THE QUANTUM REQUIRED FOR PROOF OF VOLUNTARINESS OF CONFESSIONS

*Patrick Healy**

I. INTRODUCTION

It has long been fixed in the law of criminal evidence that the prosecution bears the burden of demonstrating the voluntariness, and thus the admissibility, of an extra-judicial statement made by the accused to a person in authority.[1] There has been no such certainty with respect to the *quantum* of proof required of the prosecution, although in the past ten years Canadian courts have evidently accepted proof beyond a reasonable doubt as the governing standard.[2] With the introduction of Bill S-33 in

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* Of the Quebec Bar. Presently of Wolfson College, Oxford. This article attempts to state the law as of 1 December 1984.

[1] R. v. Thompson, [1893] 2 Q.B. 12, 69 L.T. 22 (C.C.R.). This principle was restated by Lord Sumner in the *locus classicus* on the law of confessions: Ibrahim v. The King, [1914] A.C. 599, at 609-10, [1914-15] All E.R. Rep. 874, at 877-78 (P.C. 1914) (Hong Kong). For clarity it should be noted that in conformity with the decision of the Supreme Court of Canada in Piché v. The Queen, [1971] S.C.R. 23, 11 D.L.R. (3d) 700 (1970), I have used the terms "extra-judicial statement" and "statement" interchangeably with "confession", even though by definition a confession is only an inculpatory statement. In *Piché* the Court decided that the voluntariness rule descending from *Ibrahim* was applicable to inculpatory and exculpatorh statements alike, provided that the statement in issue was made to a person in authority. In other common law jurisdictions the voluntariness rule is still applied only in respect of inculpatory statements.

[2] As will be seen in Part II, Section A, *infra*, the leading case on the point in Canada is R. v. Pickett, 31 C.R.N.S. 239, 28 C.C.C. (2d) 297 (Ont. C.A. 1975), but the trend toward the higher standard is evident in the following cases: R. v. Turgeon, [1983] 1 S.C.R. 308, 33 C.R. (3d) 200; Hobbins v. The Queen, [1982] 1 S.C.R. 553, 135 D.L.R. (3d) 244; Park v. The Queen, [1981] 2 S.C.R. 64, 122 D.L.R. (3d) 1; Horvath v. The Queen, [1979] 2 S.C.R. 376, 93 D.L.R. (3d) 1 (Martland J. dissenting); Ward v. The Queen, [1979] 2 S.C.R. 30, 94 D.L.R. (3d) 18; R. v. Clow, 35 Nfld. & P.E.I.R. 417, 65 C.C.C. (2d) 407 (P.E.I.C.A. 1982); R. v. Hape, 61 C.C.C. (2d) 182 (Que. C.A. 1980); R. v. Letendre, 7 C.R. (3d) 320, 46 C.C.C. (2d) 398 (B.C.C.A. 1979); R. v. Chow, 43 C.C.C. (2d) 215 (B.C.C.A. 1978); R. v. Hatton, 39 C.C.C. (2d) 281 (Ont. C.A. 1978); R. v. Jackson, 1 B.C.L.R. 380, 34 C.C.C. (2d) 35 (C.A. 1977); R. v. Precourt, 18 O.R. (2d) 714, 39 C.C.C. (2d) 311 (C.A. 1976), *leave to appeal to S.C.C. denied*, *id.*, 714n, 39 C.C.C. (2d) 311n; R. v. Norgren, 25 C.R.N.S. 359, 15 C.C.C. (2d) 30 (B.C.S.C. 1973), *rev'd on other grounds* 31 C.R.N.S. 247, 27 C.C.C. (2d) 488 (B.C.C.A. 1975); R. v. Frank, [1970] 2 C.C.C. 102, 69 W.W.R. 588 (B.C.C.A. 1969); R. v. Towler, 5 C.R.N.S. 55, [19698 2 C.C.C. 335 (B.C.C.A. 1968); R. v. Albrecht, 49 C.R. 314, [1966] 1 C.C.C. 281 (N.B.C.A. 1965) (Limerick J.) (*ad hoc*); R. v. Demers, 13 C.R.N.S. 338 (Que. S.C. 1970).

Parliament on 18 November 1982,[3] the government proposed in clause 64 to codify the common law rule of admissibility, but with a reduction of the requisite *quantum* to proof on a balance of probabilities.[4] After second reading, the Bill was referred to the Standing Senate Committee on Legal and Constitutional Affairs, which received submissions and heard testimony from interested parties. Among the most contentious issues raised in those deliberations was the reduced standard for the admissibility of confessions. In its interim report the Committee recommended that the Bill be remitted to the Department of Justice and the Minister for further consultation and revision.[5] Thus, although Bill S-33 eventually lapsed with the conclusion of the Thirty-Second Parliament, and has not yet been reintroduced, the *quantum* of proof required of the prosecution for the admission of confessions remains a live issue.[6] Resolution of this issue depends upon the answers to two questions: should the prosecution be obliged to prove the voluntariness of a statement on a balance of probabilities or beyond a reasonable doubt? and should the standard be the same at both the preliminary inquiry and the trial?

II. THE LAW

A. *Current Canadian Law*

While it may be obvious that the option between the two evidentiary standards at the *voir dire* raises important issues of policy, a cursory review of Canadian cases on the subject demonstrates only that these issues have not been thoroughly examined. Indeed, the treatment of the matter by Canadian courts is typically laconic, as is apparent in a representative sampling of the cases. It would appear that, before the decision of the Ontario Court of Appeal in *R. v. Pickett*,[7] no provincial

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[3] [1980-83] SENATE DEB., Vol. IV, at 5008 (1982).

[4] *An Act to give effect, for Canada, to the Uniform Evidence Act adopted by the Uniform Law Conference of Canada*, Bill S-33, 32nd Parl., 1st Sess., 1980-81-82-83 (2nd reading 7 Dec. 1982).

> 64. A statement, other than one to which paragraph 62(1)(f), (g), (h) or (i) applies, that is made by an accused to a person in authority is not admissible at the instance of the prosecution at a trial or preliminary inquiry unless the prosecution, in a *voir dire*, satisfies the court on a balance of probabilities that the statement was voluntary.

[5] PROCEEDINGS OF THE STANDING SENATE COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS, Doc. No. 168:5-6 (32nd Parl., 1st Sess., 1983).

[6] It is expected that the government will reintroduce the Bill in a slightly modified form during the course of the 33rd Parliament, which began in November 1984, although it is not considered a matter of high priority.

[7] *Supra* note 2.

Court of Appeal in Canada had addressed itself specifically to the standard of proof required of the prosecution in proving voluntariness, or to the theoretical foundations of that standard in the law of evidence, although earlier English and Canadian cases abound with casual references to the amorphous and undefined notion that voluntariness should be established "to the satisfaction of the judge".[8] In two cases, however, a judge of the Superior Court of Quebec[9] and a judge of the Supreme Court of British Columbia,[10] both sitting in appeal, applied the higher standard of proof beyond a reasonable doubt; but in each case no explanation or authority was given in support of this test.[11]

In *Pickett*, then, the question was *res integra*. It arose on an appeal from the dismissal of a motion to quash the accused's committal on the ground of an alleged absence or insufficiency of evidence. The sufficiency of the Crown's case turned on a statement made by the accused. The judge presiding at the preliminary inquiry admitted the statement on the basis that any doubt concerning the admissibility of evidence or the credibility of witnesses at a preliminary inquiry should be resolved in the Crown's favour. He noted, however, that as a trial judge he would have excluded the statement before him because he was not convinced beyond a reasonable doubt that it was voluntary.[12] He also identified three possible judicial positions[13] with regard to the admission of confessions at a preliminary inquiry:

- As illustrated in *R. v. Thibodeau*,[14] a justice or magistrate at a preliminary inquiry has no judicial function to perform with regard to the admissibility of a confession.
- As illustrated in *R. v. Pearson*[15] and *R. v. Norgren*,[16] the rules governing the admission of confessions at trial also govern their admission at a preliminary inquiry.
- A confession should be admitted if there is some evidence that it was voluntary, but it should be left to the trial judge to determine whether there is sufficient evidence to establish the voluntariness of the statement beyond a reasonable doubt.[17]

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[8] *See, e.g., Ibrahim, supra* note 1.

[9] R. v. Demers, *supra* note 2.

[10] R. v. Norgren, *supra* note 2.

[11] *See* R. v. Albrecht, *supra* note 2 (Limerick J.).

[12] R. v. Pickett, *supra* note 2, at 240-41, 28 C.C.C. (2d) at 299.

[13] *Id.*

[14] 23 C.R. 285, 116 C.C.C. 175 (N.B.Q.B. 1956) (*obiter dicta*).

[15] 25 C.R. 342, 117 C.C.C. 249 (Alta. C.A. 1957).

[16] *Supra* note 2.

[17] This last suggests an attempt to adapt the test of admissibility to the test for committal: *cf.* United States v. Shephard, [1977] 2 S.C.R. 1067, 34 C.R.N.S. 207 (1976). A formal recommendation to this effect was advanced in the REPORT OF THE SPECIAL COMMITTEE ON PRELIMINARY HEARINGS 22 (Martin J. Chairman 1982).

The judge presiding at Pickett's preliminary inquiry adopted this last position.[18]

On appeal, Jessup J.A. accepted the argument that subsection 470(1) of the *Criminal Code*[19] imports or extends the rules on the admissibility of statements at trial to the preliminary inquiry. After referring to the unambiguous precept established by the Privy Council in *Chan Wai-Keung v. The Queen*,[20] that admissibility is a question of law reserved exclusively to the judge, Mr. Justice Jessup then considered the requisite standard of proof. In support of the higher *quantum* he cited three Canadian cases that offer no analysis, but only the naked assertion that proof beyond a reasonable doubt is the appropriate test.[21] In addition, he cited two English cases that were paraphrased in the pages of the *Criminal Law Review* but which contained no indication of the rationale supporting the imposition of the standard required of the prosecution for proof of the charge.[22] As authority for the lesser standard, Jessup J.A. referred to a line of Australian cases, most notably to the decision of the High Court of Australia in *Wendo v. The Queen*.[23] In that case the Court firmly rejected the higher standard for proof of preliminary facts, on the basis that its adoption would subvert the division of labour between the trier of law and the trier of fact. Mr. Justice Jessup did not refer to American jurisprudence.

Faced with a clear option between the higher and lower standards, Jessup J.A. chose proof beyond a reasonable doubt:

> [S]ince the sole decision as to the voluntariness of a confession or statement tendered at trial is to be made by the trial Judge, it is unthinkable to me that in a criminal matter he should not be required to be satisfied beyond a reasonable doubt of such voluntariness. Otherwise a jury might give some weight to a statement which is inadmissible as evidence as being involuntary if judged on the standard of reasonable doubt. *Wendo* was decided before *Chan Wai-Keung* and when the authority of *R.* v. *Bass* required the adjudication of voluntariness to be made by the jury with the usual onus on the Crown of proving all issues beyond a reasonable doubt. In the result I prefer to follow the English and Canadian authorities I have cited.[24]

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[18] R. v. Pickett, *supra* note 2, at 244, 28 C.C.C. (2d) at 302.

[19] R.S.C. 1970, c. C-34.

[20] [1967] 2 A.C. 160, [1967] 1 All E.R. 948 (P.C. 1966) (Hong Kong), *approving* R. v. McAloon, [1959] O.R. 441, 124 C.C.C. 182 (C.A.). *See also* Prasad v. The Queen, [1981] 1 All E.R. 319 (P.C. 1980) (Fiji); Ajodha v. The State, [1982] A.C. 204, [1981] 3 W.L.R. 1 (P.C. 1981) (Trin. & Tob.).

[21] R. v. Albrecht, R. v. Demers, R. v. Norgren, *supra* note 2.

[22] R. v. Sartori, [1961] Crim. L. Rev. 397 (Cent. Crim. Ct.); R. v. McLintock, 112 L.J. 11, [1962] Crim. L. Rev. 549 (C.C.A.). These cases are discussed, *infra*, in Part II, Section B.

[23] 109 C.L.R. 559 (Aust. H.C. 1963).

[24] R. v. Pickett, *supra* note 2, at 244, 28 C.C.C. (2d) at 302-03; R. v. Bass,

Thus, despite its lack of analysis, *Pickett* established two propositions: that the rules governing the admission of statements are the same at the preliminary inquiry as at trial, and that the standard of proof in each instance is proof beyond a reasonable doubt.

There was no appeal to the Supreme Court of Canada in *Pickett*, and to date no Canadian court has disputed its conclusions or improved upon the quality of its reasons. The Supreme Court itself has evidently acquiesced in the higher standard without direct consideration of the issue. The trend toward acceptance of the higher standard began, it seems, with Mr. Justice Martland's dissenting opinion in *Horvath v. The Queen*, in which His Lordship expressly approved[25] the test of admissibility as stated by McFarlane J.A. for the Court below:

> It is therefore clear, and I must say it again, that the function of the judge so far as the facts are concerned is to determine whether the Crown *has proved beyond reasonable doubt* that the statement by the accused person was a voluntary statement in the sense that it has not been obtained from him by fear of prejudice or hope of advantage exercised or held out (or I insert inspired) by a person in authority.[26]

This is obviously thin support for "express approval" of the higher standard for the admission of confessions. Speaking for a unanimous Court in *Ward v. The Queen*, however, Mr. Justice Spence gave his support for the higher *quantum* in a similarly easy fashion:

> It is not denied that a reasonable doubt on the part of the trial judge upon the issue is sufficient to justify his refusal to admit the statements in evidence.[27]

This passage was cited by Mr. Justice Martland in his reasons for the majority of the Supreme Court in *Rothman v. The Queen*,[28] and by Laskin C.J.C. for the Court in *Nagotcha v. The Queen*.[29] In each of these cases, however, the object of the quotation was not authority for the *quantum* of proof. In his concurring opinion in *Rothman*, Lamer J. specifically included proof beyond a reasonable doubt as an integral element in his reformulation of the voluntariness rule:

> 1. A statement made by the accused to a person in authority is inadmissible if tendered by the prosecution in a criminal proceeding unless the judge is satisfied beyond a reasonable doubt that nothing said or done by any person in authority could have induced the accused to make a statement which was or might be untrue;

[1953] 1 Q.B. 680.

[25] *Supra* note 2, at 385, 93 D.L.R. (3d) at 8: "In my opinion McFarlane J.A. correctly stated the law to be applied in Canada in determining the admissibility of a statement to a police officer by an accused person."

[26] As reproduced by Martland J., *id.* at 384, 93 D.L.R. (3d) at 8 (emphasis added).

[27] *Supra* note 2, at 40, 94 D.L.R. (3d) at 26.

[28] [1981] 1 S.C.R. 640, at 670, 20 C.R. (3d) 97, at 113 (1980).

[29] [1980] 1 S.C.R. 714, at 718, 109 D.L.R. (3d) 1, at 4.

> 2. A statement made by the accused to a person in authority and tendered by the prosecution in a criminal proceeding against him, though elicited under circumstances which would not render it inadmissible, shall nevertheless be excluded if its use in the proceedings would, as a result of what was said or done by any person in authority in eliciting the statement, bring the administration of justice into disrepute.[30]

Given the reach of his opinion in *Rothman*, it is perhaps surprising that Mr. Justice Lamer offered no analysis of his reasons for adoption of the higher standard. In *Park v. The Queen*,[31] Mr. Justice Dickson (as he then was) stated the voluntariness rule as including proof beyond a reasonable doubt as an essential element of the Crown's burden at the *voir dire*. In doing so he cited *Ibrahim v. The King*,[32] *Boudreau v. The King*[33] and *R. v. Fitton*,[34] although none of these cases is authority for the higher *quantum*. Finally, in *R. v. Turgeon*,[35] the Supreme Court dismissed the Crown's appeal, on the basis that the Quebec Court of Appeal was entitled to reverse a finding of voluntariness by the trial judge due to a reasonable doubt raised by the facts, thus leaving no question of law upon which the Crown could appeal to the Supreme Court of Canada.[36]

Apart from these miscellaneous references to the higher standard in isolated opinions given for a majority or a minority of the Supreme Court, there are several unanimous decisions in which proof beyond a reasonable doubt was cited with approval or asserted by the Court. In one way or another almost every member of the Court in the past decade has endorsed the higher standard. Nevertheless, the analytical difficulty is that their "endorsement", whether indirect, in the form of approving quotations from the decisions of the lower courts, or direct, in the form of unexplained assertions, has never been the subject of *ratio decidendi*. It seems clear that the standard of proof for voluntariness in the Supreme Court of Canada is proof beyond a reasonable doubt, but we do not know why.

The jurisprudence in the lower courts is no more enlightening on this matter. In *R. v. Precourt*[37] and *R. v. Hatton*,[38] Martin J.A., in his

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[30] *Supra* note 28, at 696, 20 C.R. (3d) at 151-52.

[31] *Supra* note 2, at 66, 122 D.L.R. (3d) at 3.

[32] *Supra* note 1.

[33] [1949] S.C.R. 262, 94 C.C.C. 1.

[34] [1956] S.C.R. 958, 6 D.L.R. (2d) 529.

[35] *Supra* note 2.

[36] It should be noted, however, that the Court of Appeal was divided in the case (Turgeon v. The Queen, [1981] C.A. 217, 20 C.R. (3d) 269 (Que.)). Mr. Justice Lamer's characterization of the lower court's ruling is supported in the two judgments of the majority: *id.* at 222, 20 C.R. (3d) at 386 (Dube J.A.), *id.* at 223, 20 C.R. (3d) at 288 (Mayrand J.A.).

[37] *Supra* note 2, at 721, 39 C.C.C. (2d) at 313-14.

[38] *Id.* at 297-99.

statement of the voluntariness rule, simply reiterated the higher standard, with citation to *Boudreau*,[39] *Pickett*[40] and Lord Hailsham's speech in *D.P.P. v. Ping Lin*,[41] although in *Hatton*, His Lordship went a step further to say that defence counsel's clear submission at trial in favour of the higher *quantum* "was not questioned".[42] Similar assertions of the standard were made in a number of other cases.[43] In *R. v. Hape*,[44] however, the accused argued before the Quebec Court of Appeal that the trial judge had erred in admitting the statement on the basis that he was "satisfied" as to voluntariness. The appellant contended that "satisfaction" in this regard could only be assimilated to proof on a balance of probabilities. Speaking for the Court, Mr. Justice Beauregard allowed the appeal on other grounds and thus declined to decide this particular question because the issue was "academic".[45] It is clear that Beauregard J.A. viewed the *dicta* of Spence J. in *Ward*[46] as decisive as to the appropriate *quantum*. Having quoted those *dicta*, and having referred to the gathering trend toward the higher evidentiary standard, His Lordship concluded his discussion of the issue by saying that "given the decision by the Supreme Court of Canada in *Ward v. The Queen* cited above, the question need no longer be considered".[47]

The leading Canadian commentator on the law of confessions, Mr. Justice Kaufman of the Quebec Court of Appeal, says little about the *quantum* of proof and offers no conclusive opinion as to the appropriate standard:

> Let it be said at once that the burden is not a light one. It is not a burden which can be discharged on a balance of probabilities, nor is it a burden which is necessarily met by presenting proof beyond a reasonable doubt, although some of the more recent cases suggest this.[48]

After tracing the jurisprudential drift toward proof beyond a reasonable doubt, Mr. Justice Kaufman acknowledges that the higher standard holds some allure simply because it is the customary burden in criminal cases and a legal term of art that is well known to the profession. He suggests, however, that some of this allure might fail if the higher standard

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[39] *Supra* note 33.

[40] *Supra* note 2.

[41] [1976] A.C. 574, at 597, 599, [1975] 3 All E.R. 175, at 180, 182 (H.L. 1975).

[42] *Supra* note 2, at 298.

[43] R. v. Jackson, *supra* note 2, at 383, 34 C.C.C. (2d) at 37; R. v. Letendre, *supra* note 2, at 326-27, 46 C.C.C. (2d) at 403-04 (Bull J.A.), *id.* at 332-33, 46 C.C.C. (2d) at 409-10 (Aikins J.A.); R. v. Chow, *supra* note 2, at 233 (McFarlane J.A.), *id.* at 230-31 (McIntyre J.A., as he then was, dissenting); R. v. Clow, *supra* note 2, at 422, 65 C.C.C. (2d) at 411.

[44] *Supra* note 2.

[45] *Id.* at 187.

[46] Ward v. The Queen, *supra* note 2.

[47] *Id.* at 187.

[48] F. KAUFMAN, THE ADMISSIBILITY OF CONFESSIONS 38 (3rd ed. 1979).

contributed to slavish rigidity and formalism in the administration of the voluntariness rule. He asks, for example, whether the higher standard would necessarily preclude the admission of a statement if the Crown could not produce every witness at the *voir dire*, even though their presence would not materially affect the result and even though the Crown could provide a satisfactory explanation for the absence of the witness.[49] Another point raised by Mr. Justice Kaufman concerns the possibility that the higher standard could easily lead to contradictory results in cases where the voluntariness of a confession is litigated both in a preliminary inquiry and at trial, and accordingly he asks whether such discrepancies would not impair the public reputation of the administration of justice.[50]

In his recent book on criminal evidence, Professor Jacques Fortin is quite categorical in his support of the higher standard at the *voir dire*.[51] He does not trace the evolution of the standard or the reasons for the emergence of proof beyond a reasonable doubt for the admissibility of confessions, but he perceives a qualitative difference that justifies the imposition of the higher standard. Professor Fortin's argument is that the probative effect of a confession admitted in evidence is so powerful that policy considerations demand of the prosecution proof of all the circumstances that would preclude any possibility that the statement was elicited by improper inducement. Although he is undoubtedly correct to say that the concept of proof beyond a reasonable doubt can really only apply with regard to proven facts, Professor Fortin clearly accepts that the standard required for the admission of confessions should certainly be no less than the standard required of the Crown for conviction.

For his part, Peter McWilliams is no less categorical than Professor Fortin, although his reasons for supporting the higher standard are somewhat acidic:

> Given the inevitable tendency to abuse, arising from the secret interrogation by the police of prisoners and the unequal contest between the word of a callow youth or a scurvy rogue, who is confused in direct proportion to the extent of the pressures to which he is subjected on the one hand, and the word of sterling experienced police officers who carefully corroborate each other with precise notes, on the other, and the reluctance of the police to use tape recorders or video tapes, nothing less than the highest burden of proof is adequate.[52]

Tinctured with a good measure of cynicism and sarcasm, these observations unfortunately do nothing to place the standard of proof of voluntariness in an historical context or in a context of evidentiary theory.

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[49] *Id.* at 44-45.

[50] *Id.* at 61-62, n. 149, *citing* R. v. Vangent, 42 C.C.C. (2d) 313, at 334 (Ont. Prov. Ct. 1978) (Langdon J.).

[51] J. FORTIN, LA PREUVE PENALE 720 (1984).

[52] P. MCWILLIAMS, CANADIAN CRIMINAL EVIDENCE 514 (2nd ed. 1984).

B. *Proposals for Reform*

In addition to the consideration given to this issue by courts and commentators,[53] law-reform bodies have also turned their attention to the *quantum* required of the Crown for the admission of a statement. In 1975, the Law Reform Commission of Canada justified its recommendation of the higher standard in the following terms:

> [T]he [recommendation] requires the prosecution to prove beyond a reasonable doubt that the accused's statement was not made under circumstances likely to render it unreliable. The policy reason for this is that in most cases the admission of the confession will lead to the conviction of the accused and this ought, of course, to be proved beyond a reasonable doubt. Also, since on many *voir dires* the reliability of the statement can be determined only by deciding upon the credibility of the police officers and the accused, a high standard of proof will place an onus on the police to ensure that they take statements from an accused person under conditions in which there can be no doubt of the statement's reliability.[54]

Whatever its merits, however, the Commission's *Report on Evidence* was not adopted by Parliament.

As previously noted, the closest approximation to legislative reform in the law of evidence and the enactment of a standard for admissibility came with the introduction of Bill S-33 in Parliament on 18 November 1982.[55] The government's proposal to reduce the *quantum* of proof from beyond a reasonable doubt to satisfaction on a balance of probabilities was certainly among the most striking and controversial propositions in the Bill. If enacted, this standard would apply both at the preliminary inquiry and at trial. As the Bill included no explanatory notes, and as it was designed to give effect to the *Uniform Evidence Act* proposed by the Uniform Law Conference, the evolution of this standard in the deliberations of the Federal-Provincial Task Force on Uniform Rules of Evidence at the Uniform Law Conference is of some interest.

The *Report* of the Task Force identifies two opposing arguments with respect to the appropriate standard. The first is that the *quantum* required for proof of preliminary facts and admissibility in criminal cases is generally considered to be the lower standard, "the policy being that the court should not decide matters in such a way as to deprive the jury of its right to hear relevant evidence in deciding whether the accused is guilty or innocent".[56] No analysis is given in support of this proposition.

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[53] *See also* Schrager, *Recent Developments in the Law Relating to Confessions: England, Canada and Australia*, 26 McGILL L.J. 435, at 474-75 (1981); Hebert, *Le fardeau de preuve du poursuivant lors d'un voir-dire*, 39 R. du B. 1106 (1979).

[54] LAW REFORM COMMISSION OF CANADA, EVIDENCE, REPORT 1, at 62-63 (1975), referring to s. 16 of the proposed Evidence Code.

[55] Bill S-33, 32nd Parl., 1st Sess., 1980-81-82-83 (2nd reading 7 Dec. 1982).

[56] REPORT OF THE FEDERAL/PROVINCIAL TASK FORCE ON UNIFORM RULES OF EVIDENCE 190 (E. Tollefson Chairman 1982).

By contrast, the higher standard can be advanced on the basis that a statement will generally suffice for a conviction, and thus the Crown should be burdened with the same standard required for proof of guilt before the trier of fact.

In its deliberations on the issue the Task Force vacillated. At first the majority concluded that the *quantum* should be fixed at the preponderance of probabilities. The reported reasons for this view are as follows:

> In its original discussion of the question, the majority of the Task Force was of the opinion that the beyond reasonable doubt standard imposed too high a burden on the Crown. Reference was made to the decision of the Supreme Court of Canada in *R. v. Mitchell* where it is stated that the mental element of a crime can never be proved "to a demonstration", and therefore circumstances which establish it ". . . will seldom, if ever, be wholly consistent with only one conclusion as to his [the accused's] mental state . . .". Concern also was expressed that this standard allowed the judge an uncontrolled discretion to exclude all statements made to persons in authority and thus effectively to nullify an evidence gathering process approved by law. The Task Force, by a majority, therefore approved proof on the preponderance of probabilities as the appropriate quantum on the *voir dire*.[57]

Given the irrelevance of the reference to *Mitchell*[58] and the number of Crown Attorneys among the members of the Task Force,[59] it seems probable that the second reason held more sway than the first.

Upon reconsideration of the issue, a majority of the Task Force opted for proof beyond a reasonable doubt:

> The new majority emphasized the impact of a full confession and the necessity of making sure that such evidence did not get to the jury on the basis of insubstantial proof. Experience with the higher standard over the last few years indicates that it was not an impossible standard to meet, for statements to persons in authority are still a regular part of the evidence in criminal cases. It was also suggested that the higher standard encouraged both the police and the prosecution to be more careful and more mindful of the rights of the accused: in short, the concerns expressed by the first majority do not seem to be borne out in practice.[60]

Having reached this conclusion on the *quantum* required at trial, the Task Force unanimously recommended that the *quantum* at the preliminary

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[57] *Id.* at 190-91. R. v. Mitchell, [1964] S.C.R. 471, at 479, 46 D.L.R. (2d) 384, at 394-95.

[58] R. v. Mitchell, *id.*

[59] This fact was noted by the ALBERTA INSTITUTE OF LAW RESEARCH AND REFORM, THE UNIFORM EVIDENCE ACT, 1981: A BASIS FOR UNIFORM LEGISLATION, REPORT 37A, (1982), and by Edward Greenspan before the Senate Standing Committee on Legal and Constitutional Affairs, SENATE COMMITTEE, LEGAL AND CONSTITUTIONAL AFFAIRS, ISSUE No. 62, (32nd Parl., 1st Sess., 1983). The evolution of Bill S-33 would indeed provide a fascinating case study on the process of law reform in Canada.

[60] *Supra* note 56, at 191.

inquiry should be proof on a balance of probabilities, thus promoting greater consistency with the standard required of the Crown for committal.[61]

When put before the Uniform Law Conference in plenary session, the final recommendations of the Task Force were rejected. The following comments are recorded in the Decisions of the Uniform Law Conference:

> A motion fixing the quantum of proof of voluntariness as the "satisfaction of the judge" was approved. This is the quantum applied until recently by the courts and is more consistent with the quantum of proof required for proof of other preliminary facts.
>
> A motion stating the quantum in the following terms was carried: "that the quantum of proof of voluntariness in a *voir dire* in a preliminary inquiry be that the judge is reasonably satisfied that there is evidence on which the trial judge could find that the statement is admissible".[62]

The government accepted the first of these decisions and, apparently, thought the second unnecessary. Although such conclusions cannot be imputed to the government, it is reasonable to surmise that the drafters of the Bill accepted the rationale advanced by the first majority of the Task Force, which had supported the standard of "on the balance of probabilities".

When Bill S-33 was referred to the Standing Senate Committee on Legal and Constitutional Affairs, the proposal to reduce the *quantum* of proof at the *voir dire* was roundly attacked by several people and groups who prepared briefs or gave testimony. Representatives of the government were quite aware of the controversy that this proposal would raise. At the Committee's first hearing on the subject, Dr. Edwin Tollefson, Q.C., senior counsel with the Department of Justice and Chairman of the Federal-Provincial Task Force on Uniform Rules of Evidence, discussed the proposal as follows:

> [I]t was only in the mid-1970s that some of the courts had moved from the standard of satisfaction of the judge — whatever that meant — to proof beyond reasonable doubt that the statement was voluntary. I might point out that in the United States and Australia proof on the balance of probabilities is the standard that is in vogue, so we are certainly not alone if we adopt that standard.
>
> The reason for adopting the standard was that proof beyond reasonable doubt essentially allows a judge to say, "I am not satisfied that the statement is voluntary." He does not have to explain on what basis. The tiniest kind of doubt can be enough. The feeling was that in many instances there was a great deal of evidence to indicate that the police had followed proper practices and the statement was voluntary. It is not the end of the matter if the statement does go in, because the question of voluntariness is still going to be addressed

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[61] *See* note 17 *supra*.

[62] *Supra* note 56, at 513.

> by the jury in determining the weight of the statement. There was the feeling in the Uniform Law Conference that perhaps this was imposing too high a standard on the prosecution. On the other hand, proof on the balance of probabilities does not mean simply a 51-49 kind of balance, the merest tipping of the scales in favour of the Crown.
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> There is judicial authority in the Supreme Court of Canada in a number of cases to the effect that when the judge has to make a decision based upon proof on the balance of probabilities he takes into account the consequences of his finding. This is sort of psychological truth. You require more evidence to be convinced of something that is obviously serious than you do to be convinced of something that is rather trivial. Hence, if the statement of the accused constitutes a full confession of the crime, it is the view of the Uniform Law Conference that this will automatically require the judge to set his standard considerably higher, and he is not going to be satisfied on the balance of probabilities by the merest of proofs that the statement was voluntary.
>
> On the other hand, one must bear in mind that the Crown must prove all statements by the accused to be voluntary. That includes statements that have only a minimal incriminatory effect. In fact, an exculpatory statement, one in which the accused says, "I didn't do it," still has to be proven to be voluntary. Hence, in those cases probably the judge would require a good deal less evidence to reach this threshold of being satisfied on the balance of probabilities. In other words, what I am saying is that this is a much more flexible kind of standard, which allows the judge to take into account the nature of the statement and the consequences of finding the statement was voluntary and therefore admissible.[63]

Thus, the position taken by the government was essentially twofold. First, on theoretical grounds, voluntariness, like other conditions of admissibility, is a preliminary matter that should not attract the *quantum* required for proof of the ultimate issue in a criminal prosecution. Second, to the extent that the *quantum* of proof provides a gauge by which to exercise supervisory control over agents of the state, proof on a balance of probabilities is sufficiently flexible for this purpose.

The government's proposal to reduce the *quantum* was criticized by the Canadian Bar Association and others, principally on the ground that the lower standard was inadequate as a supervisory mechanism. The view shared by these critics was that, given the determinative effect of confessions in criminal cases, the admission of statements upon proof of voluntariness according to a balance of probabilities would result in the determination of criminal cases on manifestly inferior or less reliable evidence than was available. In no case, however, did the critics of the government meet the theoretical arguments that preliminary questions of admissibility do not justify a requirement for proof beyond a reasonable doubt.

Finally, it should be noted that the Law Reform Commission of Canada has also recently recommended, in its Working Paper entitled

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[63] SENATE COMMITTEE, LEGAL AND CONSTITUTIONAL AFFAIRS, ISSUE NO 36, (32nd Parl., 1st Sess., 1983), at 15-16.

Questioning Suspects, that the government's proposal to reduce the *quantum* at the *voir dire* for confessions should be rescinded and the higher standard restored in any future legislation on the issue.[64] In its subsequent *Report* to Parliament,[65] the Commission significantly altered the form of its recommendations for questioning suspects by disengaging its recommendations on this issue from its proposals to reform of the law of evidence. The *Report* recommends a revision of the *Criminal Code*[66] to provide procedural standards for police questioning and an exclusionary sanction for non-compliance. The voluntariness rule would therefore remain. The *Report* is silent as to the standard of proof that would be applied if its recommendations were accepted by Parliament.

C. *England*

1. *Before 1984*

In many respects the English position on the standard required for proof of voluntariness is as ambiguous as the Canadian one. When the issue is discussed at all in the courts, it is usually dismissed with a casual reference to the same litany of cases. The first case commonly cited is *R. v. Sartori*,[67] in which Edmund Davies J. (as he then was), sitting in the Central Criminal Court, ruled that the standard required was the same as for conviction. Unfortunately, the report of the case is nothing but a barrister's paraphrase of the result, unaccompanied by any discussion of the argument or the exact text of the judge's ruling. Similarly, the report of *R. v. McLintock*[68] records that the Court of Criminal Appeal dismissed the appeal on the ground that the trial judge had applied the proper test, "namely had the prosecution proved beyond reasonable doubt that at the time of the conversation with F. the inducement or threat made earlier was not still operating on the mind of M.".[69] Further affirmation of the higher standard, though without discussion, can be found in a number of other cases.[70]

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[64] LAW REFORM COMMISSION OF CANADA, QUESTIONING SUSPECTS, WORKING PAPER 32 (1984).

[65] LAW REFORM COMMISSION OF CANADA, QUESTIONING SUSPECTS, REPORT 23 (1984).

[66] R.S.C. 1970, c. C-34.

[67] *Supra* note 22.

[68] *Supra* note 22.

[69] *Id.* at 540.

[70] R. v. Richards, [1967] 1 All E.R. 829, at 830, 51 Cr. App. R. 266, at 269 (C.A.) (Winn L.J.); R. v. Wilson, [1967] 2 Q.B. 406, at 416, [1967] 1 All E.R. 797, at 801 (C.A.) (Lord Parker C.J.); D.P.P. v. Ping Lin, *supra* note 41; Wong Kam-ming v. The Queen, [1980] A.C. 246, at 261, [1979] 1 All E.R. 939, at 946 (P.C. 1978) (Hong Kong) (Lord Hailsham, dissenting); R. v. Brophy, [1982] A.C. 476, at 481, [1981] 2 All E.R. 705, at 708-09 (H.L. 1981) (Lord Fraser).

More recently, however, the Court of Appeal in *R. v. Angeli*[71] acknowledged some of the difficult theoretical questions in this area of the law, although the case did not concern confessions. In order to support its case for identification of the accused, the prosecutor in *Angeli* sought to make a comparison of a specimen of the handwriting of the accused and a sample left at the scene of the alleged offence. To do so, section 8 of the *Criminal Procedure Act, 1865*[72] required that the specimen provided by the accused be proved genuine "to the satisfaction of the judge". The admission of the specimen by the trial judge was appealed on the basis that the statutory provision should be construed to require proof beyond a reasonable doubt as the test of admissibility. In the absence of authority the appellant supported this argument with a submission that, as a matter of general principle in criminal cases, where the admission of evidence depends on a preliminary question of fact the judge should not rule in favour of the prosecution unless he is satisfied beyond a reasonable doubt of the disputed facts. Speaking for the Court, Bridge L.J. discussed this submission as follows:

> Of course the familiar example of an application of that principle is in the instance which causes 99 out of 100 trials within trials which have to be held when the voluntary character of an admission or confession on which the Crown seeks to rely is challenged, and on that basis the admissibility of the admission or confession has to be determined by the judge before he decides whether the jury shall be allowed to know about it. In those circumstances it is a very well established rule that the judge must direct himself by the criminal standard of proof and be satisfied beyond a reasonable doubt that the statement was indeed made voluntarily before he decides to admit it in evidence. Is that a rule of general application? We are prepared to assume that it is a rule of general application whenever the admissibility of evidence in a criminal trial turns on some issue of fact and depends on a rule of common law, but the vital distinction between the kind of decision which a judge has to make in relation to a disputed confession and the decision which the judge had to make as to the admissibility of disputed writing in this case is that whereas the confession evidence and its admissibility depend on rules of common law, the admissibility of the disputed writings in this case depended wholly on the application of the 1865 Act.[73]

In the result, of course, His Lordship's *dicta* on the application of the higher standard are entirely *obiter*.

Unlike the Canadian commentators, both Phipson and Cross discuss the theoretical ambiguity pertaining to the standard required for proof of admissibility. Cross suggests that English jurisprudence has fixed proof beyond a reasonable doubt as the standard required for confessions or dying declarations when such evidence is tendered by the prosecution. On the policy of the law regarding confessions he notes only that "[t]he

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[71] [1978] 3 All E.R. 950, 68 Cr. App. R. 32 (C.A.).
[72] 28 & 29 Vict., c. 93.
[73] *Supra* note 71, at 953, 68 Cr. App. R. at 36.

English view at least has the merit of ensuring that the utmost care is taken before a confession is placed before the jury, and this is particularly important because, in many cases, to admit a confession is virtually to ensure the conviction of the accused''.[74] In his chapter on confessions Phipson merely asserts the higher standard,[75] with citations to *Thompson*,[76] *Sartori*,[77] *McLintock*,[78] *Cave*[79] and *Ping Lin*.[80] Elsewhere, however, he discusses *Angeli*[81] and endorses the hypothesis advanced in that case as a general proposition:

> It is submitted that as a matter of principle the criminal standard should be applied to all submissions as to the admissibility of evidence in criminal trials. Otherwise, the result of, say, a murder trial might depend on the decision of a judge alone on the balance of probabilities.
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> . . .
>
> [I]t is submitted that in criminal cases that the criminal standard has to be applied by the judge when deciding on the admissibility of evidence sought to be adduced by the Crown save in cases where admissibility depends upon the application of a statute and the statute lays down the standard to be applied.[82]

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[74] R. CROSS, EVIDENCE 76 (5th ed. 1979).

[75] PHIPSON ON EVIDENCE 418 (13th ed. J. Buzzard 1982).

[76] *Supra* note 1. In fact, however, *Thompson* does not prescribe the higher standard; it merely suggests that if the judge has ''any doubts'' about voluntariness he should exclude the statement.

[77] *Supra* note 22.

[78] *Supra* note 22.

[79] R. v. Cave, [1963] Crim. L. Rev. 371 (C.C.A.). Although *Cave* is frequently cited as an authority in this regard, both its relevance and its correctness are open to debate in a discussion of the *quantum* at the *voir dire*. The issue in *Cave* was the appellant's allegation that the charge to the jury was defective with regard to the onus and standard of proof required of the Crown before the jury. The case was not concerned with the *quantum* for admissibility. The correctness of this decision is suspect, because the Court suggested that the voluntariness of a confession can be relitigated before the trier of fact and, *if it is*, the Crown is once again obliged to prove voluntariness beyond a reasonable doubt. This conclusion followed *dicta* in R. v. Bass, [1953] 1 Q.B. 680, at 684, [1953] 1 All E.R. 1064, at 1066 (C.C.A.). *Bass* was thoroughly rejected in *Chan Wai-Keung*, *supra* note 20, where the Privy Council restated the traditional position that admissibility and weight are the functions of the judge and the trier of fact respectively. Accordingly, the voluntariness of a statement could only be argued before the jury for purposes of enhancing or diminishing its credit. It follows that no particular standard of proof attaches to the voluntariness of a statement when argued before the trier of fact, except, of course to the degree that the statement is offered as complete evidence on the charge. *Chan Wai-Keung* was applied in R. v. Burgess, [1968] 2 Q.B. 112, [1968] 2 All E.R. 54 (C.A.) (Lord Parker C.J.); R. v. Ovenell, [1969] 1 Q.B. 17, [1968] 1 All E.R. 933 (C.A. 1968). *See also Ajodha*, *supra* note 20; *Prasad*, *supra* note 20.

[80] *Supra* note 41.

[81] *Supra* note 71.

[82] *Supra* note 75, at 65.

Accordingly, Phipson also endorsed the decision of the Court of Appeal in *R. v. Yacoob*,[83] which applied the higher standard to proof of the competence of a witness.[84]

In 1983 the decision in *Angeli*[85] was expressly disapproved of by a different panel of the Court of Appeal in *R. v. Ewing*,[86] although the Court also strengthened the position taken by the earlier panel in *obiter dicta* with regard to the application of the higher standard of proof for voluntariness and other preliminary facts. The Court rejected *Angeli* on the basis that section 8 of the *Criminal Procedure Act, 1865*[87] did not fix a standard of proof, but merely reserved the decision as to the genuineness of handwriting to the judge, rather than the jury. As the Act was applicable to civil and criminal proceedings alike, the Court concluded that the standard applicable to section 8 would follow the standard at common law and vary with the nature of the proceedings.[88] Therefore *Ewing* not only prescribed proof beyond a reasonable doubt for section 8 of the *Criminal Procedure Act, 1865*, but also apparently enhanced the *dicta* in *Angeli* to the effect that this standard would be applicable to any preliminary fact in a criminal case. It may even support, albeit in a rather loose form, the general proposition that in criminal proceedings the governing standard is proof beyond a reasonable doubt for all matters except those for which Parliament has expressly provided otherwise. Nevertheless, insofar as the Court's *dicta* appear to support such a general proposition, it must be noted that the Court offers neither authority nor argument for its position.[89] In future, of course, the courts are free to reject the *dicta* in *Angeli* and *Ewing* with regard to the standard for preliminary facts on the basis that neither case gave a decisive judgment on the matter.

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[83] [1981] Crim. L. Rev. 248.

[84] For other views of English commentators, *see* O'Regan, *Admissibility of Confessions — Standards of Proof*, [1964] CRIM. L. REV. 287; ARCHBOLD, PLEADING, EVIDENCE AND PRACTICE IN CRIMINAL CASES, para. 15-23 (and Supplement) (41st ed. 1982).

[85] *Supra* note 71.

[86] [1983] Q.B. 1039, [1983] 2 All E.R. 645 (C.A.).

[87] 28 & 29 Vict., c. 93.

[88] The Court found support for this position in Blyth v. Blyth, [1966] A.C. 643, [1966] 1 All E.R. 524 (H.L.). It must be noted, however, that to vary the standard according to the nature of the proceedings is quite different from varying the degrees of proof according to the gravity of the issue: *see* Miller v. Minister of Pensions, 177 L.T. 536, [1947] 2 All E.R. 372 (K.B.); Bater v. Bater, 94 Sol. J. 533, [1950] 2 All E.R. 458 (C.A.); Blyth v. Blyth, *id.*; Bastable v. Bastable, [1968] 1 W.L.R. 1684, [1968] 3 All E.R. 701 (C.A.). *Cf.* Rejfek v. McElroy, [1966] A.L.R. 270, 112 C.L.R. 517 (H.C. 1965).

[89] However, the Court does note that to permit proof of authenticity under s. 8 on a balance of probabilities (as was proposed in *Angeli*) could lead to a conviction on less than proof beyond a reasonable doubt, thereby suggesting faintly a policy justification for its position in *Ewing*, *supra* note 86, at 1047, [1983] 2 All E.R. at 753.

Finally, it should be noted that in its Eleventh Report, published in 1972, the Criminal Law Revision Committee recommended enactment of the voluntariness rule and stipulated that the *quantum* required of the prosecutor be fixed at proof beyond a reasonable doubt.[90] The justification offered in the *Report* was threadbare[91] and no such enactment was undertaken by Parliament.

2. *After 1984*

On 31 October 1984 the *Police and Criminal Evidence Act 1984*[92] was finally enacted and proclaimed at Westminster. As a result the law governing the admissibility of confessions in England, including the standard of proof, is now in a state of profound uncertainty. The comments offered here are necessarily speculative.

The central provisions of the Act concerning the standard of admissibility are the following:

> 76. (1) In any proceedings a confession made by an accused person may be given in evidence against him in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this section.
>
> (2) If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained —
>
> (a) by oppression of the person who made it; or
>
> (b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof,
>
> the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid.
>
> (3) In any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, the court may of its own motion require the prosecution, as a condition of allowing it to do so, to prove that the confession was not obtained as mentioned in subsection (2) above.[93]

These provisions signal a remarkable change in the approach taken toward this area of the law. *Ibrahim*[94] and the test of voluntariness have been abandoned in favour of a disjunctive test by which the admissibility of a statement may be vitiated by evidence of oppression or of conduct that is likely to render a statement unreliable.

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[90] Cmnd. 4991, at 5, cl. 2.

[91] *Id.* at 213.

[92] U.K. 1984, c. 60.

[93] The provisions of the new Act that concern the admission of confessions, including a general discretion to exclude evidence for reasons of unfairness, are ss. 76-78.

[94] Ibrahim v. The King, *supra* note 1.

The guiding rationale for the standards set out in subsection 76(2) is forensic reliability, marginally supplemented by some concern about oppression. Parliament has evidently accepted the view that what an accused person says against his own interest, if relevant to the substance of the charge, is presumed to be reliable (if not also true) because people are disinclined to make such statements. When formulated as a rule of law, this view leads to the admission of confessional statements as simple exceptions to the hearsay rule and dispenses with proof of voluntariness or any other preliminary condition as a guarantee of reliability. Accordingly, the rule in subsection 76(2) reflects a policy that conditions of admissibility for confessions should promote the intrinsic purpose of the forensic process, that is, the accurate ascertainment of facts. Correspondingly, it eschews any direct concern for the manner in which evidence is obtained or other matters extrinsic to the forensic process, subject to a limited exception for oppression. It is, of course, arguable that extrinsic considerations of policy arising from the investigative process might be enforced by the exercise of the discretionary power to exclude evidence provided in section 78,[95] but the validity of the argument is plainly contingent upon an expansive definition of fairness. Moreover, as section 78 offers only a secondary or residual basis on which to exclude a confession, it may be true to say that the narrow and essentially inclusionary rule in subsection 76(2) is reinforced by a broad exclusionary discretion. However, it is unlikely that the discretion would be invoked to enforce positive standards of investigative propriety.

If the foregoing characterization of subsection 76(2) is correct, the procedural ramifications for the administration of the provision are bewildering. Given that the provision proceeds on a presumption of reliability, subsections 76(2) and (3) indicate that the corresponding presumption of admissibility can be dislodged by representations of oppression or conduct that would suggest unreliability, or by judicial motion. Unless judges are prepared to put the Crown to proof of admissibility without preliminary representations of the kind mentioned, it follows that the Act effectively casts upon the accused the burden of leading evidence that will support a finding of oppression or unreliability. What else can the words mean? If it is represented to the court that a statement was obtained by means of oppression or by means that would render the statement unreliable, it is almost inconceivable (barring

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78.(1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

(2) Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence.

prosecutorial incompetence) that such representations would be made by anyone but counsel for the defence.[96] As a practical matter, the only avenues by which counsel for the accused will be able to challenge a statement will be by cross-examination of a Crown witness (typically a police officer) or by calling the accused himself to the box. Counsel will no longer be able to hope for assistance through the failure of the prosecution to discharge its original obligation to prove admissibility. Indeed, it would seem that if the representations by the defence are weak in any significant way, and if the judge does not put the Crown to positive proof of admissibility, the prosecution could move for a peremptory ruling in favour of admissibility.

So much, then, for problems arising solely from the burden of production; taken together, the problems arising from the burden of production and persuasion pose almost insuperable obstacles to the defence.

It must be acknowledged that cases of oppression are infrequent, and thus that paragraph 76(2)(a) is less likely to be raised in opposition to a statement than paragraph 76(2)(b). To the extent that oppression connotes violence, torture, physical abuse and other flagrant violations of human rights, such conduct is rare. To the extent that it connotes a broader concept of intimidation, oppression is notoriously difficult to prove, particularly in cases where the accused is not called to testify at the *voir dire*.

Paragraph 76(2)(b) places the accused in just as difficult a position. That provision requires evidence of something said or done to cause the accused to make a statement that might be unreliable, "notwithstanding that it may be true". Again, representations of such conduct must be made before the Crown will be required to prove beyond a reasonable doubt the absence of such conduct, unless the court puts the Crown to such proof of its own motion. But what exactly is reliability as a touchstone of admissibility? What is evidence of unreliability, and how can reliability be proved except by an assessment of probative value? Reliability is a term of qualitative assessment, like relevance or credibility, and it is not necessarily demonstrable upon proof of a conditional fact such as voluntariness. A finding of reliability implies a finding that the probative value of evidence surpasses suggestions of irrelevance, falsity or a lack of credibility in its production. Except in the most egregious cases, this calculation is by definition a question of

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[96] In the absence of specification it must be assumed that these representations need only raise a *prima facie* case on the issue in order to shift the burden of production and persuasion to the Crown. But how would this work? Will sub. 76(2) alter previous practice with regard to the commencement of a *voir dire*? Does the form of words in this provision require an objection by the defence before a *voir dire* will be held? Even if not required as a matter of procedure, the reversal of the burden of production effectively imposes such a requirement.

weight and one that will almost invariably be concluded in the prosecution's favour. This is especially so if the burden of production is cast upon the defence. How can the defence effectively disprove reliability? Relevance is not a viable avenue. Credibility is equally weak: the prospect of making a successful "representation" solely by cross-examination of a Crown witness is remote, especially if there is more than one witness for the Crown. Chances are not much improved by the defence calling the accused to testify. The apparent distinction between truth and reliability in subsection 76(2) forecloses any further line of attack because the corresponding distinction between reliability and probative value is illusory, at least as a criterion of admissibility. The premise of the Act is that it may be unsafe for the trier of fact to rely on certain statements in the assessment of guilt or innocence, even if they are true. Logically, the only foundation for such a formulation is that some part of the conduct by which a statement was induced might afford grounds on which to doubt the probative value of the statement. Although reliability could therefore give some scope for judicial supervision of interrogation practices, to the extent that the manner of questioning might in a particular case upset the probative value of a statement, it remains inextricably tied to the truth or falsity of a statement. Indeed, it is precisely because the notion of reliability allows a distinction between forensic utility and the manner of obtaining evidence that it is identified with probative value, and thus wedded to truth and falsity.

The extent of the changes wrought by the *Police and Criminal Evidence Act 1984* is thus quite unclear. After *Angeli*[97] and *Ewing*,[98] it seemed clear that the general standard of proof for preliminary facts in criminal cases was proof beyond a reasonable doubt. This was certainly the case for proof of voluntariness, but the new Act has eliminated both voluntariness and the Crown's obligation to prove admissibility unless put to the task by the court acting of its own motion or upon "representation" of oppression or unreliability. Even if the burden of production and persuasion is shifted to the Crown, it would seem that the onus would be easily met, partly because instances of oppression are exceptionally difficult to prove and partly because it will be a rare case where evidence of unreliability will be sufficient to outweigh the probative value of a statement.

D. *Australia and New Zealand*

There seems to be no question that in Australia proof of voluntariness by the prosecution is fixed at the lower standard, proof on a balance

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[97] *Supra* note 71.
[98] *Supra* note 86.

of probabilities. The leading case is the decision of the High Court in *Wendo v. The Queen*,[99] in which that Court unanimously held that voluntariness is but one example of a preliminary question of fact, and that in no instance does a factual condition of admissibility have to be proved beyond a reasonable doubt. Such a requirement would, in the Court's opinion, confuse issues of admissibility with the weighing of evidence and the assessment of probative value.[100] Australian jurisprudence has remained constant on this question ever since and no attempt has been made to alter the position by statute.[101]

For many years it was thought that the position in New Zealand was the same as in Australia, although the issue had never been put squarely before the Court of Appeal. In *Police v. Anderson*,[102] however, the Court declared itself on an analogous issue in terms that seemed to leave little doubt as to the position it would adopt with respect to proof of voluntariness. At his trial before a magistrate the accused was convicted of driving with an excessive proportion of alcohol in his blood. While

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[99] *Supra* note 23. *See also* the commentary by Matthews, *The Standard of Proof of Voluntariness of a Confession*, 5 U. QUEENS. L.J. 203 (1966).

[100] Wendo v. The Queen, *id.* at 562 (Dixon C.J.), 572-73 (Taylor & Owen JJ.).

[101] There seems to have been some doubt about the binding effect of *Wendo*, *id.* in several state courts and about whether the Court's observations on the appropriate standard were decisive or *dicta*. It now appears settled that *Wendo* states the Australian position correctly. The jurisprudence can be traced in the following cases: R. v. Sanders, [1965] Qd. R. 409 (C.C.A.); R. v. Buchanan, [1966] V.R. 9 (S.C.) (probabilities standard adopted without reference to *Wendo*); R. v. Hagan, [1966] Qd. R. 219 (C.C.A.); R. v. Bodsworth, [1968] 2 N.S.W.R. 132, 87 W.N. (Pt. 1) (N.S.W.) 290 (C.C.A.); R. v. Stafford, 13 S.A.S.R. 392 (S.C. 1976); R. v. Pfitzer, 15 S.A.S.R. 171 (Aust. S.C. 1976); R. v. Petropoulas, 15 S.A.S.R. 553 (S.C. 1977); R. v. Hart, 17 S.A.S.R. 100 (Aust. S.C. 1977); Collins v. The Queen, 31 A.L.R. 257 (F.C. App. D. 1980); MacPherson v. The Queen, 57 A.L.J.R. 15 (H.C. 1982); Cleland v. The Queen, 57 A.L.J.R. 15 (H.C. 1982). In R. v. Warren, [1982] 2 N.S.W.L.R. 360 (C.C.A.), after an extensive survey of the Australian cases and the precedential effects of *Wendo*, Lee J. offered the following *dictum*: "I would add, however, that it is my view, in any event, that there is no basis in logic or in principle for applying to proof of voluntariness of a confession that onus which applies to proof of an accused person's guilt." *Id.* at 363. *Cf.* R. v. Plotzki, [1972] Qd. R. 379 (C.C.A.). Support for the application of the lower standard of proof to other preliminary facts can be found in the following cases: R. v. Attard, [1970] 1 N.S.W.R. 750, 91 W.N. (N.S.W.), 824 (C.C.A.); R. v. Savage, [1970] Tas. S.R. 137 (S.C.); R. v. Donohoe, [1962] N.S.W.R. 1144, [1963] N.S.W. St. R. 38 (C.C.A.). It should be noted that in one recent and anomalous case, R. v. Askeland, 8 A. Crim. R. 338 (Tas. S.C. 1983), a judge of the Tasmanian Supreme Court favoured an intermediate standard between probabilities and proof beyond a reasonable doubt. This conclusion is not argued thoroughly and would certainly appear to be at odds with the established jurisprudence in Australia.

The proposed *Criminal Investigation Bill*, which was introduced in Parliament in 1977 and 1981, and which died on the order paper on both occasions with dissolutions of Parliament, evidently would not affect the standard of proof.

[102] [1972] N.Z.L.R. 233 (C.A. 1971). *See also* Adams, *Onus of Proof in Criminal Cases*, in ESSAYS ON CRIMINAL LAW IN NEW ZEALAND 70, at 74-76 (Clark ed. 1971).

forensic tests on samples of breath and blood confirmed that the accused was over the statutory limit, an appeal to the Supreme Court succeeded on the basis that the evidence did not disclose that the arresting officer had "good cause to suspect" the accused of an offence. The question put before the Court of Appeal was whether proof beyond a reasonable doubt applied to the officer's cause for suspicion. In separate judgments each member of the Court answered in the negative and for essentially the same reason. The following passage, in the opinion of Turner J., captures the point succinctly:

> It is not every fact necessary to be proved in the course of criminal proceedings which must be proved beyond reasonable doubt. Of course, all facts forming part of the definition of the crime, and of the participation of the accused in it, must so be proved. But in the course of criminal procedure other matters of fact may arise for determination, which are not required to be proved to this standard. This situation arises when questions of fact incidental or even necessary to the *procedure* of the prosecution require to be proved before that prosecution can proceed. In jury cases it is generally for the Judge, and not for the jury to decide such questions, incidental to the prosecution of the accused, though they do not amount to "ingredients of the crime", as question of fact; and in such cases, to adopt the words of Sir Owen Dixon C.J. in *Wendo v. The Queen*:
>
> > "it is a mistake to transfer the principle of proof beyond reasonable doubt from its application to the issues before the jury to incidental matters of fact which the Judge must decide".[103]

Although no attempt has been made to alter the lower standard for preliminary questions of fact by means of statutory reform, the position taken in *Anderson* was later distinguished as *obiter dicta* and rejected by the Court of Appeal in 1982.

In *R. v. McCuin*[104] three accused were jointly charged with burglary. In his ruling on the admissibility of statements introduced by the prosecution, the trial judge referred to the uncertainty in the law with regard to the appropriate standard of proof, but adopted proof on a balance of probabilities on the strength of *Anderson*. Appeals against conviction were brought before a panel of three judges in the Court of Appeal. The appeal of one of the accused was dismissed, but the other two appeals were reserved in order that a bench of five judges could rule specifically on the applicable standard of proof. The Court unanimously favoured proof beyond a reasonable doubt.

The three opinions in *McCuin* provide the most comprehensive judicial survey on the issue in the jurisprudence of the Commonwealth. Each of these opinions acknowledges that the point in issue may have more theoretical than practical significance simply because "no responsible judge would be satisfied of voluntariness at all lightly".[105]

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[103] *Id.* at 249. Wendo v. The Queen, *supra* note 23, at 562.
[104] [1982] 1 N.Z.L.R. 13 (C.A.).
[105] *Id.* at 14.

Nevertheless, all members of the panel took the view that the issue before the Court required an assertion of principle with respect to the rationale of the confessions rule. They agreed that proof of voluntariness served in part to enhance the evidentiary reliability of a statement, but accepted that proof of voluntariness also provided a necessary opportunity to supervise the manner in which statements are obtained, and thereby served to ensure that statements are not obtained by illegal or improper means. Inasmuch as these views reveal a tension between voluntariness as evidence of forensic reliability and voluntariness as a means of satisfying extrinsic considerations of policy, the Court recognized that its decision on the standard of proof would also be a matter of policy. This is made clear in the joint judgment of Cooke, Richardson and Holland JJ.:

> In short, Parliament and the Courts have regarded third degree as so obnoxious that confessions obtained thereby are to be ruled out, no matter whether or not they may be true; and for this purpose it falls on the Judge to decide the facts. It seems to us that the fairest, safest and simplest solution is to require the Judge to be satisfied of voluntariness beyond reasonable doubt. To label the question an incidental matter of fact which the Judge must decide does have some logical attraction; but, with the utmost respect for the distinguished lawyers who are content to treat that classification as decisive, we would join those who see as of overriding importance the value which this part of the law is meant to safeguard.
>
> Adopting the criminal standard should not cause any harm to the public interest. Perhaps juries may sometimes be persuaded too readily that a far-fetched or fanciful doubt is a reasonable one. Judges are not usually so vulnerable.[106]

This view acknowledges that the position taken by the High Court of Australia in *Wendo*[107] had some force in strict evidentiary theory, but rejects it in favour of a position that allows for tighter judicial control over the investigative process.

In his concurring opinion, McMullin J. is much more expansive on the actual *quantum* of proof required:

> The requisite standard of proof was put to this Court in three ways — on the balance of probabilities, to the satisfaction of the Judge (alternatively put as affirmative proof) and beyond reasonable doubt. There are difficulties in the way of accepting a standard of proof on the balance of probabilities. Proof to that degree only would, unless regard were had to the gravity of the subject-matter, allow the admission of a confessional statement when the scales were no more than tipped in its favour and even though the Judge entertained a real possibility that it was not voluntary. Residual doubts as to factual matters underlying an evidential ruling in a civil case may not be of much consequence; they do not affect the liberty of the subject. But an incorrect factual assessment and ruling in a criminal case may result in disastrous consequences for an accused person. A confessional statement may be the only real evidence which the Crown has. It may be impossible to dispel

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[106] *Id.* at 15.
[107] *Supra* note 23.

> it once it has been admitted. Therefore, whether or not it has been shown to be voluntary seems to be much more than an incidental matter of fact, as Dixon C.J. put it. In *Wendo's* case policy considerations were not considered although in *Ibrahim* the admission of confessional statements was recognised as a policy question. It is true that checks on the admission of confessional statements may have been of greater importance in former times when standards of education were less, the consequences of conviction more severe, and no opportunity existed for an accused person to give evidence. But confessional statements once admitted in evidence remain today as effectual proofs of guilt as they were in the past. The need to ensure that they are voluntarily made remains. A standard of proof which allowed the prosecution to establish that on a mere balance of probabilities would not ensure that. I would reject it.[108]

The learned judge went on to reject the so-called intermediate standard of proof, chiefly for reasons of clarity and certainty in the law. He conceded, however, that this proposed test has some attraction in that it offers a "substantial safeguard" against involuntary statements and corresponds to the one used in the practice of the courts. Despite these advantages, he rejected the intermediate standard on the ground that the task of defining it and determining the differences between it and the other standards would prove too difficult because, as a practical matter, it would be almost impossible to distinguish between the *quantum* of doubt attaching to the highest and to the intermediate standards.[109]

E. *The United States*

Quite apart from innovations in constitutional protection wrought by the Supreme Court of the United States in *Miranda v. Arizona*,[110] that Court has also ruled in *Jackson v. Denno*[111] that the Constitution affords the accused a right to challenge the voluntariness of a confession and to have this preliminary question decided in the absence of the jury.

In the case of *Lego v. Twomey*[112] the standard required of the prosecution for proof of voluntariness was considered. The Supreme Court concluded that for constitutional purposes the lower standard was correct, and that a finding of voluntariness did not oblige the trial judge to put that issue to the jury. As *Lego v. Twomey* is the only case on the point in the Supreme Court of the United States, a brief survey of the views expressed by members of the Court is appropriate here.[113]

Lego's first argument was that unless the onus to prove voluntariness is the same as the burden on the ultimate issue of guilt or innocence,

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[108] *Supra* note 104, at 21; *Wendo*, *supra* note 23; *Ibrahim*, *supra* note 1.

[109] *Id.* at 21-22.

[110] 384 U.S. 436 (1966).

[111] 378 U.S. 368 (1964).

[112] 404 U.S. 477 (1972).

[113] Certainly the best critique of the implications of this decision is Saltzburg, *Standards of Proof and Preliminary Questions of Fact*, 27 STAN. L. REV. 271 (1974).

the admission of a confession on a balance of probabilities would necessarily imply a violation of his right to be free from conviction except upon proof beyond reasonable doubt. Speaking for the majority of the Court, White J. averred that the purpose of the voluntariness hearing was to ensure that a statement was not obtained in violation of constitutional norms of due process; he denied that its purpose was to promote reliability in the forensic process of fact-finding.[114] Indeed, he argued that the Court's objective in requiring a separate hearing for voluntariness was to distinguish the consideration of due process criteria of admissibility from evidentiary questions of weight and probative value. Accordingly, Mr. Justice White rejected Lego's first contention on the basis that a verdict of guilty "is not rendered less reliable or less consistent with [the requirement for proof of guilt beyond reasonable doubt] simply because the admissibility of a confession is determined by a less stringent standard".[115]

The majority also rejected a related argument to the effect that a higher standard was necessary "in order to give adequate protection to those values that exclusionary rules are designed to serve".[116] This submission effectively conceded White J.'s position that a preliminary determination on voluntariness serves only to protect due process rights and has nothing to do with concerns about reliability. As stated, this argument raised a significant question of social policy; White J. rejected it as follows:

> But we are unconvinced that merely emphasizing the importance of the values served by exclusionary rules is itself sufficient demonstration that the Constitution also requires admissibility to be proved beyond reasonable doubt.
>
> . . . .
>
> Without good cause, we are unwilling to expand currently applicable exclusionary rules by erecting additional barriers to placing truthful and probative evidence before state juries and by revising the standards applicable in collateral proceedings. Sound reason for moving further in this direction has not been offered here nor do we discern any at the present time. This is particularly true since the exclusionary rules are very much aimed at deterring lawless conduct by police and prosecution and it is very doubtful that escalating the prosecution's burden of proof in Fourth and Fifth Amendment suppression hearings would be sufficiently productive in this respect to outweigh the public interest in placing probative evidence before juries for the purpose of arriving at truthful decisions about guilt or innocence.[117]

In a footnote to this passage Mr. Justice White stated that Lego's argument was no more persuasive for the imposition of the higher standard as an exercise of supervisory power than as a constitutional

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[114] *Supra* note 112, at 486.
[115] *Id.* at 487.
[116] *Id.*
[117] *Id.* at 488-89.

rule.[118] Having thus dismissed the issue for constitutional purposes, and more generally for federal purposes, White J. concluded by acknowledging that the states were free to promote the values they found at stake by adopting the higher standard, pursuant to their own law. It is scarcely suprising that if the Supreme Court has accepted the lower standard for constitutional purposes, few states have adopted the higher standard as part of a mere rule of evidence.[119]

The appellant's final argument was that the constitutional criteria of voluntariness should be decided afresh by the jury; White J. again dismissed the contention, on the basis that it would confuse the due process objective of the preliminary inquiry on voluntariness with the fact-finding function of the jury:

> To the extent this argument asserts that the judge's determination was insufficiently reliable, it is no more persuasive than petitioner's other contentions. To the extent the position assumes that a jury is better suited than a judge to determine voluntariness, it questions the basic assumptions of *Jackson v. Denno*; it also ignores that Jackson neither raised any question about the constitutional validity of the so-called orthodox rule for judging the admissibility of confessions nor even suggested that the Constitution requires submission of voluntariness claims to a jury as well as a judge.[120]

Moreover, said White J., a right to have the jury decide voluntariness as a distinct issue would unjustifiably afford a second forum for litigating a single issue of fact.

In his separate opinion, Brennan J. dissented on the basis that as proof beyond a reasonable doubt is an instrument of policy designed to preclude convictions based on factual error, it necessarily follows that the admission of a confession on a lower standard of proof would introduce a broader margin of uncertainty and error into findings of guilt and innocence:

> I do not think it can be denied, given the factual nature of the ordinary voluntariness determination, that permitting a lower standard of proof will necessarily result in the admission of more involuntary confessions than would be admitted were the prosecution required to meet a higher standard. The converse, of course, is also true. Requiring the higher standard means that some voluntary confessions will be excluded as involuntary even though they would have been found voluntary under the lower standard.
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> . . . .
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> Permitting proof by a preponderance of the evidence would necessarily result in the conviction of more defendants who are in fact innocent. Conversely, imposing the burden of proof beyond a reasonable doubt means that more defendants who are in fact guilty are found innocent. It seems to me that the

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[118] *Id.* at 488.

[119] For a list of the standards applied by the various states, *see* J. WIGMORE, 3 A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW, s. 860 (Chadbourn ed. 1970 & Supp. 1984).

[120] *Supra* note 112, at 488, 489-90.

> same considerations that demand the reasonable-doubt standard when guilt or innocence is at stake also demand that standard when the question is the admissibility of an allegdly [*sic*] involuntary confession.[121]

From this it is plain that Brennan J. disagrees with White J.'s characterization of the distinct functions served by judge and jury in the consideration of voluntariness.

F. *Summary*

If nothing else, this brief review of the *quantum* required of the prosecution for proof of voluntariness establishes that the law is typically ambiguous. In jurisdictions favouring the lower standard, the policy of the law is obviously predicated upon a theory regarding the relative functions of judge and jury, although the positions taken by the courts in Australia and the United States are quite different. In none of these jurisdictions, however, is there a satisfactory resolution of the danger that less reliable evidence may be put to the jury in its assessment of guilt or innocence. In jurisdictions that require proof of voluntariness beyond a reasonable doubt the jurisprudence is silent or vague as to the reasons for adopting that standard, its theoretical justification and the extent to which it is applicable to the various aspects of the voluntariness rule and other preliminary questions of fact in the law governing the admissibility of evidence. These are some of the conflicts and controversies that will be examined in the second part of this article.

III. QUESTIONS OF POLICY

A. *The Theoretical Context*

As extra-judicial statements made by an accused are by definition hearsay when tendered by the prosecution, the law allocates to the proponent the legal burden of proving that the statement in issue is admissible as an exception to the general ban on hearsay evidence.[122]

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[121] *Id.* at 493.

[122] The accuracy of this assertion may be doubted in Canada since in this jurisdiction the voluntariness rule applies to inculpatory or exculpatory statements introduced by the Crown. *See Piché*, *supra* note 1. How, it might be asked, can an exculpatory statement introduced by the Crown be construed as hearsay if the statement is plainly not adduced to prove the truth of its contents? Although this question raises some nice points, this is not the place to debate them. It is simply accepted, for present purposes, that in Canada inculpatory and exculpatory statements, made by the accused and adduced by the prosecution, can be brought within the concept of hearsay. For example, any statement made by the accused and introduced through a Crown witness can be described as hearsay if the Crown relies upon the probative effect of the contents of that statement, provided that the Crown does not adduce evidence of a statement merely to prove that such a statement was made. An exculpatory statement introduced by the Crown in reliance upon its contents will almost invariably be used for inculpatory effect, and there is no compelling reason why such a statement should not be classified as hearsay.

Such statements may be admitted under the doctrine of *res gestae*, under the exception for informal admissions by a party litigant, or under some other exception, but a statement made by the accused to a person in authority is inadmissible unless the prosecution proves the voluntariness of the statement as a preliminary fact. For elementary reasons of prudence, the presentation of evidence and the determination of this question of law take place, at least notionally, in the absence of the trier of fact; the judge is the trier of law and the jury is the trier of guilt or innocence. The law countenances some attenuation of this distinction in cases tried by judge alone; having heard and considered the evidence adduced on the *voir dire*, he must purge his mind of it if the statement is ruled inadmissible, or, having ruled it admissible, he must defer any evaluation of its weight until both parties have adduced their evidence on the charge.[123]

The *quantum* required of the prosecution for proof of preliminary facts and the admissibility of evidence reflects the policy of the law governing the respective functions of the trier of law and the trier of fact in the administration of criminal justice. Adoption of proof on a balance of probabilities would imply that the jury should be entitled to assess the probative value of relevant evidence adduced by the prosecution, subject only to argument by counsel as to the weight that such evidence deserves and to proper instruction by the court. Conversely, the imposition of the higher standard would imply that the law recognizes a compelling justification for excluding relevant evidence of a lesser standard from the consideration of the jury. Thus, it should be apparent that the standard of proof for confessions is based on the rationale that supports the exclusion of extra-judicial statements obtained by a person in authority through inducements of fear or hope.

It is unnecessary to rehearse here the convoluted history of the various rationales that have been advanced for the confessions rule, partly because no amount of exegesis will show that one rationale has been clearly or conclusively adopted by the courts.[124] A summary exposition of the principal positions in current Canadian jurisprudence will suffice for present purposes.

The division of responsibility in criminal cases between trier of law and trier of fact signifies the guiding principle that justice does not always flow from truth. The Honourable Samuel Freedman, formerly Chief Justice of Manitoba, put the point succinctly:

> The objective of a criminal trial is justice. Is the quest of justice synonymous with the search for truth? In most cases, yes. Truth and justice will emerge in

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[123] *See* Powell v. The Queen, [1977] 1 S.C.R. 362, 66 D.L.R. (3d) 443 (1976); R. v. Gauthier, [1977] 1 S.C.R. 441, 64 D.L.R. (3d) 501 (1975).

[124] For a more complete analysis, *see* QUESTIONING SUSPECTS, *supra* note 64, at 18-39.

> a happy coincidence. But not always. Nor should it be thought that the judicial process has necessarily failed if justice and truth do not end up in perfect harmony. Such a result may follow from law's deliberate policy. . . .
> . . . .
> It is justice then that we seek, and within its broad framework we may find the true reasons for the rule excluding induced confessions. Undoubtedly, as already stated, the main reason for excluding them is the danger that they may be untrue. But there are other reasons, stoutly disclaimed by some judges, openly professed by others, and silently acknowledged by still others — the last perhaps being an instance of an "inarticulate major premise" playing its role in decision-making. These reasons, all of them, are rooted in history. They are touched with memories of torture and the rack, they are bound up with the cause of individual freedom, and they reflect a deep concern for the integrity of the judicial process.[125]

If it is the function of positive rules of evidence to mediate conflicts between the interests of truth and justice, the nub of the political issue is to define the point at which such conflicts arise.

Since the decision in *R. v. Wray*,[126] the orthodox view held by the Supreme Court of Canada is that the central purposes of exclusionary rules are to prevent the reception of evidence that is inherently unreliable and to impose specific criteria by which to rebut the presumption of inadmissibility. These rules of evidence seek to ensure only that the trier of fact is presented with information on which he can safely rely in discharging his duty. Speaking for a majority of the Court, Martland J. emphatically denied that it was the function of the courts in administering rules of evidence to supervise the manner in which evidence was obtained.[127] Accordingly, he concluded that Canadian law afforded no residual discretion to exclude evidence for reasons of illegality or unfairness, unless its prejudicial effect clearly exceeds its probative value.[128]

The dissenting judges in *Wray* took the view that judges retain an exclusionary discretion to ensure that narrow rules of admissibility do not allow the admission of evidence that has been obtained in such a way that its admission would subvert the integrity of the judicial process.[129]

Ten years later, the general position adopted in *Wray* was again applied by a majority of the Supreme Court in *Rothman v. The Queen*,[130] while the minority again asserted a supervisory power to exclude relevant evidence that, if admitted, would compromise the administration of justice by virtue of the manner in which it was obtained. In the result, then, the general disposition of Canadian courts is to regard exclusionary

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[125] Freedman, *Admissions and Confessions*, in STUDIES IN CANADIAN CRIMINAL EVIDENCE 95, at 99 (R. Salhany & R. Carter eds. 1972).

[126] [1971] S.C.R. 272, 11 D.L.R. (3d) 673 (1970).

[127] *Id.* at 287-88, 11 D.L.R. (3d) at 685.

[128] *Id.* at 285, 11 D.L.R. (3d) at 683.

[129] *Id.* at 272, 11 D.L.R. (3d) at 673.

[130] *Supra* note 28.

rules of evidence, and especially the rules on hearsay, as devices for ensuring the reliability of the forensic process and not for promoting extrinsic interests in policy. Section 24 of the *Canadian Charter of Rights and Freedoms*[131] modifies this position in circumstances where constitutional rights have been violated. By contrast, however, clause 22 of Bill S-33 proposed the codification of the general rule on admissibility set out by the majority in *Wray*.[132]

Under the orthodox construction of the confessions rule, voluntariness must be proved as a preliminary fact to dispel the unreliability that is presumed to exist in a hearsay statement made by the accused in what is for practical purposes a party-and-party context. The presumption arises from the apprehension that the opposite party might exert undue influence to induce from an accused statements against his own interest. Proof of voluntariness reverses the presumption of unreliability, simply because it is assumed that a voluntary statement made by an accused against his own interest is probably true, or at least sufficiently untainted by inducement to allow a jury to rely upon the content of the statement in assessing the guilt of the accused. Thus, quite apart from extrinsic considerations of policy relating to judicial control of investigative practices, it is apparent under the traditional evidentiary view that the intimate connection between the preliminary issue of voluntariness, which is essentially a question of reliability, and the substantive issue of guilt, raises squarely the difficult question of the *quantum* of proof. If, as is typically the case, an extra-judicial statement will suffice for a conviction, should the law not impose upon the prosecution the same standard required to sustain a conviction?

There are essentially two ways in which to approach this question. The first is to assume that considerations of policy in the law of confessions are sufficiently distinct that the standard of proof at the *voir dire* on voluntariness can be settled without regard to general questions concerning proof of preliminary facts and the admissibility of evidence. The second is to proceed on the hypothesis that the standard imposed at the *voir dire* must find some theoretical foundation in the policy of the law with regard to the administration of exclusionary rules in general. To the extent that there has been any theoretical discussion at all, the courts in the jurisdictions surveyed in Part II have generally adopted the first

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[131] *Constitution Act, 1982*, Part I, *enacted by* the *Canada Act, 1982*, U.K. 1982, c. 11.

[132] Bill S-33, 32nd Parl., 1st Sess., 1980-81-82-83 (2nd reading 7 Dec. 1982):

> 22.(1) Relevant evidence is admissible unless it is excluded pursuant to the *Canadian Charter of Rights and Freedoms*, this Act or any other Act or law, and evidence that is not relevant is not admissible.
>
> (2) The court may exclude evidence the admissibility of which is tenuous, the probative force of which is trifling in relation to the main issue and the admission of which would be gravely prejudicial to a party.

approach. Even in Australia and the United States, where the standard is proof on a balance of probabilities, the courts have asserted the lower standard on an unarticulated and uncritical premise that all preliminary facts that determine admissibility need only be proved at the lower standard.

In Canada, New Zealand and in English law as it stood before the enactment of the *Police and Criminal Evidence Act 1984*,[133] the higher standard is quite conspicuously an unexplained anomaly. Though it cannot be proved, it is suggested that the higher *quantum* developed in each of these jurisdictions as a function of the narrow exclusionary policy adopted by the courts in relation to particularly controversial issues of admissibility. That is, although the policy of the law in requiring proof of preliminary facts is traditionally to enhance the reliability of evidence put before the trier of fact, extrinsic considerations based upon a "protective" rationale[134] or due process concerns are suppressed by a narrow interpetation of rules of admissibility. In assessing the voluntariness of a statement, for example, a requirement of proof beyond a reasonable doubt provides an effective substitute for a discretion to exclude on the basis of forensic unreliability and a narrow notion of "inducement" under *Ibrahim*.[135] The use of the higher standard in Canada and England for this purpose cannot be proved, but it hardly seems coincidental that the higher standard was consolidated by appellate courts, in Canada with *Wray*[136] and in Britain with *Sang*,[137] as the courts progressed toward a narrower exclusionary policy.[138] In Australia and the United States, by contrast, the lower standard for voluntariness is complemented by a broader exclusionary policy.[139]

Even if this analysis is correct, however, it too is predicated on the fact that confessions are governed by considerations that do not apply to other issues of admissibility. Whether confessions warrant such unique treatment in the rules of admissibility is thus a central issue. There is, perhaps, one obvious explanation for the imposition of the higher

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[133] U.K. 1984, c. 60.

[134] This term has gained some currency as a result of an article by Ashworth, *Excluding Evidence as Protecting Rights*, [1977] CRIM. L. REV. 723. It was adapted, for example, in the REPORT OF THE ROYAL COMMISSION ON CRIMINAL PROCEDURE, Cmnd. 8092, at 115 (1981).

[135] *Supra* note 1.

[136] *Supra* note 126.

[137] R. v. Sang, [1980] A.C. 402, [1979] 2 All E.R. 1222 (H.L. 1979).

[138] It should also not be forgotten that in Canada, unlike in England, oppression is not a distinct justification for the exclusion of a statement. The Judges' Rules, para. c., expressly allow oppression in obtaining statements. *See* Home Office Circular No. 31/1964, Practice Note, [1964] 1 All E.R. 237. *See also* Note, 51 Cr. App. R. 1 (1966) and R. v. Priestly, 50 Cr. App. R. 183 (Assizes 1965).

[139] *See* Cleland v. The Queen, *supra* note 101; R. v. Ireland, 126 C.L.R. 321 (Aust. H.C. 1970); Bunning v. Cross, 19 A.L.R. 641 (H.C. 1977); Miranda v. Arizona, *supra* note 110.

standard of proof on the issue of voluntariness for confessions; it is that the criminal law has long been suspicious of such statements because they constitute a form of "indirect testimony"[140] obtained and introduced by the opposing party in the litigation. But assuming that the law provides substantive exclusionary rules and the procedure of a *voir dire* in order to promote reliability and extrinsic policy interests, as well as to insulate the trier of fact from the contaminating effects of untested evidence, the only possible justification for requiring proof of all preliminary facts beyond a reasonable doubt is that the nature of the evidence tendered, or the close relationship between the preliminary issue of fact and the ultimate issue, demand greater protection for the accused and for the integrity of the forensic process. The touchstone for the standard would, therefore, have to be some notion of prejudice.

The decision of the Supreme Court in *R. v. Gardiner*,[141] particularly when read in conjunction with its earlier decision in *R. v. Proudlock*,[142] raises interesting questions with respect to the application of the higher standard in various aspects of criminal litigation. Following Gardiner's conviction for assault causing bodily harm to his wife, the defence appealed the *quantum* of the sentence on the basis that the Crown had not proved beyond a reasonable doubt the aggravating circumstances that would justify a sentence of four years and six months, which was very near the maximum available under the *Code*. A majority of the Supreme Court concluded that a higher standard was required of the Crown in sentencing matters because they were of paramount importance to the disposition of the case. Therefore the Court suggested that certain collateral facts that are manifestly unrelated to the central issue before the court must be proved beyond a reasonable doubt. When combined with Mr. Justice Pigeon's vague *dictum* in *Proudlock*, that the only standard to be met by the Crown against the accused in a criminal case is the higher standard,[143] could it not be argued that proof beyond a reasonable doubt is required of the Crown on all issues at all stages of a criminal prosecution or, if not at all stages, that it is required whenever the prosecution seeks to establish a fact that, if proved, would materially jeopardize the accused?

The answer to the first question is surely negative, as there are countless instances, such as the qualifications of an expert, where the proof of a relevant fact by the prosecution does not constitute a

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[140] *See* Rothman v. The Queen, *supra* note 28, at 654, 20 C.R. (3d) at 129-30 (Estey J.). *See also* E. RATUSHNY, SELF-INCRIMINATION IN THE CANADIAN CRIMINAL PROCESS 97 (1979).

[141] [1982] 2 S.C.R. 368, 68 C.C.C. (2d) 477.

[142] [1979] 1 S.C.R. 525, 91 D.L.R. (3d) 449 (1978).

[143] *Id.* at 550, 91 D.L.R., (3d) at 455. *See also* Carleton v. The Queen, 32 A.R. 181, 23 C.R. (3d) 129 (C.A. 1981), *aff'd* 47 A.R. 160, 36 C.R. (3d) 393 (S.C.C. 1983). It will be recalled that this was the position taken in England by the Court of Appeal. *See Angeli*, *supra* note 71 and *Ewing*, *supra* note 86.

threatening issue for the defence. The second question, however, is more subtle and more complex, simply because an affirmative response would require the determination of criteria to distinguish circumstances in which proof of a preliminary or collateral fact is as significant as proof of the essential elements of the alleged offence. Such a concept would, of course, have to be applied according to criteria of general application and not according to the exigencies of the instant case. The converse would not only be counter-productive, but would promote inconsistency in the jurisprudence and endless delay as proceedings were repeatedly interrupted for purposes of a *voir dire*. The development of general criteria for determining the standard on collateral issues would also be very difficult. For confessions and dying declarations, perhaps, the question might be relatively clear; for wiretapping and evidence of similar facts, the difficulties would be far greater. At the very least, aside from the possibilities raised by *Gardiner*,[144] it seems clear that the question of the standard applicable to proof of collateral facts is uncharted territory that deserves careful exploration.

By definition, however, all questions of admissibility do not raise the same risk of prejudice, either in scope or in kind. Indeed, it would be virtually impossible to define classes of preliminary facts that should or should not attract the higher standard according to a criterion of potential prejudice.[145] How could it be said, for example, that the conditions for admitting similar fact evidence need be proved on a balance of probabilities, while dying declarations should only be admitted on the higher standard because they typically afford compelling evidence of identification?[146] Similarly, how can it be said that proof beyond a reasonable doubt should be required, as a matter of general policy, for all questions of preliminary fact and admissibility, simply because it is the standard generally applied in criminal prosecutions? The examples can be multiplied, but even to raise the question suggests that no general policy on the standard required for proof of preliminary facts can be advanced on a criterion of potential prejudice. Once again, however, such a concession does not imply an answer with respect to any single issue of admissibility. What remains are the hard cases in which the evidence tendered, if admitted by the standard of lesser reliability, may have a prejudicial effect on the jury. Is it sufficient to expect the jury to make a dispassionate assessment of the weight that should be given to the evidence after argument by counsel and instruction by the judge?

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[144] *Supra* note 141.

[145] This question is fully examined by Saltzburg, *supra* note 113.

[146] It may be noted that R. v. Jenkins, L.R. 1 Cr. Cas. Res. 187 (1869) is often regarded as favouring the application of proof beyond a reasonable doubt to the admission of dying declarations.

B. *Competing Considerations in Choosing a Standard*

In the absence of criteria by which to distinguish those preliminary questions of fact that should be proved by the higher standard of proof and those that need only be proved by the lower standard, proof of voluntariness must be considered in isolation. Ultimately, there are only three plausible approaches to the adoption of a standard:

- Proof beyond a reasonable doubt is the only adequate guarantee of reliability and of the extrinsic objectives of policy that support the voluntariness rule.
- Proof on a balance of probabilities is adequate to ensure that reliable and relevant evidence is put before the trier of fact.
- The adoption of a specific standard is really moot, as the presiding judge will vary the standard according to the circumstances of each case.

In the pages that follow further consideration will be given to some of the specific factors that might be evaluated in the selection of a legislative standard.

1. *Reliability and the Allocation of Functions Between Judge and Jury*

To the extent that the difference between the competing standards can be expressed in terms of ideology or principle, the proponents of the higher standard seem to take the view that proof of voluntariness should provide more than a minimum guarantee of reliability. In their view, evidence of a statement should only be admissible at the higher standard, because it is indirect testimony by the accused himself that will generally have a powerful influence on the determination of the ultimate issue at trial, either because it provides the only conclusive evidence in support of the charge or because it provides enough evidence to put a weak case beyond doubt. The argument in favour of the higher standard, therefore, is an admixture of principle and policy, founded on the premise that the *voir dire* is *de facto* a trial because a finding of voluntariness on the preliminary issue of admissibility is almost always determinative of the ultimate issue before the court, despite the technical lack of identity between voluntariness and guilt or innocence.

It is true that the higher standard only crystallized in our jurisprudence during the last decade,[147] but it does not follow that the courts previously required the lower standard. Traditional common law doctrine allows for conviction upon an uncorroborated confession; therefore, general acceptance of proof at the lower standard would imply that the courts have traditionally countenanced convictions for crime upon a balance of probabilities. This, of course, would be anathema to the Anglo-Canadian system of criminal justice and there is no historical

[147] *See* Part II, *supra*.

basis for it. A survey of the early cases on this issue, including *Ibrahim* itself,[148] makes it hard to credit that the judges of that era contemplated proof on a balance of probabilities only. Precisely what they thought is now largely a question of conjecture and interpretation, but even if it were assumed that those judges did intend the lower standard, it must be remembered that they also asserted a broad discretion to exclude evidence which would preclude any possibility of conviction upon mere probabilities. This is evident in the speech given by Lord Sumner in *Ibrahim*.[149] Although a ruling of admissibility is not the same as a conviction, it takes little imagination to predict the effect of the lower standard upon the rate of conviction, particularly in cases where the Crown has little or nothing else to rely upon.

In this regard, the consequences of adopting the lower standard deserve consideration. The most obvious is that less reliable evidence would be received and placed before the trier of fact as a basis upon which grave decisions might be taken. The lower standard transforms many issues into questions of weight and would encourage greater litigation on voluntariness before the trier of fact. Therefore, despite arguments by some members of the Task Force that the higher standard allows "an uncontrolled [exclusionary] discretion",[150] it is in fact the lower standard that promotes an unfettered inclusionary discretion, one that is as susceptible to the vagaries of philosophical opinion as any other general discretion. Moreover, the lower standard would not promote consistent jurisprudence and in this sense would defeat the objective of legislative certainty. Most seriously, the admission of a confession on the lower standard would sacrifice almost all protections against misconduct. Indeed, the lower standard is predicated on a perception of the trial or the preliminary inquiry as a process that is primarily designed to ascertain the truth of the allegations in question.

The assertion that the higher standard affords an uncontrollable power to exclude is also not without interest or significance. To the extent that a judge can use it to compensate for the stringency of *Wray*,[151] by excluding otherwise admissible evidence on the basis that the fact of its voluntariness was not proved beyond a reasonable doubt, he does indeed exercise a discretion that is unreviewable because it consists of little more than a finding of fact. The propriety of this practice, however, only begs any questions about the propriety of the law's policy on

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[148] *Ibrahim*, *supra* note 1. *See also* Rogers v. Haken, 67 L.J.Q.B. 526, 19 Cox C.C. 122 (1898); R. v. Histed, 19 Cox C.C. 16 (Assizes 1898); R. v. Male, 17 Cox C.C. 689 (Assizes 1893); R. v. Thompson, *supra* note 1; R. v. Brackenbury, 17 Cox C.C. 628 (Assizes 1893); R. v. Gavin, 15 Cox C.C. 656 (Assizes 1885).

[149] *Supra* note 1. *See also* R. v. Rothman, 42 C.C.C. (2d) 377 (Ont. C.A. 1978) (Dubin J.A., dissenting).

[150] *Supra* note 56, at 190-91.

[151] *Supra* note 126.

exclusionary rules. Although the exercise of such a discretion cannot be appealed, it is not without further ramifications, especially at the preliminary inquiry. If the Crown were to lose at the *voir dire* and had little other evidence to offer at the preliminary inquiry, it could always proceed by direct indictment. If the Crown were to win at the *voir dire*, and the defence had a weak case on the main issue, the probability of a guilty plea or re-election would be high. The same applies at trial if the accused should lose, although in cases where a preliminary inquiry has been held it is likely that at this stage he will also have a stronger case on the merits. If the Crown were to lose at this juncture, especially in indictable cases not tried before a magistrate, it is probable (though not necessary) that the Crown would have other evidence to adduce on the main issue; if not, the Crown would probably lose its case, particularly if it were tried by judge alone. Indeed, if conducting a trial with a jury, the court might be obliged to direct a verdict of acquittal. In sum, then, it cannot be said that this uncontrollable discretion is the pernicious vice that the opponents of the higher standard would seem to suggest that it is.

2. *Consistency*

Another issue to be considered in determining the appropriate standard of proof is consistency. This issue has two dimensions: consistency between the standard required for voluntariness and other preliminary facts, and consistency between the standards applied at the preliminary inquiry and at trial.

As to the first point, the position adopted by the first majority of the Task Force, by the Uniform Law Conference and by the government, is not an argument but an assertion based on an assumption and a choice in policy. It is far from clear that the courts applied the lesser standard for confessions before the developments of the past ten years and, moreover, there is no certain basis for the assertion that all other preliminary facts in criminal cases need only be proved on a balance of probabilities. Indeed, it is virtually without foundation in the arguments of the courts, although its theoretical premise is that collateral issues need not be determined according to the standard prescribed for trying substantive issues, simply because collateral facts are not in themselves conclusive of the merits of the case. Professor Jacques Fortin has even asserted that there is no fixed evidentiary standard for proof of preliminary facts, apart from confessions, simply because such a standard would necessarily entail the logical conundrum that preliminary rulings on the admissibility of evidence must themselves be governed by rules of evidence.[152]

The second point on consistency raises the question of whether the standard required of the Crown at the *voir dire* should be the same at the

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[152] J. FORTIN, *supra* note 51.

preliminary inquiry as at trial. If the answer were in the affirmative, there would still be two possible variations: whether to impose the higher standard at both stages or to use the lower standard at both stages.

The negative response would be that the higher standard should apply only at trial. The opponents of the higher standard on the *voir dire*, either at the preliminary inquiry or at trial, argue that the trial of a preliminary fact should not be assimilated to the trial of the charge lest the judge arrogate to himself the prerogatives of the jury. Some support can be found for this argument. First, irrespective of the standard applied, the rigid distinction between the *voir dire* and the principal proceedings allows the accused at least three opportunities to attack voluntariness in indictable cases not tried by a magistrate. Second, and in support of the argument for the use of the lower standard at the preliminary inquiry, it can be argued that in proceedings on committal the sole test should be that a statement is admissible unless enough evidence is adduced to satisfy the presiding judge that there is no reasonable basis on which a properly directed trial judge could admit the statement.[153] This has all the ambiguity of the test set forth in *United States v. Shephard*,[154] and one interpretation of it would permit a standard less than a balance of probabilities at the preliminary hearing if the standard were a balance of probabilities at trial. On the other hand, the imposition of the higher standard at both preliminary inquiry and trial raises the spectre of entirely inconsistent findings on the same issue. Third, since the Crown need not prove voluntariness before the trier of fact, the preliminary fact of voluntariness should not be tied to the ultimate issue of guilt on the charge, every element of which must be proved beyond a reasonable doubt; the higher standard should not be imposed simply because the issues to be proved are entirely distinct. This argument gains strength when it is remembered that the standard applies equally to inculpatory and exculpatory statements introduced by the prosecution. Finally, it can be argued that since defence counsel often treat the preliminary inquiry as the real trial, the lower standard would effectively diminish the length and expense of such hearings, because there would be no advantage to calling a lengthy series of witnesses.

3. *The "Non-issue" Argument*

Arguments for both the lower and the higher standard can be made on the basis of reliability, consistency and jeopardy to the accused. A third argument is that whatever standard is imposed by law, the judge will in practice adjust the *quantum* of proof according to his view of the circumstances.

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[153] *See* note 17, *supra*.
[154] *Id.*

In some respects this position is only a variant of the position that the higher standard allows a broader exclusionary discretion, although this argument would imply a prerogative to raise *or lower* the standard. In other respects it is dignified by the view that neither standard is perfectly fixed and both admit of varying degrees.[155] Thus, proponents of the lower standard might argue that no judge would allow that standard to result in a conviction upon a balance of probabilities, especially in cases where a statement was the only evidence or was the determinative evidence. A judge would ensure that the Crown satisfied him of the voluntariness of the statement on the higher standard before convicting. In large measure, however, this argument only recapitulates the debate as to whether it is better policy to recognize the narrow exclusionary discretion that flows from the higher burden of proof or to adopt, with the lower *quantum*, an inclusionary policy that is subject only to a discretion in the judge to raise or lower the *quantum* according to the imperatives of each case.

Although this third argument has much to commend it for its pragmatic appreciation of the vagaries of litigation, it is scarcely adequate for the determination of legislative policy and the assertion, if not the observance, of principle.

IV. CONCLUSION

The determination of the *quantum* of proof at the *voir dire* for confessions will ultimately be made according to our view of the limits and functions of judicial control over the forensic process. Even if it is accepted for purposes of discussion that the sole function of the voluntariness rule is reliability, there is a substantial margin for disagreement in policy. Given the close connection between voluntariness or reliability for purposes of admissibility and the prejudicial effect of admitted statements, the higher standard can be justified as a precaution against convictions on the basis of evidence that does not meet the substantive *quantum* required of the Crown before the trier of fact. Conversely, it can be argued that proof of voluntariness does not determine the ultimate issue because neither it nor the statement in issue is an essential element of the Crown's burden, even though the statement may admit enough of the essential elements to ensure a conviction: the higher burden would thus confound the division of functions between the trier of law and the trier of fact.

The position taken by the government in Bill S-33 favoured the lower standard, and I suggest that this is almost entirely attributable to

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[155] *See Bater*, *supra* note 88 (Denning L.J.); Miller v. Minister of Pensions, *supra* note 88, Blyth v. Blyth, *supra* note 88. *But see* Bastable v. Bastable, *supra* note 88.

the politicization of the reform process by virtue of the divided criminal bar, and in particular to the dominance of prosecutors in the development of the Bill.[156] The position taken by the final majority of the Task Force seemed to promote a compromise by recommending that the lower standard apply at the preliminary inquiry and the higher standard at trial. Among its other virtues, this position implies the need to distinguish between the two standards according to a measure of the accused's jeopardy at the different stages.

The *quantum* required for voluntariness raises issues concerning the appropriate standard with respect to other preliminary facts or collateral issues in criminal cases. It is an area of the law that has been administered in practice largely on a basis of unarticulated assumptions. These assumptions, the applicable principles and competing considerations in policy, to say nothing of procedural implications, deserve further scrutiny.

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[156] This point has been amplified in two recent reports by the Law Reform Commission of Canada: DISCLOSURE BY THE PROSECUTION 16-17 (1984) and QUESTIONING OF SUSPECTS, *supra* note 65, at Part I.