1120; Gary T. Trotter, "False Confessions and Wrongful Convictions" (2003-2004) 35 Ottawa L. Rev. 179, at 201-202; Welsh S. White, "False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions" (1997) 32 Harv. C.R.-C.L. L. Rev. 105, at 153.

that far.[113] Currently, Canadian law imposes no mandatory recording requirement. In *Oickle*,[114] Iacobucci J. encouraged the police practice of recording interrogations and enumerated its advantages, but insisted that non-recorded interrogations are not "inherently suspect".[115]

In a series of cases decided after *Oickle*,[116] the Ontario Court of Appeal has held that, where recording facilities exist, failure by police to record an interrogation militates against crediting the police version of events and makes any resulting statement suspect.[117] A choice by police to interrogate a suspect without recording the interview on readily available equipment weighs against a prosecutor seeking to establish voluntariness.[118] Such a failure to make a record can also be the subject of a special jury instruction indicating that deliberate non-recording undermines the value of police testimony about alleged confessions.[119] While not universally accepted,[120] the Ontario approach has much to commend it. Surely the most persuasive reason for the Supreme Court's reluctance to impose a mandatory recording requirement is that such a requirement could put onerous demands on police to procure and maintain recording facilities and to record every interaction with suspects inside and outside the station. By focusing on failures to record where equipment is available, the Court of Appeal has found a way to encourage recording that accords with the Supreme Court's jurisprudence and avoids the pitfall of placing impossible burdens on police. This approach to the problem of recording interrogations merits wider acceptance in Canadian law.

---

113 See, *e.g.*, Manitoba, *The Inquiry Regarding Thomas Sophonow* by Peter DeC. Cory (Winnipeg: Manitoba Justice, 2000) at 19, online: <http://www.gov.mb.ca/justice/publications/sophonow/intro/index.html> (recommending that unrecorded confessions should generally be inadmissible); Canada, FPT Heads of Prosecutions Committee Working Group, *Report on the Prevention of Miscarriages of Justice* (2004) online: <http://canada.justice.gc.ca/en/dept/pub/hop/PreventionOfMiscarriagesOfJustice.pdf> (recommending the video recording of custodial interviews respecting violent offences).

114 *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3 (S.C.C.).

115 *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at para. 46 (S.C.C.).

116 *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3 (S.C.C.).

117 See especially *R. v. Moore-McFarlane*, [2001] O.J. No. 4646, 56 O.R. (3d) 737, at 760 (Ont. C.A.).

118 See, *e.g.*, *R. v. Moore-McFarlane*, [2001] O.J. No. 4646, 56 O.R. (3d) 737 (Ont. C.A.); *R. v. Sabri*, [2002] O.J. No. 2202, 166 C.C.C. (3d) 179, at 186 (Ont. C.A.); *R. v. Ahmed*, [2002] O.J. No. 4597, 170 C.C.C. (3d) 27 (Ont. C.A.); *R. v. White*, [2003] O.J. No. 2458, 65 O.R. (3d) 97 (Ont. C.A.).

119 *R. v. Wilson*, [2006] O.J. No. 2478, 39 C.R. (6th) 345 (Ont. C.A.).

120 See *R. v. Ducharme*, [2004] M.J. No. 60, 184 Man. R. (2d) 36 (Man. C.A.), leave to appeal to S.C.C. refused (May 20, 2004); *R. v. Crockett*, [2002] B.C.J. No. 2947, 7 C.R. (6th) 300 (B.C.C.A.).

4. Relying on Other Charter Rights

Like the confessions rule, the Charter rights to silence under section 7 and to counsel under section 10(b) regulate the use of an accused's self-incriminating statements. These rights buttress the confessions rule; they are independent protections that complement the voluntariness rule and advance its aims. As the Supreme Court has observed, the confessions rule and the rights to silence and counsel "operate together to provide not only a standard of reliability with respect to evidence obtained from persons suspected of crime who are detained but fairness in the investigatory process".[121] In *Oickle*,[122] Iacobucci J. identified three respects in which the confessions rule offers broader protection to the accused than related rights under the Charter.[123] First, the confessions rule applies whether or not the suspect is detained, while the right to counsel is triggered only on arrest or detention. Second, the prosecution must prove beyond a reasonable doubt that a confession is voluntary, while the burden of establishing a Charter breach lies on the accused on a balance of probabilities. And third, involuntary confessions are automatically excluded, while statements obtained in breach of Charter rights are excluded only if admitting them would bring the administration of justice into disrepute.

In other areas, the Charter provides broader protection than the confessions rule. For example, the section 7 pre-trial right to silence can exclude statements elicited from detainees through undercover operations, while the confessions rule applies only where a suspect believes he or she is speaking with a person in authority.[124] The Supreme Court recognized the right to silence under section 7 in *Hebert*,[125] where the accused refused to talk to police but made incriminating statements to an undercover officer who was placed in his cell and who elicited the statements. The Court held that the police violated the accused's right to silence, the essence of which was seen to be the freedom to choose whether to speak to police. This application of the section 7 right to silence is one situation where an accused who cannot claim the protection of the confessions rule can have a self-incriminating statement excluded on other grounds under the Charter.

---

121 *R. v. Whittle*, [1994] S.C.J. No. 69, [1994] 2 S.C.R. 914, at 931 (S.C.C.).

122 *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3 (S.C.C.).

123 *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at para. 30 (S.C.C.).

124 *R. v. Grandinetti*, [2005] S.C.J. No. 3, [2005] 1 S.C.R. 27, at para. 37 (S.C.C.).

125 *R. v. Hebert*, [1990] S.C.J. No. 64, [1990] 2 S.C.R. 151 (S.C.C.).

Of course, the significance of the section 7 right to silence as an independent protection for interrogated suspects has recently been limited by *Singh*.[126] Prior to *Singh*, some courts applied *Hebert*[127] to interrogations by known police, holding that where detainees repeatedly asserted their intentions not to speak, unrelenting interrogation could override their choice and violate the section 7 pre-trial right to silence.[128] This extension of the Charter right to silence was used to exclude even voluntary statements.[129] This line of authority ended with *Singh*, which established that the section 7 right to silence offers no independent protection to detainees interrogated by known police over and above the safeguards offered by the confessions rule itself.

One might be tempted to read *Singh*[130] as an unmitigated disaster for the defence, since it limited the scope of the section 7 right to silence. However, in one respect *Singh* enriched the safeguards offered by the confessions rule. In *Singh*, the Supreme Court recognized for the first time that unrelenting interrogation of a suspect who repeatedly asserts the right to silence may result in the exclusion of a confession.[131] Admittedly, the majority suggested that such a confession should be excluded under the confessions rule, and not under the rubric of section 7. But, surely, from the point of view of defensive safeguard, what matters is the existence of an exclusionary remedy and not its doctrinal source.[132] Moreover, while the majority in *Singh* declined to hold that persistent police questioning rendered the statements involuntary in that case, that holding was largely based on deference to the ruling of the trial judge, who had fully considered the effect of the persistent questioning during the voluntariness *voir dire*.[133] In different circumstances, such police

---

126 *R. v. Singh*, [2007] S.C.J. No. 48, 2007 SCC 48 (S.C.C.).

127 *R. v. Hebert*, [1990] S.C.J. No. 64, [1990] 2 S.C.R. 151 (S.C.C.).

128 See *R. v. Otis*, [2000] J.Q. no 4320, 151 C.C.C. (3d) 416 (Que. C.A.); *R. v. Roy*, [2003] O.J. No. 4252, 15 C.R. (6th) 282 (Ont. C.A.).

129 See, *e.g.*, *R. v. Reader*, [2007] M.J. No. 225, 2007 MBQB 136 (Man. Q.B.).

130 *R. v. Singh*, [2007] S.C.J. No. 48, 2007 SCC 48 (S.C.C.).

131 *R. v. Singh*, [2007] S.C.J. No. 48, 2007 SCC 48, at para. 47 (S.C.C.).

132 See Lisa Dufraimont, "Annotation to *R. v. Singh*" (2007) 51 C.R. (6th) 203. The majority in *R. v. Singh*, [2007] S.C.J. No. 48, 2007 SCC 48, at para. 50 (S.C.C.), went so far as to praise the "particularly instructive" judgment of the Quebec Court of Appeal in *R. v. Otis*, [2000] J.Q. no 4320, 151 C.C.C. (3d) 416 (Que. C.A.), in which unrelenting interrogation of a detainee who repeatedly asserted his right to silence and who disintegrated emotionally during questioning led to the exclusion of the suspect's statements on s. 7 grounds. It is now clear that the admissibility of the statement should have been decided under the confessions rule, but the *Singh* majority's approval of *Otis* suggests that the result would have been the same.

133 *R. v. Singh*, [2007] S.C.J. No. 48, 2007 SCC 48, at paras. 50-52 (S.C.C.).

persistence might have raised a doubt about voluntariness. In sum, by acknowledging that persistent interrogation in the face of repeated assertions of the right to silence can vitiate voluntariness, *Singh* expanded in a small way the protection offered by the confessions rule. This recognition of the right to silence *within* the voluntariness inquiry may in future ground further protection for interrogated suspects.

5. Educating Juries about False Confessions

A final means of buttressing the protections of the confessions rule would be to educate juries about false confessions. Because the current rule permits police to use psychological interrogation methods that have been known to give rise to false confessions, one would expect that false confessions will sometimes be ruled voluntary and admissible. In such cases, the trier of fact must judge the reliability of the statement. Unfortunately, there is reason to believe that juries unfamiliar with the criminal justice system are ill equipped to judge the truthfulness of retracted confessions. Social science researchers suggest, and the Supreme Court of Canada has accepted, that ordinary people are reluctant to accept that innocent people confess to crimes.[134]

It is always open to an accused to argue that a confession admitted at trial was coerced and untrue. Trial judges are required to review for the jury the positions of the parties and the evidence that supports them, including any evidence tending to confirm or refute the truth of a confession.[135] Moreover, when confession evidence is disputed, judges must explain that it is for the jury to decide whether the alleged statements were made, whether the statements (if made) were true, and how much weight the statements (if true) should be given.[136] However, current Canadian law lacks a mechanism for informing jurors about the risk of false confessions arising from police interrogation.

---

134 See *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at para. 34 (S.C.C.); See Gisli H. Gudjonsson, *The Psychology of Interrogations, Confessions and Testimony* (J. Wiley: New York, 1992), at 234. Some empirical support for this proposition can be found in two mock juror studies: Saul M. Kassin & Lawrence S. Wrightsman, "Coerced Confessions, Judicial Instructions, and Mock Juror Verdicts" (1981) 11 J. Applied Soc. Psychol. 489; Saul M. Kassin & Lawrence S. Wrightsman, "Prior Confessions and Mock Juror Verdicts" (1980) 10 J. Applied Soc. Psychol. 133.

135 See, *e.g.*, *R. v. Rustad*, [1965] S.C.J. No. 25, [1965] S.C.R. 555 (S.C.C.).

136 See, *e.g.*, *R. v. Mulligan*, [1955] O.R. 240 (Ont. C.A.).

Experts are permitted to testify about any idiosyncratic psychological vulnerabilities that might have led a specific suspect to confess falsely.[137] But expert evidence on the general phenomenon of police-induced false confessions has not been accepted in Canadian trials,[138] though such evidence has occasionally been admitted in other jurisdictions.[139] In Canadian law, then, there is no recognized way to educate and warn juries about the features of psychological interrogation that have been found to result in false confessions, or even to challenge the commonsense belief that innocent suspects do not confess. Without some education on these issues, one wonders how juries can fairly evaluate the reliability of confessions.

Recently, in *R. v. Osmar*,[140] the Ontario Court of Appeal considered the issue of expert evidence on false confessions. The Court ruled the evidence inadmissible in the circumstances, which involved self-incriminating statements made by the accused to police officers posing as members of a criminal organization. The Court was right to exclude the evidence on the facts because the witness's expertise, which was on false confessions arising from police interrogation, appeared to have little or no application to statements emerging from undercover operations. Interestingly, however, *Osmar* left open the possibility that false confessions expert evidence could be admitted in a future case.[141] The Court of Appeal's openness should be applauded. In an appropriate case involving police interrogation, expert evidence on the phenomenon of false confessions could offer much-needed education to the jury. Armed with insight into the relationship between false confessions and interrogation practices, juries would be better able to evaluate a defence claim that a confession was untrue.

Indeed, future courts might consider delivering this education through jury instructions.[142] As the Supreme Court has observed, instructions have

---

[137] See, *e.g.*, *R. v. L. (D.B.G.)*, [1998] B.C.J. No. 1584, 17 C.R. (5th) 70 (B.C.S.C.); Gary T. Trotter, "False Confessions and Wrongful Convictions" (2003-2004) 35 Ottawa L. Rev. 179, at 190-91.

[138] See, *e.g.*, *R. v. Warren*, [1995] N.W.T.J. No. 7, [1995] 3 W.W.R. 371 (N.W.T.S.C.); Gary T. Trotter, "False Confessions and Wrongful Convictions" (2003-2004) 35 Ottawa L. Rev. 179, at 190-91.

[139] See, *e.g.*, *R. v. Fell*, [2001] EWCA Crim 696 (Ct. App. (Crim. Div)); *United States v. Hall*, 93 F.3d 1337 (7th Cir. 1996).

[140] [2007] O.J. No. 244, 44 C.R. (6th) 276 (Ont. C.A.).

[141] *R. v. Osmar*, [2007] O.J. No. 244, 44 C.R. (6th) 276, at para. 66 (Ont. C.A.). See also Lisa Dufraimont, "Annotation to *R. v. Osmar*" (2007) 44 C.R. (6th) 278.

[142] See Lisa Dufraimont, "Evidence Law and the Jury: A Reassessment", McGill L.J. [forthcoming in 2008].

advantages over expert evidence as a way of delivering social science information to juries: instructions are simple, fast and inexpensive, and the judge who delivers them is impartial.[143] Moreover, many findings of false confessions researchers were judicially noticed and incorporated into the law in *Oickle*.[144] The Supreme Court has endorsed the propositions that false confessions sometimes occur in the context of police interrogations, that a suspect's vulnerability exacerbates the risk of a false confession, that threats or promises from police contribute to false confessions, and so on. In the future, judges may offer some of this basic information on false confessions in the form of jury instructions.

VI. CONCLUSION

The confessions rule constitutes a vital but limited safeguard for the accused. It offers some protection against two dangers: that innocent people will be convicted on the strength of false confessions, and that interrogated suspects will be treated unfairly. This paper has suggested several ways in which the protection offered by the confessions rule can be enhanced. Lawmakers can fortify the rule by imposing clearer limits on police practices, offering further guidance on vulnerable suspects, encouraging police to record interrogations, looking to other Charter rights as safeguards against coercive interrogation and finding ways to educate juries about the problem of false confessions.

143 *R. v. D. (D.)*, [2000] S.C.J. No. 44, [2000] 2 S.C.R. 275, at para. 67 (S.C.C.).

144 *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3 (S.C.C.).