False Confessions and Wrongful Convictions

GARY T. TROTTER*

The author identifies and examines the phenomenon of false confessions and their role in wrongful convictions. Empirical research has demonstrated that false convictions have played an important role in the production of wrongful convictions in Canada and elsewhere. The author discusses how the Supreme Court of Canada in Regina v. Oickle, *in its development of the common law confessions rule, has absorbed much learning from this social science research on false confessions. The author contemplates the implications of the Supreme Court's recognition of this body of research. He suggests that even though the Supreme Court relied upon this research, the state of empirical research on false confessions is not sufficiently mature to be admissible as expert evidence. The author discusses the implications of this conclusion. Lastly, and picking up on comments made by the Supreme Court about the videotaping interrogations, the author considers the advantages of the courts requiring that confessions being recorded as a condition-precedent to admissibility.*

L'auteur décrit le phénomène des fausses confessions et examine le rôle de ces confessions dans les condamnations injustifiées. La recherche empirique démontre que les faux aveux ont mené à plusieurs condamnations injustifiées au Canada et ailleurs. L'auteur explique comment la Cour suprême du Canada, dans l'affaire Regina c. Oickle, *en développant la règle de common law sur les confessions, s'est largement inspirée de cette recherche en sciences sociales sur les fausses confessions. L'auteur analyse ensuite les répercussions de la reconnaissance de ce corpus de recherche par la Cour suprême. Il suggère que même si la Cour suprême s'est inspirée de cette recherche, la recherche empirique sur les fausses convictions est encore à un stade trop précoce pour constituer de la preuve d'expert admissible. L'auteur examine les conséquences de cette conclusion. Enfin, citant certains propos de la Cour suprême concernant l'enregistrement vidéo des interrogatoires, l'auteur considère les avantages que les cours fassent de l'enregistrement des confessions une condition préalable à l'admissibilité de tels aveux.*

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1. Introduction

IT HAS LONG BEEN THE CASE that trial judges are required to caution themselves and juries that the major cause of wrongful confessions is the faulty evidence identifying the accused person before the court.[1] While the perceived role of identification evidence has not waned in its role in wrongful convictions, it now has competition. Increasingly, false confessions are identified as key contributors to wrongful convictions. In *R. v. Oickle*,[2] the Supreme Court of Canada explicitly recognized this relationship.

In Canada, the legality of confessions is tested through a doctrinal web consisting of the common law confessions rule, the right to counsel (section 10(b) of the *Charter*[3]) and the right to silence (section 7 of the *Charter*). Despite the fact that these three inter-related bodies of law have been developed with the prevention of false confessions in mind, it is believed that the problem persists.

This paper examines emerging themes in the law relating to confessions, with emphasis on preventing false confessions from being obtained and entered into evidence. The starting point of this analysis is the Supreme Court's important decision in *Oickle*,[4] which is the latest word on the voluntary confessions rule. Among other things, *Oickle* is significant for its absorption of the growing body of social science literature on false confessions and police interrogation practices. This paper examines the implications of the

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1. Canadian judges customarily instruct juries on the dangers of convicting on the basis of identification evidence. This is referred to as the "Turnbull caution" or "Turnbull warning": see *R. v. Turnbull*, [1976] 3 All E.R. 549, [1977] Q.B. 224 (C.A.). In *R. v. Hibbert*, [2002] 2 S.C.R. 445 at 469, 211 D.L.R. (4th) 223, the Supreme Court says: "The danger of wrongful conviction arising from faulty but apparently persuasive eyewitness identification has been well documented." See also Jill Copeland, "Helping Jurors Recognize the Frailties of Eyewitness Identification Evidence" (2002) 46:1 Crim. L.Q. 188, discussed at greater length at note 62.
2. [2000] 2 S.C.R. 3, 190 D.L.R. (4th) 257 [*Oickle* cited to S.C.R.].
3. *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 [*Charter*].
4. I am obliged to make the disclaimer that I represented the Attorney General for Ontario as an intervener before the Supreme Court in *Oickle*. I have endeavoured to be as objective as I can in my assessment of the Court's decision.

Court's recognition and use of this body of literature and how this learning might be used in the future to prevent wrongful convictions. This is followed by a discussion of the value of recording confessions and the consequences of failing to do so.

II. False Confessions and Wrongful Convictions

THAT FALSE CONFESSIONS HAVE PLAYED A ROLE in wrongful convictions is incontrovertible. Almost every major academic study of wrongful convictions has pointed to false confessions as an important contributing factor.[5] This is also the case with official commissions of inquiry into wrongful convictions, both at home[6] and abroad.[7] Moreover, the phenomenon of false confessions in the criminal process is becoming part of our broader social consciousness as cases of miscarriages of justice increasingly attract the attention of the mass media. For instance, popularized accounts, both in print and film, of the interrogations of the alleged IRA bombings of public houses in England focus on brutal police interrogation tactics that led to confessions that were later revealed to be false. It might be said that the false confessions associated with the IRA bombing cases kindled the modern interest in the phenomenon of false confessions and miscarriages of justice. Indeed, in England, recent cases referred to the Court of Appeal by the Criminal Cases Review Commission have examined false confession claims, resulting in a number of favourable results for individuals convicted long ago

5. For instance, see C. Ronald Huff, Arye Rattner & Edward Sagarin, *Convicted But Innocent: Wrongful Conviction and Public Policy* (Thousand Oaks, California: Sage Publications, 1996) at 111–41 [*Convicted But Innocent*]; Clive Walker, "Miscarriages of Justice in Principle and Practice" in Clive Walker & Keir Starmer, eds., *Miscarriages of Justice: A Review of Justice in Error* (London: Blackstone Press Ltd., 1999) at 54; Michael L. Radelet, Hugo Adam Bedau & Constance E. Putnam, *In Spite of Innocence: Erroneous Convictions in Capital Cases* (Boston: Northeastern University Press, 1992); and Jim Dwyer, Peter Neufeld & Barry Scheck, *Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongfully Convicted* (New York: Doubleday, 2000).

6. See *The Inquiry Regarding Thomas Sophonow–The Investigation, Prosecution and Consideration of Entitlement to Compensation* (Winnipeg: Attorney General, 2001), online: Government of Manitoba <http://www.gov.mb.ca/justice/sophonow/toc.html> (Commissioner Peter deC. Cory) [*Sophonow Inquiry*].

7. See U.K., Royal Commission on Criminal Justice, *Report* (London: HMSO, 1993) (Chair Viscount Runciman) [Runciman Commission], stemming from the cases arising from British bombings allegedly set by the IRA. The Royal Commission was a wide-ranging enterprise that examined all facets of the criminal justice system. It was preceded by a more focused inquiry into the bombings see: U.K., *Report of the Inquiry Into The Circumstances Surrounding the Convictions Arising Out of the Bomb Attacks in Guildford and Woolwich in 1974, Interim Report* (1989–90 HC 556), *Second Report of the Inquiry Into The Circumstances Surrounding the Convictions Arising Out of the Bomb Attacks in Guildford and Woolwich in 1974* (1992093 HC 296), *Final Report of the Inquiry into the Circumstances Surrounding the Convictions Arising out of the Bomb Attacks in Guildford and Woolwich in 1974* (1993–94 HC 449).

of serious crimes.[8] Perhaps the most dramatic incident of the impact of false confessions was illustrated in the "Central Park jogger case," in which no less than five individuals confessed to brutally raping a woman. Years later, their convictions were vacated when DNA recovered from the victim was traced to another individual, who then confessed to the crime.[9]

It has long been known that a confession is a potentially powerful piece of evidence in any prosecution. As Peter Brooks said in his brilliant book, *Troubling Confessions: Speaking Guilt in Law and Literature*: "the law still today—as in medieval times—tends to accept confession as the 'queen of proofs.'"[10] Confessions have this value, Brooks argues, because they represent a powerful mark of inner authenticity.[11] Indeed, this feature of confessions makes them particularly compelling to all players in the criminal justice system, particularly triers of fact. Because of this evidentiary power, confessions can be enormously damaging when they are false and presented to a jury. Social science research teaches us that people have great difficulty accepting the fact that others confess to crimes that they did not commit.[12] In other words, researchers suggest that laypersons (and presumably, jurors) think that false confessions are more or less a myth, when research suggests that they are not. This phenomenon, which was explicitly recognized in

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8. See *e.g. R. v. Pendleton*, [2001] UKHL 66, [2002] 1 All E.R. 524. The creation of the Criminal Cases Review Commission (CCRC) was the direct result of the Runciman Commission. One of the critiques of the regime in place at the time the IRA cases were making their way through the system was that the Home Office, which was previously responsible for referring questionable convictions to the Court of Appeal, was ineffective and unfair. For more general information about the CCRC, consult its comprehensive website and list of cases online at <www.ccrc.gov.uk>.
9. Susan Saulny "Convictions and Charges Voided In '89 Jogger Attack" *The New York Times* (20 December 2002–Late edition) A1. See also Jim Dwyer, "Confessions and the Central Park Jogger Case" (Lecture to the Yale Law School, 19 February 2003) [unpublished] and "Crime, False Confessions and Videotape," Editorial, *The New York Times* (10 January 2003) A22.
10. Peter Brooks, *Troubling Confessions: Speaking Guilt in Law and Literature* (Chicago: University of Chicago Press, 2000) at 4. This was recognized by the Supreme Court of Canada in *R. v. Hodgson*, [1998] 2 S.C.R. 449, 163 D.L.R. (4th) 577 [*Hodgson* cited to S.C.R.]. At 461, Cory J. writes, "Evidence of a confession has always been accorded great weight by triers of fact. This is a natural manifestation of human experience."
11. Brooks, *ibid.* at 4. Brooks writes, "Meanwhile, Western culture, most strikingly since the Romantic era to our day, has made confessional speech a prime mark of authenticity, par excellence the kind of speech in which the individual authenticates his inner truth."
12. Saul M. Kassin & Lawrence S. Wrightsman, "Coerced Confessions, Judicial Instructions, and Mock Juror Verdicts" (1981) 11:6 J. Applied Soc. Psychol. 489. See also Richard A. Leo, "Inside the Interrogation Room" (1996) 86:2 J. Crim. L. & Criminology 266 at 298; Richard Leo, "Police Interrogation and Social Control" (1994) 3 Social and Legal Studies 93 at 99; and Welsh S. White, "False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions" (1997) 32 Harv. C.R.-C.L. L. Rev. 105 at 134.

Oickle,[13] seems all the more anomalous in light of the growing social awareness of false confessions in popular culture.[14]

It is not known how often the police obtain false confessions. This quantitative problem is intimately linked to the bigger question of the pervasiveness of wrongful convictions in general. There is no Canadian research on either issue. Researchers debate both issues in the United States. Because these questions are virtually impossible to answer accurately,[15] the issues engender a dialogue that is largely political in nature, fostering postulations determined by the allegiance of the writer or speaker to a certain view of criminal justice.

On the issue of the frequency with which false confessions play a role in wrongful convictions in the United States, the debate is played out between Richard Ofshe and Richard Leo on one side, and Paul Cassell on the other. Professors Ofshe and Leo are proponents of the view that false confessions pose a serious problem for the American criminal justice system.[16] Based on a study of 60 cases in which inculpatory statements were later proved to be false (or very likely false), they suggest that false confessions are elicited "frequently."[17] Leo believes that they occur with "troubling regularity and are highly likely to lead to unjust deprivations of liberty."[18]

Professor Paul Cassell, another leading expert in the field, claims that researchers in general, and Leo and Ofshe in particular, overestimate the

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13. *Supra* note 2 at 26. See Gisli H. Gudjonsson, *The Psychology of Interrogations, Confessions and Testimony*, (Chichester: John Wiley & Sons Ltd., 1992) at 234, where he states:
> It seems that many people believe that innocent individuals would never confess to a serious crime during police interrogation, when it is so blatantly against their self-interest. The implicit assumption is that people always act in a self-serving way. In reality this is often not the case.... The sad fact is that some people who are not obviously mentally ill or handicapped do confess falsely to serious crimes and are consequently wrongfully convicted. Greater awareness of this is an important step forward in achieving justice.

This passage is cited by Richard A. Leo & Richard J. Ofshe, "Using the Innocent to Scapegoat *Miranda*: Another Reply to Paul Cassell" (1998) 88:2 J. Crim. L. & Criminology 557 at 567 ["Using the Innocent to Scapegoat *Miranda*"].

14. This anomaly may be somewhat explained by the fact that the research, referenced in note 12, has not caught up to the media's interest in false confessions and wrongful convictions. Also, presence in popular culture does not necessarily translate into acceptance of the authenticity of claims that wrongful convictions have been the result of confessions given by innocent people. That is, people may know about or read about it, but they do not accept "it" as having really happened.

15. *Convicted But Innocent*, *supra* note 5 at 53 writes: "Quite clearly, there is no accurate, scientific way to determine how many innocent people are convicted, or, put another way, how many of those convicted of crimes are innocent."

16. See Richard A. Leo & Richard J. Ofshe, "The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation" (1998) 88:2 J. Crim. L. & Criminology 429 [Leo & Ofshe, "Consequences"].

17. *Ibid.* at 430. In fairness, however, Leo and Ofshe do acknowledge the difficulties involved in quantifying the prevalence of false confessions, at 431: "Yet no one knows precisely how often false confessions occur in the United States, how frequently false confessions lead to wrongful convictions, or how much personal and social harm false confessions cause." In a similar vein, see White, *supra* note 12 at 108.

18. Richard A. Leo, "False Confessions: Causes, Consequences and Solutions" in Saundra D. Westervelt & John A. Humphrey, eds., *Wrongly Convicted: Perspectives on Failed Justice* (Piscataway, New Jersey: Rutgers University Press, 2002) 36 at 44–45 [Leo, "False Confessions"].

frequency with which false confessions occur.[19] Cassell attacks the work by Ofshe and Leo as anecdotal and that their methodology fails to generate valuable information about frequency.[20] After re-examining the Leo and Ofshe data, Cassell concludes that they seriously overestimated the frequency with which false confessions are obtained and suggests that, based on available data, the problem seems rather insignificant.[21] Cassell warns that there is an "established human tendency to overestimate the likelihood of extremely low probability events."[22] Cassell extrapolates from these conclusions in a later piece[23] to suggest that proven cases of false confessions are quite few and are "concentrated among a narrow vulnerable population: persons with mental disabilities."[24] Leo and Ofshe have responded to Cassell's comments by asserting that psychologically-induced false confessions "occur frequently enough to warrant the concern of criminal justice officials, legislators and the general public."[25]

Resolving this question of frequency is important in terms of critical appraisals of the law and the possibility of change. Sweeping changes to the law based on inflated frequency estimates may have the result of increasing the possibility of wrongful acquittals.[26] That is, changes to the law, based on faulty empirical data, which push the pendulum in a direction that makes it more difficult to introduce confessions, may run the risk of producing another type of error in the system. While this type of error is more palatable in a system such as ours which is rightly committed to the presumption of innocence, needless wrongful acquittals also represent justice in error. This potential impact ought to be an ever present concern given the numerous and broad law reform proposals that have emerged from commissions of inquiry examining wrongful convictions. Even the best research that has come out of the U.S. sheds little light on the extent of false confessions (and their relationship to wrongful convictions) in Canada. Nevertheless, the rest of this paper proceeds on the assumption that false confessions have played a

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19. Paul G. Cassell, "Protecting the Innocent From False Confessions and Lost Confessions—And From *Miranda*" (1998) 88:2 J. Crim. L. & Criminology 497 at 500–01 [Cassell, "Protecting the Innocent"].
20. *Ibid.* at 506. Cassell suggests at 507 that the issue would be better approached with a random sampling methodology.
21. *Ibid.* at 506–507, 512–513, 524, 530.
22. *Ibid.* at 520–521.
23. Paul G. Cassell, "The Guilty and the 'Innocent': An Examination of Alleged Cases of Wrongful Conviction From False Confessions" (1999) 22 Harv. J.L. & Pub. Pol'y 523 [Cassell, "The Guilty"]. This piece is also meant as a reply to Leo and Ofshe's study in "Consequences," *supra* note 15.
24. *Ibid.* at 526. Similar references at 583–584. Cassell says at 529 that: "The dearth of false confessions in all these samples suggests that false confessions occur quite infrequently, with the result that any effort to determine frequency will necessarily involve a methodology for estimating low probability events." Cassell also blames the media for over-estimating the frequency of false confessions at 580.
25. "Using the Innocent to Scapegoat *Miranda*," *supra* note 13 at 561. They also claim that it produces "serious policy problems" for the American criminal justice system at 561–562.
26. See Cassell, "Protecting the Innocent," *supra* note 19 at 502–503, 524 and 530.

role in wrongful convictions which is sufficient to warrant concern and attention. It would appear that the Court in *Oickle* also operated on this assumption.

Oickle concerned an accused charged with numerous counts of arson. He was also a volunteer fire fighter who responded to some of the fires that he was alleged to have set. Oickle was the subject of an interrogation that lasted many hours. He was subjected to intense questioning. He agreed to take a polygraph. After completing the polygraph, he was told that he had failed the test, and the questioning continued. After many hours of questioning, Oickle confessed to setting the fires.[27] The trial judge held that the statements were given voluntarily and were admissible.[28] Oickle was subsequently convicted, partly on the basis of those statements. His conviction was quashed by the Nova Scotia Court of Appeal, which held that the statements were involuntary and ought to have been excluded.[29] The Supreme Court restored the decision of the trial judge.[30]

Some commentators have claimed that the Court in *Oickle* has transformed the substantive law in a way that has authorized or encouraged oppressive and unfair police practices.[31] However, there is little new "law" in *Oickle*. The majority of the Court merely confirmed existing categories of voluntariness.[32] The Court also addressed, for the first time, the permissible uses of the polygraph in the interrogation process.[33] *Oickle*'s most valuable contribution *is* its acknowledgment of the social science literature on confessions. After reviewing the typology of confessions recognized in the social science literature,[34] Iacobucci J. for the majority made the following observations about the role of interrogations and false confessions:

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27. *Oickle*, *supra* note 2 at 14–17.
28. *Ibid.* at 17–18.
29. (1998), 164 N.S.R. (2d) 342, 122 C.C.C. (3d) 506 (C.A.).
30. Madam Justice Arbour dissented, holding that the Court of Appeal properly found the statements to be involuntary. *Oickle*, *supra* note 2 at 88.
31. See, for instance, the work of my colleague, Professor Don Stuart, "*Oickle*: The Supreme Court's Recipe for Coercive Interrogation," Case Comment (2000) 36 C.R. (5th) 188. The courts, including the Supreme Court, continue to regularly exclude confessions for lack of voluntariness. See *R. v. Tessier*, [2002] 1 S.C.R. 144, 190 D.L.R. (4th) 257 [*Tessier* cited to S.C.R.], which was released shortly after *Oickle*. Allowing the appeal from a decision of the New Brunswick Court of Appeal that reversed the trial judge's finding that the confession was involuntary, Iacobucci J. for the unanimous Court held at 144: "Although the trial judge did not have the benefit of this Court's reasons in *R. v. Oickle*..., in our view, the trial judge properly applied the required elements of the voluntariness test to conclude, in all the circumstances, that he had a reasonable doubt as to the voluntariness of the confession."
32. *Oickle*, *supra* note 2 at 31–45.
33. In *R. v. Béland*, [1987] 2 S.C.R. 398, 43 D.L.R. (4th) 641 [*Béland*], the Court considered the use of the polygraph as evidence in a criminal trial. The Court held that polygraph evidence is inadmissible. *Oickle* does not alter this holding.
34. Drawing on an article by Richard J. Ofshe and Richard A. Leo, "The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions" (1997) 16 Stud. L. Pol. & Soc. 189, in *Oickle*, *supra* note 2 at 27–29 Iacobucci J. identified five categories of confessions: voluntary, stress-compliant, coerced-compliant, non-coerced-persuaded, and coerced-persuaded.

> Fortunately, false confessions are rarely the product of proper police techniques. As Leo & Ofshe (1998) ["The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation," *supra*, note 16] point out... false confession cases almost always involve "shoddy police practice and/or police criminality". Similarly, in Ofshe & Leo (1997) ["The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions" (1997), 16 Stud. L. Pol. & Soc. 189] ... they argue that in most cases, "eliciting a false confession takes strong incentives, intense pressure, and prolonged questioning.... Only under the rarest of circumstances do an interrogator's ploys persuade an innocent suspect that he is in fact guilty and has been caught."[35]

This conclusion is significant because it confirms the viability of the existing categories of voluntariness in Canadian law. The majority in *Oickle* concluded that the common law voluntariness rule is consistent with the social science literature by virtue of the law's primary concern for confessions obtained through threats and promises.[36] However, this is no reason for uncritical contentment. While the research adopted in *Oickle* confirms the validity of the structure of the Canadian approach to determining voluntariness, it also demonstrates that this approach may still result in the admission of confessions that are false. The rest of this paper explores two ways in which this might be minimized: (1) through the admission of expert evidence; and (2) through proper recording of the interrogation process.

III. The Possibility of Expert Evidence

A. THE PROBLEM AND THE BROADER CONTEXT

Whatever view one takes of the result in *Oickle*, there is no disputing its significance in terms of updating the voluntary confessions rule by placing it in the context of social science evidence. Such research is helping us to understand *why* and *how* false confessions occur. This was key to the *Oickle* Court's formulation of the contours of the voluntary confessions rule. As Justice Iacobucci said, "Given the important role of false confessions in convicting the innocent, the confessions rule must understand why false confessions occur."[37]

Yet judges and juries must also understand why false confessions are made and be able to apply that understanding on a case-by-case basis. While a confessions rule consistent with or derived from social science research

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35. *Oickle*, *supra* note 2 at 30.
36. *Ibid.*: "Coerced-compliant confessions are the most common type of false confessions. These are classically the product of threats or promises that convince a suspect that in spite of the long-term ramifications, it is in his or her best interest in the short and intermediate term to confess." In short, the Supreme Court has accepted the conclusion, based on the literature, that false confessions are more likely to be given in circumstances where the police act in an abusive and aggressive fashion in dealing with the accused.
37. *Ibid.* at 27.

will go some distance in preventing the admission of false confessions (and consequent wrongful convictions), this is not enough. A confessions rule that understands why false confessions occur will have limited currency and value, and only at the time when it is applied (*i.e.* on the *voir dire* into voluntariness).

This is due to the fact, which is perhaps peculiar, that the truthfulness of a confession is not the direct focus of a *voir dire* into the admissibility of a confession under the common law confessions rule or the *Charter*. The truthfulness of a tendered confession is relevant only to the extent that it is operationalized by the requirements of the confessions rule. Experience and the research discussed above demonstrate that confessions that are determined to be voluntary may still be false. As the truthfulness of a confession is the province of the trier of fact, trial judges sitting in their capacity as triers of fact, must be ever vigilant of the possibility that confessions ruled admissible may be false. In the wake of *Oickle*, judges will probably be aware in a general sense of how social science sheds light on this problem.

While jurors may share in the growing public awareness of false confessions and wrongful convictions, it is doubtful whether the average juror is aware of *why* or *how* false confessions are made.[38] Thus, the challenge is to determine how to rectify this gap in knowledge by delivering to triers of fact our learning about false confessions and wrongful convictions. In short, how can the learning absorbed by *Oickle* be delivered to the courtroom in individual cases? As the discussion below demonstrates, the courts have been reluctant to admit expert evidence touching upon the voluntariness of confessions. Perhaps the growing recognition of the role of false confessions in wrongful convictions will alter this course.

The Supreme Court regularly relies on social science evidence in providing context for its judgments, particularly in the criminal law sphere. At one time, "social context evidence" was more typical of the Court's constitutional judgments, particularly under section 1 of the *Charter*. Now the Court increasingly relies on this type of evidence to help shape different aspects of the criminal law,[39] including certain aspects of human behaviour.[40]

However, the Court's treatment of this type of information has been a little unclear. The Court has not taken judicial notice, at least not formally, of the body of literature that informs its judgments, nor has it felt con-

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38. Indeed, as discussed above, in the text that accompanies note 12, it is worse than that because research suggests that lay people (and presumably jurors) have a difficult time accepting that people falsely confess to crimes that they did not commit.
39. See *R. v. Golden*, [2001] 3 S.C.R. 679, 159 C.C.C. (3d) 449 [*Golden* cited to S.C.R.], in which the Court considered evidence of systemic racism against black Canadians in re-shaping the search incident to arrest, and strip searches. In *R. v. Gladue*, [1999] 1 S.C.R. 688, 133 C.C.C. (3d) 385 [*Gladue* cited to S.C.R.], a sentencing case involving conditional sentences, the Court relied on extensive evidence regarding the impact of prejudice against Aboriginal individuals in the criminal justice system.
40. For example, see *R. v. Lavallée*, [1990] 1 S.C.R. 852, 55 C.C.C. (3d) 97 [*Lavallée* cited to S.C.R.] regarding the battered woman syndrome and self-defence.

strained by the strictures of expert evidence. This informality was evident in *Oickle*. Academic articles and book excerpts were simply filed with the Court by one of the interveners (the Criminal Lawyers Association of Ontario), without complaint, objection or comment from any of the parties, or from the Court itself.

The Supreme Court has increasingly shown caution in its approach to admitting expert evidence.[41] In *R. v. D.D.*,[42] the Court held that the trial judge had erred in admitting evidence of a child psychologist on the issue of why disclosure of child sexual abuse is sometimes delayed.[43] A majority of the Court held that the necessity requirement for admissibility was not met, nor was the evidence necessary to prevent ordinary persons from making erroneous judgments on this matter.[44] At the root of the majority's decision was a concern for the distortion of the fact-finding process by the admission of needless and improper expert testimony. On a theme similar to the one explored in this paper, Justice Major recalled a time when the neutrality of experts was assured by virtue of being called as witnesses by the courts. However, he cautioned:

> This notion has long disappeared and now the "professional expert witness" has emerged. Although not biased in a dishonest sense, these witnesses frequently move from the impartiality generally associated with professionals to advocates in the case. In some notable instances, it has been recognized that this lack of independence and impartiality can contribute to miscarriages of justice (See, *e.g.*, *The Commission on Proceedings Involving Guy Paul Morin* (Kaufman Report) (1988) at p. 172).[45]

After considering a number of other dangers associated with expert evidence,[46] the majority did recognize that delay in the reporting of sexual abuse was an important issue for triers of fact. The Court's solution was to suggest that trial judges instruct jurors on how they should approach the issue. The majority held that trial judges could simply instruct juries that delay in reporting, standing alone, is unremarkable.[47]

It is unclear why the Court singled out this type of phenomenon as particularly well-crystallized and stable enough to warrant a jury instruc-

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41. See *R. v. Mohan*, [1994] 2 S.C.R. 9, 114 D.L.R. (4th) 419 [*Mohan* cited to S.C.R.] and *R. v. J.-L.J.*, [2000] 2 S.C.R. 600, [2001] 192 D.L.R. (4th) 416 [*J.-L.J.* cited to S.C.R.]. More generally, see Alan D. Gold, *Expert Evidence in Criminal Law: The Scientific Approach* (Toronto: Irwin Law, 2003).
42. [2000] 2 S.C.R. 275, 191 D.L.R. (4th) 60 [*D.D.* cited to S.C.R.].
43. See *R. v. Marquard*, [1993] 4 S.C.R. 223, 108 D.L.R. (4th) 47 [*Marquard* cited to S.C.R.] in which the Court held that expert evidence on this issue was admissible.
44. *D.D.*, *supra* note 42 at 298, Iacobucci, Binnie and Arbour JJ., concurring. McLachlin C.J.C. and L'Heureux-Dubé and Gonthier JJ. dissented on this issue, but agreed with the majority that the appeal had to be dismissed.
45. *Ibid.* at 299-300.
46. *Ibid.* at 300.
47. For a critical account of a jury instruction as a solution to this problem, see Nicholas Bala, "*R. v. D.(D.)*: The Supreme Court and Filtering of Social Science Knowledge about Children" (2000) 36 C.R. (5th) 283.

tion, as opposed to requiring the matter be proved in the normal course of the trial. Nevertheless, on one level *D.D.* offers some hope for the admissibility of expert evidence on false confessions, as the Court draws the link between expert evidence and miscarriages of justice. Of course, in *D.D.* the link was made as a basis for *rejecting* expert evidence proffered by the Crown. Still, this underlying theme in the judgment—the prevention of miscarriages of justice—ought to be important in evaluating expert evidence bearing on false confessions, especially in light of *Oickle*. Recognizing the role of false confessions in wrongful convictions will be important to the legal relevance requirement for the admissibility of expert evidence.

This is because pre-*Oickle* attempts to admit expert evidence bearing on false confessions met with little success. For example, in *R. v. Warren*,[48] the accused attempted to tender expert evidence before a jury[49] to demonstrate that he falsely confessed to the culpable homicide of nine miners. The proposed psychological evidence was intended to report the accused's scores on tests measuring "compliance," "suggestibility" and another type of "confessions" test, in the form of true/false questionnaires.[50] The trial judge, de Weerdt J., explored the validity of the evidence proposed by the defence and accepted the acknowledgement of the expert witness that the research upon which his opinion was based was "still in the toddler stage."[51] The evidence was ultimately rejected as neither legally relevant nor necessary to assist the jury in its fact-finding function.[52] Similarly, in *R. v. Leland*,[53] the trial judge held that the accused could not lead evidence bearing on "whether a confession is or is not a true one, or whether it is to be looked on as reliable or unreliable."[54] However, he was permitted to lead expert evidence designed to demonstrate that he was a pathological liar.[55]

Some of the early cases dealing with false confessions underscore the importance of identifying the proposed use of expert testimony. There are several possibilities. Expert evidence may be tendered on a *voir dire* on the issue of whether the statement was voluntary as defined in the jurisprudence. This type of evidence, which is not controversial, includes evidence relating to particular psychological susceptibilities or weaknesses of the

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48. [1995] 3 W.W.R. 371, 35 C.R. (4th) 347 (N.W.T. S.C.) [cited to W.W.R].
49. de Weerdt J. observed at 373 that the accused did not attempt to lead this evidence on the *voir dire* on voluntariness.
50. *Ibid.*
51. *Ibid.* at 376.
52. *Ibid.* at 377–378, referring to *Mohan*, *supra* note 41, discussed further below.
53. (1998) 17 C.R. (5th) 70, [1998] B.C.J. No. 1584 (QL) (S.C.) [*Leland* cited to C.R.].
54. *Ibid.* at 73.
55. See also *R. v. Dietrich*, [1970] 3 O.R. 725, 1 C.C.C. (2d) 49 (C.A.) [*Dietrich* cited to O.R.], in which a similar issue was raised. The court in *Leland*, *ibid.* at 74, held that the experts were not permitted to express opinions on the techniques used by the police officers during interrogation.

accused person.[56] Other possible uses of expert evidence on the *voir dire* might address the method of interrogation employed by the police, perhaps in combination with factors specific to the accused, in terms of whether the confession was coerced, as opposed to freely given.

On the trial proper, the trier of fact will be confronted with different issues that extend beyond the issue of voluntariness. First, it may be disputed that the tendered statement was ever made. Responses to this position are discussed below in the context of recording what transpires during an interrogation. The potential value of expert evidence on the trial proper will lie in its ability to address the question of whether the statement attributed to the accused is authentic. It is not realistic to expect that judges will admit expert evidence about whether the accused's statement was actually true or false. This is beyond the realm of any expert's expertise. More realistically, expert evidence before a trier of fact may take two forms. As with the possibility of expert evidence on the *voir dire*, an accused may lead evidence relating to particular psychological susceptibilities or weaknesses that support his or her claim that the confession is false. For instance, the accused may adduce expert evidence suggesting a mental handicap or illness that makes him or her more likely to make a confession that is untrue. More contentious is expert evidence of a more general nature, elaborating on the phenomenon of false confessions and the circumstances in which they are typically made.[57] In short, this type of evidence would attempt to convey to the jury the social science foundation relied upon in *Oickle*.

These potential uses of expert evidence may be measured against the requirements for the admissibility of expert evidence set out in *Mohan*.[58] Bearing these requirements in mind, comparisons of the research regarding false confessions may usefully be made with the issue of whether expert evidence bearing on the frailties of eyewitness identification should be admissible. In *R. v. McIntosh*,[59] the Court of Appeal for Ontario rejected the view that jurors could benefit from listening to expert evidence on eyewitness

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56. See *R. v. Whittle*, [1994] 2 S.C.R. 914, 116 D.L.R. (4th) 416 [*Whittle* cited to S.C.R.] dealing with the operating mind component of voluntariness.
57. As Leo, "False Confessions," *supra* note 18 at 50 suggests:
    > The purpose of expert witness testimony is to educate triers of fact about the general findings from the scientific research on interrogation and confession so that they can more adequately understand psychological principles, practices, and processes of modern interrogation and thereby more accurately discriminate between reliable and unreliable confessions.

    At 51, Leo continues: "More specifically, social science expert witnesses can aid the jury by (1) discussing the scientific research literature documenting the phenomenon of police-induced false confessions [...] (2) explaining how and why particular interrogation methods and strategies can cause the innocent to confess, (3) identifying the conditions that increase the risk of false confession, and (4) explaining the generally accepted principles of post-admission narrative analysis."
58. *Mohan*, *supra* note 41. The court writes that admission of expert evidence depends on the application of the following criteria: (a) relevance; (b) necessity in assisting the trier of fact; (c) the absence of any exclusionary rule; and (d) a properly qualified expert.
59. (1997), [1998] 35 O.R. (3d) 97, 117 C.C.C. (3d) 385 (C.A.) [*McIntosh* cited to O.R.].

identification; like false confessions, our growing experience with wrongful convictions requires that this position also be reconsidered.

B. EXPERT EVIDENCE AND NOVEL SCIENCE

The modern approach to determining the admissibility of expert evidence is still governed by the Supreme Court of Canada's decision in *Mohan*. However, *Mohan* was refined by *J.-L. J.*,[60] which addressed the admissibility of expert evidence involving "novel" science. For the reasons discussed below, expert evidence on the phenomenon of false confessions is properly classified as novel science. This is largely based on the infancy of the research in this area and the lack of consensus among researchers as to the nature and extent of the phenomenon. *J.-L. J.* sounds a cautionary warning about expert evidence as Binnie J. echoes the words of the late Justice Sopinka in *Mohan* that trial judges must play an important gate-keeping function with respect to the admissibility of expert evidence.[61] The two decisions yield the following criteria for admissibility of this type of evidence, which are considered in relation to expert evidence on false confessions.[62]

1) Necessity and the Subject Matter of the Inquiry

The evidence must be necessary in the sense that the subject matter of the inquiry must be such that ordinary people are unlikely to reach a proper judgment about the issue without specialized knowledge.[63] With false confessions, the issue is whether jurors are properly equipped to deal with the dangers associated with false confessions without the assistance of an expert. Expert evidence dealing with accused-specific factors is not controversial. A case can easily be made to support the view that jurors would not necessarily appreciate how a mental disability or illness might impact on the veracity of a statement given by an accused person. However, expert evidence of a general nature is more difficult. In *McIntosh*, the Court of Appeal held that jurors did not need the assistance of an expert witness to remind them that all witnesses have difficulty with perception and memory when the circumstances in which the observation took place was brief and stressful.[64] The Court held that this was not outside the "normal experience of the trier of fact." At this level of generality, the same might be said of expert evi-

60. *J.-L. J.*, *supra* note 41.

61. *Ibid.* at 613. See also *Mohan*, *supra* note 41 and Gold, *supra* note 41 at 45.

62. The following analysis has benefited greatly from Jill Copeland's excellent, "Helping Jurors Recognize the Frailties of Eyewitness Identification Evidence" (2002), C.L.Q. 187. My discussion is not meant to be a comprehensive analysis of each criterion. The basic issues relevant to false confessions are: (i) necessity and subject matter of the inquiry; (ii) a "reliable foundation" to the technique or body of literature underlying the opinion; (iii) the ultimate issue concern; (iv) the absence of exclusionary rules; (v) a properly qualified expert; and (vi) legal relevance. These issues will be raised at each stage for consideration.

63. *J.-L. J.*, *supra* note 41 at 614.

64. *McIntosh*, *supra* note 59.

dence that informs the jury that people sometimes confess to crimes that they did not commit. If this were all that expert evidence had to offer, it could be conveyed to the trier of fact as an instruction, in a manner similar to *D.D.*[65] However, just as important as identifying the phenomenon of a false confession is explaining how or why it can occur. This is not within the normal experience of jurors in the case of false confessions or eyewitness identifications.[66] It is unlikely that a trial judge could adequately detail the factors that might contribute to the giving of a false confession.[67]

After *Oickle*, the necessity threshold should be met for expert evidence on false confessions. As discussed above, Justice Iacobucci recognized that false confessions are made and that they have resulted in miscarriages of justice. Moreover, the Court referred to research establishing that laypersons have difficulty accepting that a person would confess to a crime he or she did not commit. It is a counter-intuitive proposition. It suggests an unusual person, an unusual scenario, or perhaps both. Without assistance in unraveling this issue, the conduct of the accused may be beguiling to a juror in the same way as the battered woman who does not leave her abuser.[68]

As *Oickle* recognized, false confessions tend to stem from certain exceptional techniques or strategies employed by the police during interrogation. Expert evidence on the types of techniques that are likely to lead to false confessions with various types of individuals would greatly assist jurors in determining whether the accused's assertion that he/she confessed falsely is true.

2) A "Reliable Foundation" to the Technique or Body of Literature Underlying the Opinion

Opinion evidence relating to characteristics of the accused does not pose a problem under this branch of the test for expert evidence. Cases such as *Whittle* engage traditional learning about mental disorder in the context of the admissibility of statements.[69] Thus, opinion evidence about an accused person's mental disorder or cognitive deficit, in the context of the voluntariness and/or reliability of a confession, is unlikely to founder on the "reliable foundation" criterion.

Evidence of a more general nature about false confessions poses a slightly different question under this criterion. *Mohan* and *J.-L.J.* require that, if opinion evidence based on so-called novel science is to be admitted into evidence, it must meet a further criterion for admissibility: it must be

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65. *Supra* note 41.
66. See Copeland, *supra* note 1 at 198.
67. See Copeland, *ibid.* at 202–03 citing research suggesting that a caution by a trial judge is not as effective as the testimony of an expert witness. See also Nicholas Bala, "*R. v. D.(D.)*: The Supreme Court and Filtering of Social Science Knowledge about Children" (2001) 36 C.R. (5th) 283.
68. See *Lavallée*, *supra* note 40.
69. See *Whittle*, *supra* note 56. See also *Leland*, *supra* note 53; *Dietrich*, *supra* note 55.

demonstrated that the opinion offered is based on a "reliable foundation."[70] This involves further considerations, including: (i) whether the theory or technique can be and has been tested; (ii) whether the theory or technique has been subjected to peer review or publication; (iii) the known or potential rate of error or the existence of standards; and (iv) whether the theory or technique has been generally accepted.[71]

Thus far, Canadian courts have treated the social science literature on false confessions with skepticism, similar to that shown to expert evidence on eyewitness testimony. No court has yet to engage in the type of analysis now required by *J.-L.J.* as it applies to either type of evidence. However, Jill Copeland has made a compelling case for rejecting the analysis in *McIntosh* and recognizing expert evidence on eyewitness identification as being based on a reliable foundation, permitting its admissibility in criminal proceedings.[72] She points to a large body of peer-reviewed literature that convincingly demonstrates eyewitness identification is a recognized branch of psychology.[73]

Opinion evidence relating to false confessions does not yet appear to stand on the same foundation as expert testimony regarding eyewitness identification. The strongest argument in favour of there being a reliable foundation is the Supreme Court's recognition of this body of literature in *Oickle*. *Oickle* demonstrates that there is a growing body of literature that has been generated about false confessions and the types of factors that contribute to their occurrence. By and large, these leading pieces on false confessions have been published in peer-reviewed journals.

However, there is a serious debate in the academic literature about whether this body of research has reached a sufficient level of maturity for the purposes of expert testimony. Some researchers, such as Richard Leo and Richard Ofshe, are strong proponents of the value and admissibility of expert evidence on the nature of false confessions.[74] Indeed, both regularly testify in the United States. However, Professor Paul Cassell seriously disputes the usefulness of expert evidence on false confessions. Cassell's funda-

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70. *J.-L.J.*, *supra* note 41 at 615. This approach, based on "reliable foundation" as opposed to "general acceptance," is derived from the test laid down by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

71. *J.-L.J.*, *ibid.* at 615 Binnie J. points out that general acceptability is only one of several factors to be considered. A theory or technique may not be generally accepted by the scientific community, but may well be admissible, based on other factors. As Binnie J. observes, "[a] case-by-case evaluation of novel science is necessary in light of the changing nature of our scientific knowledge: it was once accepted by the highest authorities of the western world that the earth was flat." (*ibid.* at 616).

72. *Supra*, note 1 at 203–04.

73. See Gold, *supra* note 41 at 63, n. 59. Alan Gold asserts that Finlayson J.A. was wrong in *McIntosh*, *supra* note 59 when he suggested that it was doubtful that eyewitness identification is a recognized branch of psychology.

74. See Leo, "False Confessions," *supra* note 18 at 50–52. Leo states that, "[t]he use of social science expert witness testimony in cases involving a disputed interrogation or confession has become increasingly common" (*ibid.* at 51).

mental objection is that the available research has not properly established whether false confessions occur with sufficient frequency in the criminal justice system to warrant concern about police practices.[75] Moreover, Cassell complains that the failure of researchers like Leo and Ofshe to use random samples compromises the validity of their claim that false confessions pose a serious problem for the criminal justice system.[76] Cassell re-examined the data relied upon by Leo and Ofshe. He disputes the number of cases that they classified as miscarriages of justice due to false confessions and concluded that "[t]his low batting average raises serious questions about the admissibility of expert testimony resting on Leo and Ofshe's research about false confessions."[77] Moreover, it appears that U.S. courts are divided on whether expert evidence on the general nature of false confessions should be admissible.[78] Saul Kassin, another leading expert in the area, has expressed doubts about whether expert evidence on false confessions is ready for the courtroom.[79]

3) The Ultimate Issue

A long-standing concern with expert evidence is that it should not usurp the function of the trier of fact by approaching the ultimate issue to be decided. Discussing this concept in the context of necessity (discussed above), Justice Sopinka said in *Mohan*, "[t]he closer the evidence approaches an opinion on an ultimate issue, the stricter the application of this principle."[80] Thus, while there is no general rule excluding expert evidence that bears upon the ultimate issue, this type of evidence does put additional importance on the criteria of relevance and necessity.[81] Evidence that relates to the credibility of another witness, or evidence that is merely oath-helping has been excluded on these bases.[82]

In the context of false confessions, the ultimate issues are whether or not the confession is voluntary and whether it is true or false. Where a confession is ruled voluntary, but it is alleged that the confession is false, the issue for the trier of fact (whether it be judge or jury) is whether the accused is to be believed when he or she asserts that the confession is not true. On

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75. Cassell, "Protecting the Innocent," *supra* note 19.
76. Cassell, "The Guilty," *supra* note 23 at 526–35, 580–88.
77. *Ibid.* at 588.
78. *Ibid.*, nn. 393–94. Cases that have held expert evidence to be admissible include: *United States v. Hall*, 93 F.3d 1337 (7th Cir. 1996). An example of a case that found the evidence inadmissible is: *Bullard v. State*, 650 So.2d 631 (Fla. Dist. Ct. App. 1995). Cassell notes that the courts tend to admit evidence relating to an accused's mental disorder or deficit, a trend that Cassell does not seem to oppose.
79. See Saul M. Kassin, "The Psychology of Confession Evidence" (2001) 52 American Psychologist 221, cited in Cassell, *ibid.* at 590, n. 400.
80. *Supra*, note 41 at 25.
81. See *R. v. Bryan* (2003), 171 O.A.C. 391 at 393-94, 175 C.C.C. (3d) 285 (C.A.).
82. *Mohan*, *supra* note 41 at 25.

another level, the issue may be distilled down to the actual guilt or innocence of the accused person. Of course, this determination is for the trier of fact to make based on the totality of evidence, at the end of the trial.

The narrower and more authentic "ultimate issue" is whether the accused is to be believed when he or she asserts that the confession he or she gave was false. No witness is capable of giving an expert opinion on this issue, it being a matter for the trier of fact to decide. However, an expert may assist the trier of fact in making a decision by providing the necessary tools and context.[83]

4) The Absence of Any Exclusionary Rule

This criterion bars the admission of expert evidence that would offend other rules of evidence. For example, in *R. v. Morin*,[84] it was held that the admission of Crown expert testimony might run afoul of the rule prohibiting the Crown from leading evidence of bad character without the accused first having put his character in issue. On a general level, there are no other exclusionary rules of evidence that would be offended by the admission of expert evidence on false confessions.[85]

5) A Properly Qualified Expert

In *Mohan*, Sopinka J. said that an expert opinion "must be given by a witness who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify."[86] In the context of testing the admissibility of novel science, this may well be addressed under heading two above, dealing with "a reliable foundation."[87] This criterion has typically been an easy one to surpass, as the courts have been generous in recognizing the credentials of experts.[88]

As discussed throughout, there are two types of evidence that may be

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83. Copeland, *supra* note 1 at 205 (Copeland makes a similar point in relation to false identification. She agrees that an expert witness should not be allowed to provide an opinion on whether an identification witness is correct in identifying the accused person. However, this should not stop the witness from educating the trier of fact "on what factors can affect the reliability of eyewitness identification evidence, so that the jury can draw its own inferences from the evidence at trial."); Cassell, "The Guilty," *supra* note 24 at 589 ("the clear trend in the cases is that, at the very least, courts should preclude any testimony on the truth or falsity of a particular confession.").
84. [1988] 2 S.C.R. 345, 44 C.C.C. (3d) 193 [*Morin* cited to S.C.R.].
85. Copeland, *supra* note 1 at 205 (Copeland reaches the same conclusion on eyewitness identification evidence).
86. *Mohan*, *supra* note 41 at 25; see also *R. v. J.-L. J.*, *supra J.-L. J.* note 41 at 622 (This case also recognized this as an independent criterion).
87. Copeland, *supra* note 1 (Copeland deals with both together).
88. See David Paciocco & Lee Stuesser, *The Law of Evidence*, 3rd ed. (Toronto: Irwin Law, 2002) at 170 ("'Expertise' is a modest status..."); *R. v. Marquard*, [1993] 4 S.C.R. 223, 85 C.C.C. (3d) 193, McLachlin J. ("The only requirement for the admission of expert opinion is that the 'expert witness possesses special knowledge and experience going beyond that of the trier of fact.'" at 243.); *Béland*, *supra* note 33 at (Deficiencies in the expertise go to weight, not admissibility).

adduced on the issue of false confessions: evidence about the accused and evidence related to the phenomenon of false confessions. Each may have a different impact on the properly qualified expert standard. Expert evidence focused on the characteristics of the accused that may be relevant to voluntariness (*i.e.* low intelligence and/or mental disorder) is not controversial under this heading. The courts have routinely admitted this type of evidence from psychiatrists and psychologists.[89]

Expert evidence on the phenomenon and features of false confessions is more difficult. The foundation of the core of knowledge bearing on the phenomenon of false confessions is only as good as those conducting research in the field. But who are these people who are found to be experts in this area? They are not necessarily the same group of so-called "mainstream" experts mentioned in the preceding paragraph (physicians, psychologists and psychiatrists) who might offer evidence on the characteristics of the accused person. Those conducting work on false confessions are a mixed group, including psychologists, sociologists, criminologists and legal academics. It is likely that the courts will require someone conducting research in the area with special skill in empirical research involving human subjects. The idea of legal academics, without this special empirical research expertise, offering expert testimony on this issue before juries seems highly improbable and ill advised.

6) Legal Relevance

A critical threshold marker in determining the admissibility of expert evidence is legal relevance. Relevance in this context extends beyond logical relevance, in the sense that it tends to establish a fact in issue. As Sopinka J. held in *Mohan*:

> Other considerations enter into the decision as to admissibility. This further inquiry may be described as a cost benefit analysis, that is "whether its value is worth what it costs." See *McCormick on Evidence* (3rd ed. 1984), at p. 544... Evidence that is otherwise logically relevant may be excluded on this basis, if its probative value is overborne by its prejudicial effect, if it involves an inordinate amount of time which is not commensurate with its value or if it is misleading in the sense that its effect on the trier of fact, particularly a jury, is out of proportion to its reliability. While frequently considered as an aspect of legal relevance, the exclusion of logically relevant evidence on these grounds is more properly regarded as a general exclusionary rule (see *Morris v. The Queen*, [1983] 2 S.C.R. 190). Whether it is treated as an aspect of relevance or an exclusionary rule, the effect is the same. The reliability versus effect factor has special significance in assessing the admissibility of expert evidence.[90]

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89. See *Whittle*, *supra* note 56; *Leland*, *supra* note 53; *Dietrich*, *supra* note 55.
90. *Mohan*, *supra* note 41 at 20–21; See also R.J. Delisle, "The Admissibility of Expert Evidence: A New Caution Based on General Principles" (1994), 29 C.R. (4th) 267.

Both aspects of this consideration are relevant to expert testimony respecting false confessions.

As Alan Gold suggests, logical relevance is still very important at this stage because it allows the court to engage in a quality control function, separating a valid opinion based on a proper foundation from an opinion that is suspect because it is not based on a reliable foundation or was not generated through a proper process.[91] This aspect of the relevance inquiry was at the core of the Supreme Court's rejection of the expert evidence in *J.-L. J.*[92] Expert evidence focused on characteristics of the accused person (*i.e.* intelligence and mental disorder) is not likely to falter on this test. This type of evidence is similar to evidence regularly accepted on the mental function of accused persons. The assessment or diagnosis offered may well assist the jury in confronting the contention that the confession, while given, is in fact false. Evidence of the verifiable fact that people sometimes confess to crimes that they did not commit, and the reasons for this occurrence, is a more difficult proposition. The link to the veracity of the confession in individual cases is more remote than evidence bearing on specific characteristics of the accused. The bare assertion of the pervasiveness of false confessions, standing alone, is not likely to advance the cause in a useful way. However, when the facts surrounding the taking of the confession resonate with the findings of researchers on why false confessions are made, the argument in favour of logical relevance (*i.e.* that *this* confession is false) is strengthened.

The broader inquiry into legal relevance, in terms of a cost-benefit analysis, is likely not to be a serious issue with evidence respecting the characteristics of the accused before the court. If the accused does display features of mental disorder or cognitive deficit, little argument can be made that the value of the jury hearing this evidence is outweighed by the expense of time and the added complication to the proceedings. This argument against admissibility will be raised more often in relation to more general evidence on the phenomenon of false confessions. Jill Copeland argues that concerns about jurors being confused by a time-consuming battle of experts is the location in the analysis where expert evidence on eyewitness identification is most likely to fail, especially when the option of a cautionary instruction by the trial judge is a viable option.[93]

For reasons discussed above, a cautionary instruction is really not an option in the context of false confessions.[94] The fact that people confess to

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91. See Gold, *supra* note 41 at 48–57.
92. *R v. J.-L. J.*, *supra* note 41, Binnie J. ("The possibility that such evidence–'cloaked under the mystique of science' (*Béland*, *supra* note 33 at 434)–would distort the fact-finding process, was very real.") at 627.
93. Copeland, *supra* note 1 at 206.
94. Copeland, *ibid.*, also makes a persuasive argument why a simple instruction is not sufficient in the eyewitness identification context.

crimes to which they did not commit might work well as a cautionary instruction. But this is only the beginning of the analysis because research suggests that false confessions do not merely "happen"; they are obtained in particular situations, using certain techniques, with particular types of individuals. Mock jury studies have demonstrated that expert evidence makes jurors more sensitive to eyewitness identification evidence.[95] Research replicating this finding in the false confession context would make the case for admissibility more powerful in terms of the application of this criterion.

On a more general level, the cost-benefit analysis ought to bend toward the admissibility of expert evidence in terms of false confessions. The Supreme Court has, on more than one occasion, held that the accused ought to be permitted to lead evidence in his or her defence, so long as its probative value is not substantially outweighed by its potential prejudice.[96] This ought to factor into the test for legal relevance in this context. More importantly, in engaging in the cost-benefit analysis mandated by *Mohan* and subsequent cases, consideration must be given to the potential for avoiding wrongful convictions. This, of course, is an animating force behind the probative value versus prejudicial effect formula forged by the Supreme Court. Indeed, courts, including the Supreme Court, advert to the potential for miscarriages of justice in many contexts. Sometimes these general references to miscarriages of justice, as well as specific references to reports into miscarriages of justice, are little more than a rhetorical device added to give deeper meaning to a conclusion reached on a plain application of the law.[97] However, it ought to have currency in those areas in which research and experience tells us to be especially cautious about generating wrongful convictions.[98] Relying on this research and experience, the Court in *Oickle* has raised a real concern about this potential. The learning reflected in *Oickle* suggests that this type of evidence ought to be given favourable consideration in terms of cost-benefit, more so than other evidence that has not been so directly linked with the potential for serious errors in the criminal justice process.

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95. See Copeland, *supra* note 1 at 206–207.
96. See *R. v. Seaboyer*, [1991] 2 S.C.R. 577 at 609–610, 66 C.C.C. (3d) 321 at 391–392; *R. v. Shearing*, [2002] 3 S.C.R. 33 at 48–49, 165 C.C.C. (3d) 225 at 237–238; *R. v. Osolin*, [1993] 4 S.C.R. 595 at 671–672, 86 C.C.C. (3d) 481 at 522–523.
97. See *R. v. Burke*, [2002] 2 S.C.R. 857, 164 C.C.C. (3d) 385 (The majority found it necessary to mention the possibility of miscarriages of justice, with specific reference Donald Marshall, David Milgaard and Guy Paul Morin, as a basis for finding error with the trial judge's resolution of the issue of when a jury become *functus officio* at 903).
98. See *Sophonow Inquiry*, *supra* note 6 (In the eyewitness identification context, retired Supreme Court of Canada Justice Peter Cory, in his capacity in the commission into the proceedings against Thomas Sophonow, recommended that trial judges "consider favourably and readily admit" qualified expert evidence on eyewitness identification at 33–34).

C. CONCLUSION—AN OVERALL ASSESSMENT

The case for the admission of expert evidence on false confessions is straightforward in one sense, but precarious in another. Evidence about mental disorder or cognitive deficit in relation to accused persons ought to easily gain admission on the issues of voluntariness and reliability. General evidence about the nature of false confessions is more problematic. There is no doubt that this is an important area of research being carried out by respected researchers. However, doubts exist about the maturity of this body of research insofar as expert testimony is concerned. Researchers cannot agree on extent and nature of the problem of false confessions or about the most efficacious methodological approach to the issue. In short, notwithstanding the concern of criminal justice actors about the problem of false confessions, the state of scientific knowledge suggests that it may not be ready to surpass the established thresholds for expert testimony. This is a cause for concern, especially in light of the Supreme Court's utilization of this body of literature in *Oickle*. This state of affairs has created a troubling situation whereby judges may educate themselves, in a general sense, about the possibility of false confessions while there is no recognized procedure for placing this type of information before triers of fact. We may take some solace in the fact that our current law of voluntariness understands and, to an extent, gives voice to current social science learning on false confessions. However, the voluntariness rule is just one part of the puzzle; a part having nothing to do with juries, and which may well result in the admission of false confessions.

IV. The Proper Recording of Interrogations

A. THE PROBLEM

Interrogations take place in private, where the accused is cut off from the outside world. As U.S. Supreme Court Chief Justice Warren wrote in *Miranda v. Arizona*:

> Interrogation still takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms.[99]

The isolation of the suspect no doubt plays a critical, tactical role for the police in the interrogation process.[100] The law can abide privacy or isolation during the interrogation process. Indeed, it would be absurd to suggest that interrogations take place in public or in front of a larger audience. This would come with its own coercive qualities. But while the law might be able to live with isolation or privacy, it cannot countenance secrecy. There must

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99. 384 U.S. 436 (1966) at 448.
100. See Brooks, *supra* note 10 at 13.

be a clear record of what took place during the interrogation of the suspect.

The adequacy and form of the police record has recently attracted the attention of the courts. Again, *Oickle* is a good place to start. Richard Oickle was questioned by the police over many hours. The questioning was scrupulously recorded by the police on videotape. This proved invaluable to the Supreme Court. Under the heading, "The Problem of False Confessions," Iacobucci J. recognized the numerous salutary benefits of videotaping statements.[101]

Seemingly everyone writing on interrogations supports the requirement of recording confessions. As Richard Leo observes, "both liberal *and* conservative legal scholars have recommended the use of videotaping inside the interrogation room."[102] The benefits that accrue from recording might be separated into three related categories: epistemological, behavioural and systemic. After exploring these benefits of recording, the issue of what ought to flow from a failure to record properly is considered.

From an epistemological perspective, a taped record helps to provide an authentic account of what happened in the confines of the interrogation room. While written confessions by the accused or notes of admissions made by police officers may adequately convey the substance of what occurred (and even this is debatable), a videotape or audiotape recording preserves and conveys both the tone in which words were uttered and the body language of those present.[103] Of course, these nuances are lost with a mere written record. A properly recorded record will be helpful for judges in determining voluntarinesss.[104] The visual cues may also assist the trier of fact in determining whether the statement is true or false.

These features of recording, especially videotaping, which focus on "what happened and what was said," can equally benefit both the accused person and the police. A proper recording will prevent the police from convincingly asserting that the accused said things that were never said. Similarly, an indelible record will prevent the accused from saying "I never said that" or from suggesting that the confession was made but was the product of psychological or physical abuse. A comprehensive record will minimize the guess-work of which version of the interrogation will be accepted by the trier of fact, and thereby permit prosecutors and defence lawyers to make more straightforward choices about their respective positions.[105] This

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101. *Oickle*, *supra* note 2 at 30–31, (Iacobucci J. relied on White, *supra* note 12 and J.J. Furedy & J. Liss, "Countering Confessions Induced by the Polygraph: Of Confessionals and Psychological Rubber Hoses" (1986) 29 Crim. L.Q. 91).

102. See Richard A. Leo, "The Impact of *Miranda* Revisited" (1996) 86 J. Crim. L. & Criminology 621 at 692 [Leo, "Impact"]. See also Christopher Slobogin, "Toward Taping" (2003) 1 Ohio St. J. Crim. L. 309.

103. Furedy & Liss, *supra* note 101 at 104–105.

104. Leo, "Impact," *supra* note 102, at 682–692.

105. *Ibid.* at 684. See also White, *supra* note 12 at 155.

will also translate into more efficient and accurate fact-finding by judges and jurors and better safeguard against wrongful convictions based on false confessions.[106] Of course, this depends on the integrity of the recording process and the continuity of an unedited record.

The potential effects of videotaping on the behaviour of the police are obvious. Knowing that they are being videotaped, police officers will be more likely to conduct their interrogations in a professional and fair manner.[107] A police officer will be less likely to engage in abusive and illegal conduct if he or she knows that the interrogation is being recorded for the world to see. In turn, this ought to reduce the number of untrustworthy confessions and consequentially the number of wrongful convictions.[108] Moreover, videotaping may foster a greater sense of professionalism in the police. The fact that their work is being recorded leads to the possibility that it may be evaluated, not just for court purposes, but also for employment purposes. Moreover, and in the longer term, exemplary interrogations may provide a good teaching model for new police officers or interrogators and thereby further enhance a culture of professionalism in police forces.[109]

In a broader systemic sense, the videotaping of confessions bolsters the reputation of the justice system as a whole. Widespread knowledge that the police videotape interrogations can only enhance confidence in the criminal justice system by conveying the message that citizens have nothing to fear in the interrogation process because it will all be captured on videotape and subjected to review by others.

The salutary benefits of videotaping, as stated above, are well accepted in the relevant social science literature; they appeal equally to those interested in crime control and those interested in due process. For crime control adherents, a properly recorded confession will undoubtedly aid in convicting the guilty. As for due process, the recorded interrogation ensures police fairness and prevents against coerced or otherwise false confessions.[110]

Some researchers see videotaping of interrogations as a panacea against false confessions. Professor Paul Cassell recommends replacing the protections provided by *Miranda* with a requirement that the police videotape all confessions.[111] As Cassell suggests, "Replacing *Miranda* with video-

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106. See White, *ibid.* at 153. See also Leo & Ofshe, "Consequences," *supra* note 16 at 494–495; Leo, "False Confessions," *supra* note 18 at 49.
107. See Leo, "Impact," *supra* note 102 at 683–684, White, *ibid.* at 154, Leo, "False Confessions," *supra* note 18 at 50.
108. White, *ibid.* at 153.
109. Leo, "Impact," *supra* note 102 at 683–684.
110. See Leo, "False Confessions," *supra* note 18 at 49; Leo, "Impact," *supra* note 102 at 682. See generally Herbert L. Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968).
111. Cassell, "The Guilty," *supra* note 23 at 533–534. This proposal may well be quite risky and self-defeating. The solution favoured by most commentators in this area is to preserve the *Miranda* warning in conjunction with comprehensive videotaping.

taping offers a real chance to identify those rare cases of police interrogation gone bad, while at the same time not impeding police in their efforts to obtain confessions."[112] Professor Richard Leo argues that videotaping be mandated as an aspect of substantive due process under the U.S. Bill of Rights.[113]

The Canadian approach is more modest. After noting the benefits to the recording of police interrogations, Justice Iacobucci for the majority in *Oickle* included the following important caveat:

> This is not to suggest that non-recorded interrogations are inherently suspect; it is simply to make the obvious point that when a recording is made, it can greatly assist the trier of fact in assessing the confession.[114]

The insertion of this observation is curious. The recording of the confession in *Oickle* did not give rise to a contentious issue. The recording of the confession was comprehensive and there was no doubt of its great assistance to all levels of court in helping them to assess the voluntariness of the statement. However, the effect of these words has been the subject of debate in a number of cases since *Oickle* was decided.

B. THE AFTERMATH OF *OICKLE*

Shortly after *Oickle* was decided, the Hon. Peter deC. Cory (as he then was) finished his inquiry into the case of Thomas Sophonow.[115] Among the many problems with the case against Mr Sophonow was the manner in which he was interrogated. The interrogation lasted many hours and was recorded in handwriting by the officers involved. This led to crucial discrepancies about what Sophonow had said to the officers. Justice Cory found this unacceptable and issued some sweeping recommendations that would make unrecorded confessions *prima facie* inadmissible. In the report, he recommended the following:

> The evidence pertaining to statements given by an accused will always be of great importance in a trial. The possibility of errors occurring in manually transcribing a verbal statement by anyone other than a skilled shorthand reporter is great; the possibility of misinterpreting the words of the accused is great; and the possibility of abusive procedures, although slight, exists in those circumstances. That, coupled with the ease with which a tape recording can be made, make it necessary to exclude unrecorded statements of an accused. It is the only sure means of avoiding the admission of inaccurate, misinterpreted and false statements.

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112. *Ibid.* at 534. See also Cassell, "Protecting the Innocent," *supra* note 19 at 503, 553–556.
113. Leo, "False Confessions," *supra* note 18 at 49; Leo, "Impact," *supra* note 102 at 688–689. Leo points out that the Supreme Court of the State of Alaska has held that videotaping is required by substantive due process to protect rights under the Fifth, Sixth and Fourteenth amendments to the U.S. Constitution: see *Stephan v. State*, 711 P.2d 1156 (Alaska 1985). The Minnesota Supreme Court has also mandated videotaping, but has not rested its decision on a constitutional footing: see *Scales v. State*, 518 N.W.2d 587 (Minn. 1984). See also Slobogin, *supra* note 102.
114. *Oickle*, *supra* note 2 at 31.
115. *Sophonow Inquiry*, *supra* note 6.

> I would recommend that videotaping of interviews with suspects be made a rule and an adequate explanation given before the audiotaping of an interview is accepted as admissible. *This is to say, all interviews must be videotaped or, at the very least, audiotaped.*
>
> *Further, interviews that are not taped should, as a general rule, be inadmissible.* There is too great a danger in admitting oral statements. They are not verbatim and are subject to misinterpretation and errors, particularly of omission. Their dangers are too many and too serious to permit admission. Tape recorders are sufficiently inexpensive and accessible that they can be provided to all investigating officers and used to record the statements of any suspect.[116]

No mention was made of the recent words of Iacobucci J. in *Oickle*. Indeed, when Justice Cory wrote, there was no precedent for this sweeping statement that would make unrecorded confessions, "as a general rule," inadmissible. However, as discussed below, the law in England has moved in this direction.

Independent of Justice Cory's *Sophonow Inquiry* recommendations, some courts have addressed the failure of the police to provide an adequate record of the interrogation process. This started with the Ontario Court of Appeal's decision in *R. v. Moore-McFarlane*.[117] The case originated from the robbery of a convenience store. The Crown relied on an inculpatory statement made by the accused to the officers. Mr Moore-McFarlane testified that *en route* to the police station, he was hit in the jaw with a walkie-talkie by a police officer. The accused testified at the *voir dire* that his clothes were removed and that he was interrogated while naked. Police witnesses testified that the accused was strip-searched, but then provided with underwear and socks. One of the officers testified that he conducted a short interview with the accused, during which an inculpatory statement was made. The accused had apparently told the officers "it was my job to watch."[118] He then agreed to make an audiotaped statement that was introduced at trial. Moore-McFarlane testified that the statement that was introduced was his third attempt at a statement, made after the officers beat him. He said that the first two statements "didn't take" because he was either snivelling and crying or complaining too much during them.[119]

Similar factual discrepancies arose with respect to the statements of the co-accused, Bogel, who was arrested after a police chase. He was pepper-sprayed. The police testified that Bogel made some inculpatory statements. There was no taped record of any of the police encounters with Bogel while he was in custody. Bogel denied making any statements to the officers, except to say that he wished to speak with a lawyer.[120]

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116. *Ibid.*, at *Police Interviews with Thomas Sophonow in Vancouver–Recommendations*, online: <http://www.gov.mb.ca/justice/sophonow/police/recommend.html>.
117. (2001), 56 O.R. (3d) 737, 160 C.C.C. (3d) 493 (C.A.) [*Moore-McFarlane*].
118. *Ibid.* at para. 22.
119. *Ibid.* at para. 25.
120. *Ibid.* at para. 48.

The trial judge admitted the statements of both Moore-McFarlane and Bogel. The Court of Appeal ordered a new trial because of deficiencies with the voluntariness *voir dire*. Of particular concern to the Court was the absence of a reliable record of what was said in the interrogation room. On appeal, defence counsel argued that there should be a common law and constitutional obligation on the police to create a record of all custodial interrogations and waivers of the right to counsel.[121] The Court of Appeal stopped short of accepting the accused's invitation to create a constitutional entitlement, noting that "there is no absolute rule requiring the recording of statements," due to the contextual nature of the voluntariness inquiry.[122] However, the Court effectively created an unremitting standard in its subsequent comments on the issue. Writing for the Court, Charron J.A. (as she then was) said:

> However, the Crown bears the onus of establishing a sufficient record of the interaction between the suspect and the police. That onus may be readily satisfied by the use of audio, or better still, video recording. Indeed, it is my view that where the suspect is in custody, recording facilities are readily available, and the police deliberately set out to interrogate the suspect without giving any thought to the making of a reliable record, the context inevitably makes the resulting non-recorded interrogation *suspect*. In such cases, it will be a matter for the trial judge on the *voir dire* to determine whether or not a sufficient substitute for an audio or videotape record has been provided to satisfy the heavy onus on the Crown to prove voluntariness beyond a reasonable doubt.[123]

Charron J.A. later added that "it is difficult to see how the Crown could discharge its heavy onus of proving voluntariness beyond a reasonable doubt where proper recording procedures are not followed."[124]

The Ontario Court of Appeal took the issue one step further in *R. v. Ahmed*,[125] another robbery case. Again, the case involved a dispute as to what transpired in the interview room. A police officer testified that when he went into the interview room with the purpose of obtaining background particulars about the accused, the accused blurted out that he had lied to another officer and that he had in fact committed the robbery.[126] The accused testified that the officer came in and told him that if he wanted to go home he had to confess. The accused said that he confessed because of this inducement.[127]

The case involved a question of credibility based on the competing testimony of the accused and the police officer. There were facilities and equipment in the police station that could have been used to record the disputed

121. *Ibid.* at para. 61. The Court noted some authority, mainly at the trial level, where courts either excluded confessions when the failure to videotape was deliberate or issued strong urgings for the recording of interrogations.
122. *Ibid.* at para. 64, relying on *Oickle*, *supra* note 2 and *Hodgson*, *supra* note 10.
123. *Moore-McFarlane*, *ibid.* at para. 65.
124. *Ibid.* at para. 67.
125. (2002), 170 C.C.C. (3d) 27, 166 O.A.C. 254 (C.A.) [*Ahmed* cited to C.C.C.].
126. *Ibid.* at 31–32.
127. *Ibid.* at 32.

discourse but they were not used.[128] The trial judge believed the police officer and rejected the evidence of the accused and admitted the statement.[129]

The Court of Appeal found the failure to record Ahmed's confession to be fatal. Writing for the Court, Feldman J.A. referred to the above-quoted passages from both *Oickle* and *Moore-McFarlane* and came to the conclusion that, although the failure to record is "not necessarily fatal," recording is "not only the better practice, but in most circumstances, the failure to record will render the confession suspect."[130] Justice Feldman rejected the explanation for failing to record because the officer did not set out to obtain a confession when he entered the interview room.[131] In conjunction with the inadequacy of the trial judge's reasons on the *voir dire*, the Court held that the decision to admit the statement was in error and a new trial was ordered.[132]

The British Columbia Court of Appeal took a different approach in *R. v. Crockett*.[133] The accused was arrested on a charge of sexual assault. The case involved a dispute about the order in which things were said during the interview with the police. There was a tape-recorded conversation with the police in which Crockett declined to say anything.[134] The officers subsequently spoke to the accused, but without the tape recorder.[135] One of the officers testified that he purposely did not bring the recording equipment with him because he thought it might get in the way of building a rapport with the accused.[136] The disputed issue in the case concerned the use of the expression "the truth goes along way" by one of the police officers. Crockett testified on the *voir dire* that he asked the police what sentence he would receive, and the police said the police answered "the truth goes a long way" in response his question.[137] In short, Crockett asserted that his subsequently recorded statement was induced by this response. Both officers testified that while these words were spoken during the interview, they were not uttered in response to the accused's inquiry.[138] The trial judge ruled that the statement was admissible.

The Court of Appeal dismissed Crockett's appeal. The Court noted that in Crockett's recorded statement he had said that he confessed out of "guilt more than anything."[139] While admitting that a videotape of the disputed part of the interrogation would have resolved the factual dispute in

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128. *Ibid.*
129. *Ibid.* at 34.
130. *Ibid.*
131. *Ibid.* at 35–6.
132. *Ibid.* at 36.
133. (2002), 170 C.C.C. (3d) 569, 7 C.R. (6th) 300 (B.C.C.A.) [*Crockett* cited to C.C.C.].
134. *Ibid.* at 571.
135. *Ibid.*
136. *Ibid.*
137. *Ibid.* at 571–72.
138. *Ibid.* at 572.
139. *Ibid.*

the case, the Court of Appeal ruled that failure to videotape was not fatal.[140] After reviewing the portions of *Oickle* and *Moore-MacFarlane* set out above, the Court distinguished *Moore-MacFarlane* on its facts and concluded that the issue could be resolved "by a traditional assessment of the credibility and reliability of the testimony of the participants."[141]

The same conclusion was reached by the Manitoba Court of Appeal in *R. v. Ducharme*.[142] The police had properly videotaped a statement given by the accused, but had failed to videotape an earlier statement, which the accused alleged was obtained as a result of threats. The trial judge was troubled by the failure of the police to properly record the earlier statement when they could have easily done so, but ruled that the failure to do so ought not to result in the automatic exclusion of the statement. The Court of Appeal shared the trial judge's concern about the refusal to videotape. After considering *Moore-MacFarlane* and *Ahmed*, the Court held that *Oickle* was the controlling authority and that failure to videotape did not automatically render a statement involuntary.[143]

As a matter of policy, there is no serious dispute that the recording of confessions is the best way to resolve issues regarding the admissibility of confessions. However, presumptive exclusion, based on a judicially created rule is another matter. After *Oickle*, there is simply no basis for the provincial appellate courts to create such a rule. *Oickle* is clear that failure to videotape does not make a confession "inherently suspect."[144] The Court of Appeal in *Moore-MacFarlane* and in *Ahmed* seemed to recognize the strictures of *Oickle*, but reached an independent conclusion on the issue to the effect that unrecorded statements are inherently suspect. *Crockett* makes a valiant attempt to distinguish *Moore-MacFarlane* on its facts, but the Court itself admitted that a videotape would have resolved the issue. However, it was not necessary to distinguish *Moore-MacFarlane*. As the Court in *Ducharme* recognized, *Oickle* is still authoritative. However, given the divergence of opinion in the appellate courts, the resolution of this issue will require the intervention of the Supreme Court of Canada.

Before leaving this topic, a comment needs to be made about the issue of desirability of recording facilities in police stations on the one hand and the availability of proper equipment to carry out the mandate of the courts on the other. All of the decisions immediately referred to appear to operate on the assumption that video or audio recording facilities are universally

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140. *Ibid.* at 575.

141. *Oickle*, *supra* note 2 at 31.

142. [2004] M.J. No. 60.

143. *Ibid.*, para. 46. The Court referred to an earlier, unpublished version of this paper in its discussion of the issue. The Court said that: "The difficulty is that until either the Supreme Court articulates or Parliament legislates the duties of the police and lays out a protocol to be followed, the common law definition of voluntariness will remain in effect."

144. *Oickle*, *supra* note 2 at 31.

available. This may well be the case. However, the feasibility and desirability of the conclusions reached in the *Moore-MacFarlane* line of cases really hinges on the adequacy of existing resources. While it is probably safe to assume that most modern police forces have the capacity to record confessions in a comprehensive fashion, this central fact needs to be confirmed.[145] Again, we are forced to operate, speculate and make reform proposals in an empirical vacuum.

C. THE FUTURE

A presumptive rule of inadmissibility of unrecorded confessions will certainly further the behavioural justifications for recording confessions. The police will be careful to avoid confessions being ruled inadmissible and will videotape out of an abundance of caution. In an indirect way, it bolsters systemic considerations by sending the message that when the police do not record interrogations they will be punished. However, it leads to a rule of automatic exclusion like no other, justified by neither constitutional authority nor legislative command. It may lead to an unwarranted windfall for the accused in the litigation process. According to *Moore-MacFarlane* and *Ahmed*, in a case where video recording has not taken place, all an accused need say is "I did not say that" or "I was threatened or beaten by the police" and the statement must be excluded.

There undoubtedly will be cases where the failure to record ought to be fatal, especially where it prevents a trial judge or jury from doing their respective jobs properly. However, the issue of exclusion ought to be based on a richer consideration of factors, beyond the mere availability of recording equipment, including: the adequacy of the record without the assistance of a recording; the reason for failing to record the accused person's statement; the availability of video recording facilities; whether the statement was made at the police station, or somewhere else; and, the nature of the legal dispute in issue.

As the court in *Crockett* held, voluntariness and right to counsel issues are often amenable to resolution through the assessment of credibility, depending on the issue at stake.[146] The question of whether a statement was or was not made may well be resolvable through live testimony, depending on the circumstances of the case. Determining issues of greater subtlety, or focusing on the manner or sequence in which things were said or done, may

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145. See Joyce Miller, *The Audio-Visual Taping of Police Interviews With Suspects and Accused Persons by Halton Regional Police Force: An Evaluation* (Ottawa: Law Reform Commission of Canada, 1988) at 20. See also Law Reform Commission of Canada, *Questioning Suspects–Report 23* (Ottawa: Supply and Services, 1984) at 60–61.

146. *Crockett*, *supra* note 133 at 576.

well require a more comprehensive record such as that provided by an audio or video recording.[147]

As with other aspects of the investigation process, the Canadian landscape would greatly benefit from the clarification of police powers and responsibilities, especially at the interrogation stage. In the U.K., the *Police and Criminal Evidence Act, 1984* prescribes the duties of the police when dealing with suspects.[148] According to one of the Codes of Practice under P.A.C.E., the police are required to refrain from interrogating suspects in the field, save for exigent circumstances.[149] This is no doubt meant to funnel interrogations into the more controlled environment of the custodial setting, where specific safeguards emerge and can be delivered. Indeed, in another Code of Practice, the specific obligations of police officers to tape record or videotape confessions are set out in great detail.[150] While failure to adhere to the Codes of Practice does not inevitably lead to the exclusion of evidence in this context, the obligations of the police are clearly demarcated by Parliament.[151]

The Supreme Court has at times shown an interest in the *Police and Criminal Evidence Act*. In *R. v. Golden*, the majority of the Court borrowed from the U.K. legislation quite liberally in constructing guidelines for police officers conducting strip searches.[152] While mentioning the *Police and Criminal Evidence Act* in *Oickle*, the Court was not moved to incorporate the U.K. protocols on recording confessions. This may have been because the issue was not squarely before the Court or because the U.K. model, which makes recording the norm, is not consistent with the Court's view of the role of recording confessions. It is, of course, still open to Parliament to intervene and legislate in this area. Indeed, it is preferable that the issue be addressed in this way. Borrowing only a portion from a comprehensive legislative regime runs the risk of incorporating standards that must operate out of context, in a foreign environment.[153] In the legislative realm, Parliament can take account of (and perhaps amend) other legislative provisions related to the issue.[154]

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147. While the approach in *Crockett* is preferred, the result is somewhat surprising. The Court acknowledged that a recording of the interrogation would have resolved the issue on appeal. Even if it is assumed that all of the witnesses in *Crockett* were telling the truth, the issue was a difficult one to resolve unassisted by technology. While the police may not have intended to suggest that the delivery of the truth by Crockett might lead to leniency, this is how it may have come across.
148. *Police and Criminal Evidence Act, 1984* (U.K.), 1984, c.60 [P.A.C.E.].
149. See Codes of Practice, Code C, *Practice for the Detention, Treatment and Questioning of Persons by Police Officers*, s. 11.
150. See Codes of Practice, Code E, *Practice on Tape Recording*.
151. P.A.C.E., *supra* note 148 at s.76(2). This section allows the exclusion of a confession not taken according to lawful procedures. This would contemplate not adhering to the Codes of Practice.
152. *Golden*, *supra* note 39 at 711–712.
153. *Ibid.* at 691, stating the minority opinion. See also Gary T. Trotter, "Developments in Criminal Law and Procedure: The 2001–2002 Term" (2002) 18 Sup. Ct. L. Rev. (2d) 203, at 238–40.
154. See *e.g. Hodgson*, *supra* note 10 at 467. The Supreme Court declined to roll back the "person in authority" requirement of the confessions rule, holding that a matter so fundamental was best dealt with by Parliament. Admittedly, *Golden* sees the Court do the complete opposite.

v. Conclusion

IN THE CANADIAN CONTEXT, the phenomenon of false confessions is mired in contradictions. What we know about false confessions is really quite limited. Culturally, we seem to treat confessional speech as supreme proof of an agent's guilt, because of its inner authenticating quality.[155] Moreover, it seems incontrovertible that confessions have proven to be false and some have contributed to wrongful convictions. Yet, we have no idea how often this occurs. Our neighbours to the south vehemently disagree about the extent of this problem. In Canada, we have not yet inquired into the extent of the "problem." The mass media reports on cases of false confessions and wrongful convictions with sufficient frequency that knowledge of the phenomenon occupies part of our shared social consciousness. However, social science researchers tell us that laypersons have a difficult time accepting that people confess to crimes that they did not commit.

The Supreme Court of Canada in *Oickle* has accepted the view that false confessions are a serious problem in the criminal justice system.[156] While this conclusion was well documented in the foreign literature made available to the Court, the implications of the Court reaching this conclusion, in the manner that it did, are problematic. By simply reading and assimilating current legal writing on false confessions and wrongful convictions, the Court has created a gap in knowledge between the judiciary and juries. Well-informed judges can share in this important contextual knowledge about the interrogation process and apply it to their decision-making. But, the same U.S. researchers who disagree on the nature and extent of false confessions also disagree on the readiness of the underlying research for the purposes of expert evidence. This means that juries may never hear about this important background information. This creates an unacceptable disconnect between the knowledge base of trial judges and juries, which may well have a practical impact on the quality of justice between judge alone and judge and jury trials. Without compromising our rules relating to expert evidence, we need to determine how this learning may be delivered to juries in an effective way.

The one thing that everyone seems to agree upon in this area is that videotaping confessions is desirable. However, we are divided on what to do when this does not occur. It is unclear why we are so adamant about creating an indelible record by recording police interrogations since it is quite clear that we do not know what we are looking for. Nevertheless, it seems like a prudent and relatively easy thing to do until we find out. Until we do, more sweeping policy reforms that push the law relating to interrogations in one direction or the other seem pointless.

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155. See Brooks, *supra* note 10 at 4.
156. *Oickle*, *supra* note 2 at 26-27.