Significance of Exculpatory statements from the Stafford homicide

R. v. Rafferty, 2012 ONSC 1162 (CanLII) Feb. 16, 2012

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Introduction: No evidence is stronger than a true confession. A properly obtained, true confession is the best evidence you can get. But, the rules of evidence regarding statement admissibility may be the most complex in all of Canadian criminal law. No statute explains how to get a confession. No statute even explains the rules of confession admissibility. The only way to become an expert in confession admissibility is to study case law. Case law holds the secret to getting true confessions. To become an expert interrogator, you have to become an expert case law researcher. There's no way around the study of case law. If you don't have an expert understanding of case law, you don't have an expert understanding of interrogation. The reason is simple – case law has all the answers to interrogation. Case law has the solution to interrogation. But how can police officers be expected to study the mounds of case law when they're busy fighting crime?

This case involves a voir dire in the Tori Stafford homicide, the horrific murder of an 8 year old that dominated the news for months. I decided to include most of the judgment verbatim for two reasons: (i) so absolutely nothing gets lost in translation. (ii) You, the reader, have to read the judgment to make full sense of it. (iii) There's no way to condense it. (iv) to prove my point about the complexities of rules of evidence and how case law has all the answers and solutions that solve the mystery of how to get true confessions in Canada.

I've included the usual conclusion where I emphasize the key points and how to practically apply them in real-life. If you have any comments or questions, feel free to contact me at gino@ginoarcaro.com.

Offences: The accused was in custody since his arrest on May 19, 2009. He faced trial on charges of kidnapping, sexually assaulting and committing first degree murder on a young child, 8 year old Victoria Stafford.

Issue: This voir dire deals with a motion where the Crown sought an admissibility ruling regarding two statements given by the accused to the police, one prior to his arrest and one immediately after.

The Court ruled that "the accused said nothing inculpatory in either statement." However, the Crown wished to play the first statement, taken May 15, 2009, during its case, and to have the second statement, taken in the early morning hours of May 20, 2009, available for cross-examination in case the accused testified. The sole issue of this motion was voluntariness.

Two other statements were discussed during this motion. One was taken May 22, 2009. In it, the accused said "virtually nothing except that he wanted to speak to his lawyer and return to his cell." The supposed evidentiary value of that statement was that, toward the end of the interview, D/Sgt. Smyth "made an offer to have the accused help search for the body of Tori Stafford." The Crown proposed to use this in the event that the accused maintains that he was treated differently than his alleged accomplice, Terri-Lynne McClintic. The Court previously ruled that this statement was voluntary, but deferred a ruling about whether it had any probative value until such time as the Crown proposed to refer to it or not.

The other statement was made on May 20, 2009, to undercover officers who were placed in the holding cells with the accused after the cautioned statement had been taken in the early morning hours of that same day. Counsel have agreed that the following statement by the accused is admissible: *"Rafferty said he uses 'Oxys'. If they are 80 mgs he takes 5 per day but if they are 40 mgs he takes 11-12 per day. If they are Percocet, he takes 20-30 per day."* The Crown does not seek to admit anything else said by the accused to the undercover officers.

The first analysis dealt with statement #1 of May 15, 2009, made before the arrest. It was an audio recorded interview by D/Const. Johnson and D/Const. Darmon, which occurred just after 7 p.m. at the accused's residence. Both officers testified during this voir dire motion. Most of their evidence explained the status of their investigation at the time of the interview, and in particular, whether the accused was considered to be a suspect, a person of interest, or merely someone who may or may not possess information useful to the investigation. The accused's status is connected to the "obligation to caution the accused as to his right to remain silent."

The leading case that clarified when the caution is required is ***R v. D.(A.)*, [2003]** O.J. No. 4901 (S.C.J.) at paras. 62-75 (directly from that judgment):

> "In considering the admissibility of statements made by persons who are not under arrest and who have not been cautioned about their right to silence, two significant questions must be addressed.
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> The first is: *whom, if anyone, other than a person under arrest, should the police caution before commencing an interview?*
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> The second is: *what are the consequences of not cautioning a person who should be cautioned?*
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> I can dispose of the second question briefly, and so will address it first.
> With respect to the second question, I note that when the admissibility of a statement is considered, the fundamental concern is whether it was made voluntarily. The ***mere fact that a warning was given is not necessarily decisive in favour of voluntariness and admissibility but, on the other hand, the absence of a warning does not compel a Court to rule that the statement is not voluntary, and inadmissible***. All the surrounding circumstances must be investigated. The presence or absence of a warning will be a factor and, in many cases an important one. (See *R. v. Boudreau* (1949), 7 C.R. 427 (S.C.C.) per Kerwin J. at p. 433.)
> With respect to the first question, I begin by noting that it has long been clear at common law that the obligation to give a caution arises in circumstances short of either arrest or detention. Returning to *Boudreau* , Estey J. stated, at p.449, that:
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> > . . . when the police or others in authority have either arrested the accused or made up their minds that he is the party whom they will prosecute then before being questioned he should be cautioned or warned in a manner that will explain his position . . .
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> Recent cases reveal, however, that the goal posts have moved since 1949. A more contemporary formulation of the point at which the police should provide a caution might be inferred from the decision in *Oickle* , where Iacobucci J. stated, at p. 340, "the confessions rule applies whenever a person in authority questions a suspect." While Iacobucci J. did not say so, it is logical to conclude that the point in time from which the authorities have an obligation to satisfy the court that an accused's statement

was made voluntarily is the same point in time when the authorities would be wise to caution an accused about the right to silence. This would assist in ensuring that the accused knows of the potential jeopardy being faced, and help to ensure that what is then said is said voluntarily.

This is consistent with the views of Trafford J. in *R. v. Morrison*, [2000] O.J. No. 5733 (Ont. S.C.J.). He noted, at paragraph 56, that suspects who are neither under arrest nor detained nevertheless have a right of silence under s.7 of the *Charter*. He continued, "The interrogating officers do not have a duty to advise a person in those circumstances of the right to silence. However, the failure of the interrogating officer to caution such a person may in the circumstances of a case" have consequences.

Similarly, in *R. v. Worrall*, [2002] O.J. No. 2711(Ont. S.C.J.), Watt J. expressed the view that once a police officer has information that "would alert any reasonably competent investigator to the realistic prospect" that the death of the deceased may have been associated with an unlawful act committed by a person being questioned by that officer, the officer should tell that person that his or her answers could be used in evidence in a prosecution brought against him, even where that person is neither arrested nor detained. The "informational deficit" arising from a failure to so caution the accused is a consideration when the voluntariness of the statement is considered at trial.

In *R. v. Randall*, [2003] O.J. No. 718(Ont. S.C.J.), O'Connor J. applied the protection of the voluntariness rule to any person whom the police "*reasonably suspect may become an accused person"*, and that the failure to caution such a person is a consideration on the issue of voluntariness."

Having regard to the recent authorities, it does not appear to be controversial to conclude that when the police are questioning or wish to question a person about an offence, they should caution that person about their right to silence when that person is or becomes a suspect. The more difficult problem is defining the word "suspect". A dictionary definition of the word is unhelpful. The *Shorter Oxford English Dictionary* defines a suspect, in part, as "a suspected person", and the verb "to suspect", in part, as "[t]o imagine something evil, wrong, or undesirable in (a person or thing) on slight or no evidence." The ordinary meaning of the word, including as it does groundless speculation, cannot be the trigger for the need to provide a caution.

The Ontario Major Case Manual, which I have previously mentioned, defines a suspect as "A person an investigator reasonably believes may possess a degree of culpability in the commission of the criminal offence being investigated and there is some incriminating information linking the person to the crime." In my view, this places the bar too high, at least for the purpose under discussion.

The case law outside of the three recent cases I have mentioned also provides little guidance. In *R. v. Morrison* , at paragraph [50], Trafford J. concluded that the test was an objective one, and settled on the following. "A person is a suspect when, objectively viewed, the information collected during an investigation tends to implicate him/her in the crime."

As I have already noted, although he did not refer to the word "suspect", Watt J. expressed the view in *R. v. Worrall* that once a police officer has information that "would alert any reasonably competent investigator to the realistic prospect" that the death of the deceased may have been associated with an unlawful act committed by a person being questioned, that person should be cautioned.

In *R. v. Randall* , O'Connor J. adopted both formulations, and expressed the view that the test had both a subjective and an objective element.

...

> In the end, I do not see a great deal of difference in these various formulations. The ***trigger for an expectation that the police will give a person being questioned a caution respecting the right to silence must be less than reasonable grounds to believe that the person committed an offence, but must surely be more than speculation***, knowledge that other persons suspect that person, or even reliable information that, to the use the words of the Major Case Manual, a person's "background, relationship to the victim or the opportunity to commit the offence may warrant further inquiry".

Both officers testified that they were assigned to interview the accused for the purpose of obtaining background information so as to prepare for a polygraph interview of Terri-Lynne McClintic, which had been set up for May 19.

The Court ruled that the accused was not a suspect at the time of the interview. Consequently, the confessions rule didn't apply, and that the police had no duty to caution the accused as to his right to remain silent. The reasons why the accused was not a suspect are explained in the following quote directly from the judgment to illustrate the specific evidence, in this case, that made the accused not a suspect:

From the judgment: *"She was in custody on another matter, and a judge's order had been obtained to facilitate the interview. She was a person of interest in the investigation, because several people had said that she looked similar to the woman in the white puffy coat who had been seen walking with Tori Stafford in a College Avenue Secondary School ("CASS") surveillance video on April 8, at the time of her abduction. In this regard, McClintic was merely one of many "look alikes" who had been pointed out to the police during their investigation. However, one witness indicated that McClintic herself had said she was on the CASS video, although simply as someone who had walked through the frame during that afternoon and not as the person walking with the child. She had allegedly been in the neighbourhood buying drugs that same day.'*

Police also had information that: (i) "McClintic had cut her hair two days after the abduction, claiming that she had gotten gum in it, and had dyed her hair and coat," and (b) McClintic had "dumped clothes after eve with boyfriend Mike Reynolds".

As a result of this, an action request was issued to find Mike Reynolds. A neighbour reported that McClintic had a boyfriend "Mike" who drives a blue car, possibly a Honda with black paint on it as well, and provided the license number. Officer Darmon traced this number and found the vehicle to be registered in the name of the accused, with an address of 70 Tennyson St. in Woodstock. When he and Officer Johnson went there to interview him on the evening of May 15, they saw a blue Honda Civic, with a rear spoiler and black rims parked in the driveway.

This vehicle was of some significance, because on May 13, D/Const. Brocanier had reviewed the CASS video and noticed a 4-door, dark vehicle with a spoiler, snow tires and no rims. This was communicated to Officers Darmon and Johnson, as a possible vehicle of interest. This was only the latest in a series of possible vehicles of interest. In the weeks

prior to this, the focus had been on a small green station wagon, a green Saturn and a red pickup truck.

The CASS video was played during the course of the motion. While it does show a small dark coloured car, there appear to be very few other details that are discernable to the unaided eye to enable a match to be made with another vehicle.

That, then, is a brief synopsis of the information available to the police at the time of the interview of May 15. In my view, this information falls far short of objectively implicating the accused in the crime. Certainly McClintic was a person of interest, and quite possibly a suspect, given the reports of her similarity to the woman in the CASS video, her admission that she was in the area and on the video, and her objectively suspicious behaviour in cutting and dyeing her hair and dyeing her coat."

The key point is the type of connection that the above evidence constituted – *"mere speculation."* From the judgment: "He was reported to be McClintic's boyfriend (incorrectly identified as Mike Reynolds) which meant that he may well have important information to offer about McClintic, and indeed that is the very reason why the interview was set up in the first place. Information that he and McClintic dumped some clothing could arouse some suspicion and merit further investigation, although it is noteworthy that the officers made no enquiries about this allegation when they conducted the interview. The fact that his vehicle bore some resemblance to the grainy CASS video represented, once again, a potential lead that merited follow up investigation, as had been done with all previous vehicles of interest, but could not be said to implicate the accused in the crime. There was, at that point in time, no reason to believe that the female who abducted the child was working with an accomplice."

Interview #1 was ruled voluntary for the following reasons:

- The interview was conducted at the accused's home, and not at the police station or "some other more intimidating venue;"
- The accused invited the police into his home;
- The manner of the interviewer, Officer Johnson, was polite and friendly throughout;
- The questions were open-ended, allowing the accused to "provide whatever information he saw fit;"
- Although the officers were interested in information about McClintic, it was the accused who first brought up her name as a person he was friends with;
- The interviewer did not confront the accused with any accusatory information, such as the allegation that he and McClintic had dumped clothing, that she had dyed and cut her hair and dyed her coat, or that a car resembling his had been seen on the CASS video. Indeed, the interview could not be considered to be an "interrogation" in any sense of the word;
- The accused was clearly in control of the interview, and "decided which questions he was going to answer and which he was not. For example, he declined to provide the last names of past girlfriends, particulars as to his employment, and personal information about a person named "Joy". In each case, Officer Johnson respected his wishes and moved on without pressing for a response. Thus, the "informational deficit" that might

arise from a failure to caution the accused that he had a right to remain silent is not a factor, because the accused clearly knew that he had that right and chose to exercise it;

- The accused said nothing during the interview that implicated him in the crime under investigation;
- "At the conclusion of the interview, when Officer Johnson apologized for having arrived on "short notice", the accused laughed and said "I don't really need notice anyway". This is illustrative of his demeanour throughout, which was light, casual and frequently punctuated with laughter;"
- The interview lasted only 29 minutes.

Considering the interview as a whole, in its context, nothing that raised a reasonable doubt that the will of the accused was overborne so as to render the statement involuntary. There were no threats, promises or inducements of any kind. There was no atmosphere of oppression. Instead, there was the opposite: a congenial, friendly atmosphere where the police were looking for information that might assist them in their investigation, and the accused was cooperating in providing them with information he chose to provide, while withholding information he chose to withhold. There was nothing in the nature of police trickery during the interview.

The remaining issue was "whether the probative value of the statement exceeds its prejudicial effect. Given that the accused said very little about any of the facts that matter in this case, it cannot be said that the probative value is high. However, the statement is not devoid of relevance. The accused does, for example, minimize his relationship with McClintic, and distances himself from the use of illegal drugs. Both are assertions which the Crown believes it can prove to be a lie, and are therefore relevant to his credibility."

"There is virtually no prejudicial effect from this statement. It is entirely exculpatory, and contains nothing in the way of bad character evidence that might be prejudicial to the accused."

The court was satisfied that the probative value of this evidence outweighs its prejudicial effect. Statement #1, made on May 15, was admissible.

Statement #2: This was the post-arrest statement. It was ruled voluntary in accordance with the Oickle framework. The following are the reasons and circumstances, directly from the judgment.

"On May 19, McClintic gave a polygraph interview, where she confessed to her part in the abduction and murder of Tori Stafford, and directly implicated the accused. "He was arrested that same day at 7:42 p.m. for murder. He was told by D/Const. Miller that "it is in your best interests not to say anything at this time". He was read his rights to counsel and acknowledged that he understood those rights. En route to the police station, he was again advised, by D/Const. Wilkinson, of his right to counsel, and was advised that the police could put him in touch with a free lawyer, which offer the accused accepted. He was also given the standard caution and the secondary caution, and indicated that he understood."

"At the OCPS headquarters in Woodstock, he was again advised that he was under arrest for the murder and abduction of Tori Stafford. S/Sgt. Shelton confirmed that he had been provided with his rights to counsel, and the accused indicated that he understood those rights. A call was placed to the Legal Aid toll free line, and the accused was provided with an opportunity to speak to a lawyer in private. He did so, from 8:45 p.m. to 8:53 p.m."

"At 12:08 a.m. on May 20, S/Sgt. Loam began interviewing the accused. His portion of the interview lasted until 2:05 a.m., at which point the interview was continued by D/Sgt. Smyth and D/Const. Johnson. The interview concluded at 3:54 a.m."

"Officer Loam identified himself as being from the Behavioural Sciences Section (which was true) and that he was there to do a "threat assessment" (which was not true) to see if the accused posed a risk that he would kill other people, after the present case was all over. He made it clear that he was convinced that the accused had abducted and murdered the child as described by McClintic. He ***used the "Reid Technique" of interviewing***, whereby he sought to establish a rapport with the accused through a seemingly endless monologue, the apparent purpose of which was to convince the accused that he empathized with him and believed that there must be some mitigating explanation for what the accused had done. He adopted, to use the common terminology, the "good cop" role."

"By contrast, Officer Smyth exploded into the room clearly in the role of the "bad cop", angrily confronting the accused with hard evidence. After he left the room, Officer Johnson continued in the role of "good cop" Officer Smyth later returned, still in bad cop mode but this time accompanied by Ms. McClintic, and challenged the accused to call McClintic a liar to her face. Mr. Rafferty proceeded to do precisely that."

"What is abundantly clear from watching the videotape of the interview is that, despite the skill of the interviewers and the varied techniques utilized by them, they were **completely unsuccessful**. The accused never made any admission that directly or indirectly implicated him in the abduction and murder. He denied any involvement, consistently and repeatedly."

"The Crown, of course, bears the onus of proving beyond a reasonable doubt that the statement was voluntary. In ***R. v. Oickle***, 2000 SCC 38 (CanLII), [2000] 2 S.C.R. 3, the Supreme Court of Canada established the framework for analyzing the issue of voluntariness, and emphasized that the approach must be contextual. At para. 47, Iacobucci J., speaking for the majority, said this:

> The common law confessions rule is well-suited to protect against false confessions. While its overriding concern is with voluntariness, this concept overlaps with reliability. A confession that is not voluntary will often (though not always) be unreliable. The application of the rule will by necessity be contextual. Hard and fast rules simply cannot account for the variety of circumstances that vitiate the voluntariness of a confession, and would inevitably result in a rule that would be both over- and under-inclusive. A trial judge should therefore consider all the relevant factors when reviewing a confession.

The court listed a number of factors which should be considered by the court in determining whether a statement is voluntary. The following three are to be considered together:

i. Threats or promises;

ii. Oppression; and

iii. The operating mind requirement.

The fourth factor is the existence of "police trickery", which is a "distinct inquiry" from the other factors.

The first factor ─ threats or promises ─ represents the remnants of the classic Ibrahim test, where a statement would be inadmissible if it resulted from "fear of prejudice or hope of advantage". Justice Iacobucci stressed, however, that the mere fact that some inducement was used during the course of obtaining a statement does not automatically mean that the statement must be excluded. He said this, at para. 57:

> In summary, courts must remember that the police may often offer some kind of inducement to the suspect to obtain a confession. Few suspects will spontaneously confess to a crime. In the vast majority of cases, the police will have to somehow convince the suspect that it is in his or her best interests to confess. This becomes improper only when the inducements, whether standing alone or in combination with other factors, are strong enough to raise a reasonable doubt about whether the will of the subject has been overborne. On this point I found the following passage from *R. v. Rennie* (1984), 74 Cr. App. R. 207 (C.A.), at p. 212, particularly apt:
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> > Very few confessions are inspired solely by remorse. Often the motives of an accused are mixed and include a hope that an early admission may lead to an earlier release or a lighter sentence. If it were the law that the mere presence of such a motive, even if promoted by something said or done by a person in authority, led inexorably to the exclusion of a confession, nearly every confession would be rendered inadmissible. This is not the law. In some cases the hope may be self-generated. If so, it is irrelevant, even if it provides the dominate motive for making the confession. In such a case the confession will not have been obtained by anything said or done by a person in authority. More commonly the presence of such a hope will, in part at least, owe its origin to something said or done by such a person. There can be few prisoners who are being firmly but fairly questioned in a police station to whom it does not occur that they might be able to bring both their interrogation and their detention to an earlier end by confession.
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> The most important consideration in all cases is to look for a *quid pro quo* offer by interrogators, regardless of whether it comes in the form of a threat or a promise.

The second factor, oppression, focuses on the potential for oppressive circumstances to produce a false confession. At para. 58, Iacobucci J. said this:

> If the police create conditions distasteful enough it should be no surprise that the suspect would make a stress-compliant confession to escape those conditions. Alternatively, oppressive circumstances could overbear the suspect's will to the point that he or she comes to doubt his or her own memory, believes the relentless accusations made by the police, and gives an induced confession.

At para. 60, Iacobucci J. indicated that such factors could include:

> ... depriving the suspect of food, clothing, water, sleep or medical attention; denying access to counsel; and excessively aggressive, intimidating questioning for a prolonged period of time.

Another possible source of oppressive conditions is the police use of non-existent evidence. Justice Iacobucci made the following comments in this regard, at para. 51:

> The use of false evidence is often crucial in convincing the suspect that protestations of innocence, even if true, are futile. I do not mean to suggest in any way that, standing alone, confronting the suspect with inadmissible or even fabricated evidence is necessarily grounds for excluding a statement. However, when combined with other factors, it is certainly a relevant consideration in determining on a voir dire whether a confession was voluntary.

With respect to the third factor, the operating mind requirement, Iacobucci J. provided the following explanation, at para. 63:

> This Court recently addressed this aspect of the confessions rule in *Whittle*, *supra*, and I need not repeat that exercise here. Briefly stated, Sopinka J. explained that the operating mind requirement "does not imply a higher degree of awareness than knowledge of what the accused is saying and that he is saying it to police officers who can use it to his detriment" (p. 936). I agree, and would simply add that, like oppression, the operating mind doctrine should not be understood as a discrete inquiry completely divorced from the rest of the confessions rule. Indeed, in his reasons in *Horvath*, *supra*, at p. 408, Spence J. perceived the operating mind doctrine as but one application of the broader principle of voluntariness: statements are inadmissible if they are "not voluntary in the ordinary English sense of the word because they were induced by other circumstances such as existed in the present case".

As to the fourth factor, "police trickery",Iacobucci J. provided the following guidance, at paras. 65 and 66:

> A final consideration in determining whether a confession is voluntary or not is the police use of trickery to obtain a confession. Unlike the previous three headings, this doctrine is a distinct inquiry. While it is still related to voluntariness, its more specific objective is maintaining the integrity of the criminal justice system. Lamer J.'s concurrence in *Rothman*, *supra*, introduced this inquiry. In that case, the Court admitted a suspect's statement to an undercover police officer who had been placed in a cell with the accused. In concurring reasons, Lamer J. emphasized that reliability was not the only concern of the confessions rule; otherwise the rule would not be concerned with whether the inducement was given by a person in authority. He summarized the correct approach at p. 691:

> [A] statement before being left to the trier of fact for consideration of its probative value should be the object of a voir dire in order to determine, not whether the statement is or is not reliable, but whether the authorities have done or said anything that could have induced the accused to make a statement which was or might be untrue. It is of the utmost importance to keep in mind that the inquiry is not concerned with reliability but with the authorities' conduct as regards reliability.

Lamer J. was also quick to point out that courts should be wary not to unduly limit police discretion (at p. 697):

> [T]he investigation of crime and the detection of criminals is not a game to be governed by the Marquess of Queensbury rules. The authorities, in dealing with shrewd and often sophisticated criminals, must sometimes of necessity resort to tricks or other forms of deceit and should not through the rule be hampered in their work. What should be repressed vigorously is conduct on their part that shocks the community. [Emphasis added.]

As examples of what might "shock the community", Lamer J. suggested a police officer pretending to be a chaplain or a legal aid lawyer, or injecting truth serum into a diabetic under the pretense that it was insulin. Lamer J.'s discussion on this point was adopted by the Court in *Collins*, supra, at pp. 286-87; see also *R. v. Clot* reflex, (1982), 69 C.C.C. (2d) 349 (Que. Sup. Ct.).

The Court applied the Oickle framework to statement #2 as follows:

The first is that Officer Loam pretended to be writing a report for the court to determine what the risk level of the accused was. He wanted to determine whether this was a situation where the accused "just snapped" and committed this crime, or whether it was something that he had planned for many months and got some enjoyment out of the planning. Presumably, he would be considered to be less dangerous if the former were true rather than the latter.

Officer Loam agreed in cross-examination that there was an implicit message to the accused that there would be some advantage to getting a good report. However, on my review of the transcript, there was no "*quid pro quo*" offered in return for information that might generate a good report. He also admitted that he was wrong to have mentioned the subject of bail as he developed this theme, although after having done so he made it clear to the accused that bail was not a realistic option. I am satisfied that Officer Loam did not make any connection between this risk assessment report and the possibility of the accused obtaining bail.

The next complaint is that Officer Loam urged the accused to accept the proposition that his credibility was at its highest at this moment, and that two years from now no-one will listen to, believe or care what he says. Mr. Derstine argues that this is legally incorrect, because it has been held in *R. v. B. (K.G.)* 1993 CanLII 116 (SCC), (1993), 79 C.C.C. (3d) 257 (S.C.C.) that a statement is neither more nor less likely to be true based solely upon when it is given. While I agree with that proposition, that does not address the point Officer Loam was making. He put forward the common sense proposition that the accused's story will be more credible if given before he has heard all of the evidence and

has had the opportunity to tailor his story to the evidence. There is nothing legally incorrect about that proposition.

In a related point, Officer Loam repeatedly told the accused that "this" was the time he needed to set the record straight and give his side of the story. As pointed out by Hill J. in *R. v. Van Wyk*, [1999] O.J. No. 3515 (S.C.J.) at para. 162, this was legally incorrect. The accused could provide an account to the police at any time, or wait for an opportunity to testify at trial. Officer Loam conceded in cross-examination that this statement was incorrect, and was made in order to get a statement from the accused.

Another **theme** pursued by Officer Loam was that "there is no downside" to saying his side of the story. Taking his comments as a whole, one of the reasons for saying this was that Mr. Rafferty was going to get charged with first degree murder no matter what he said, and to that extent things could not get any worse for him. However, there is clearly a downside to confessing to a crime, because the confession can become the centerpiece in the Crown's case against the accused. Once again, Officer Loam conceded that this statement was not correct.

One of the tactics employed by Officer Loam was to present a choice to Mr. Rafferty between two public images of himself: on the one hand, a cold-blooded, remorseless killer, like Paul Bernardo; or, on the other hand, someone like Michael Briere, who watched some child pornography, "snapped", and proceeded to abduct a little girl. Briere apologized for what he did, and explained why he did it so that other children might be protected. Officer Loam presented this as a choice to be made by the accused as to which type of person he wished to see himself portrayed by the media.

In my view, **this is a "moral or spiritual" inducement**, as discussed at para. 56 of *Oikle*, where the interrogator seeks to convince the accused that he will feel better about himself if he confessed. It is not problematic because there is no *quid pro quo*. The interrogator has no control over the outcome, and therefore has nothing to offer in return for the confession. In other words, the media will do what they will do, and the public will think what they will think.

Mr. Rafferty, in fact, indicated that it did not matter what the media said about him. When Officer Smyth said "it's open season for the media, they can say whatever they want", his response was: "well it doesn't matter what they say ... nothing's gonna change". As to whether it mattered to the accused what the public perception of him was, he said to Officer Loam: "let them think what they're gonna think".

Mr. Derstine suggested that the timing and conditions of the interview might constitute oppression. He said that the length of the interview, roughly four hours in total, was not dispositive in and of itself, and I agree with that. Where the interview follows an arrest for the first degree murder of a young child, I would be surprised if were anything less than that. He does suggest, though, that it did not need to begin at midnight and run until 4 a.m., when the accused was clearly tired. In addition to fatigue, he pointed out that the accused said, on several occasions, that he was cold and he was hungry. Food, in the form of a bowl of soup, was promised to him but never delivered.

It could amount to oppression to keep an accused awake well into the middle of the night, hoping to weaken him to the point where he begins to talk. However, that is not evident on the videotape of this statement. The accused shows no visible signs of fatigue, such as repeated yawning or nodding off. In fact, he appears to become fresher and more energetic as the interview wears on.

With respect to the accused being hungry, Officer Loam enquired at the outset of the interview if he was hungry, and upon being told that he was, brought him a donut and a cup of tea. The donut remained untouched throughout the interview. Officer Loam's conclusion, which is a reasonable one, was that if the accused really was hungry, he would have eaten the food that was sitting in front of him. Because he did not do so, the officer did not give any priority to his subsequent requests for food.

The accused did indicate, before the interview, that he was cold, and was given a blanket, which he kept wrapped around his upper body during the initial portion of the interview, and then lowered throughout the latter part so that it was covering his lower body only. I interpret this as a physical sign that he was no longer feeling cold as the interview progressed. Certainly he was not shivering or showing any other physical signs of being cold.

Moving to the next point, Mr. Derstine observed that the **accused stated, in excess of twenty times through the entire interview, that he was "not saying any more"**, or various forms of that expression. He argues that it amounts to a violation of his right to silence for the interrogators to continue to question him in the face of his assertion of his right to remain silent.

When confronted with this, Officer Loam said that he continued to question the accused because the accused continued to engage him in conversation. Despite Mr. Rafferty's assertions that he did not want to say anything, he continued to talk and say things that he wished to say. At times he asked questions of the officer. Had the accused simply stopped talking altogether, Officer Loam testified that he would have stopped the interview. But so long as the accused continued to talk to him, he felt that he was entitled to continue the interview.

In my view, Officer Loam's view is entirely correct. **There is no obligation on a police officer to stop the interview merely because the accused says he does not want to say anything.** If that were the law, the police would be completely hamstrung in their ability to do their job. Of course, continuing to browbeat an accused with questions in the face of persistent silence could amount to oppression, if it succeeded in wearing the accused down to the point where his resistance was overcome and he began to speak. But that is not what happened here. The conversation continued in a normal tone following each assertion by the accused that he did not want to say anything more, and the accused continued to respond to questions that were put to him.

This situation is very much like *R. v. Roy*, [2002] O.J. No. 5541 (S.C.J.). At para. 140, Watt J. (as he then was) summed things up as follows:

> While it is fair to say that Detective Sergeant Matanovic continued to ask questions of Francis Carl Roy after Roy had asserted his right to silence, Roy also continued to speak, often about the same subjects he had said he didn't want to talk about. Detective Sergeant Matanovic often reminded Roy that it was his (Roy's) choice whether to speak or say nothing. When all was said and done, Francis Carl Roy maintained his denial of involvement in the preliminary events, abduction, sexual assault, and killing of Alison Parrott. He admitted seeing a body in the park, but denied putting it there. He told of a phantom motor vehicle leaving the scene. He told the story he wanted to tell. Nothing more. Nothing less.

Justice Watt found the statement to be voluntary. An appeal of that finding was dismissed by the Court of Appeal: [2003] O.J. No. 4252 (C.A.).

The Supreme Court of Canada, in ***R. v Singh***, [2007] S.C.J. No. 48, expressly rejected the notion that a statement made following the assertion by the accused of his right to silence is inadmissible. At para. 45, Charron J., speaking for the majority, noted "the importance of achieving a proper balance between the individual's right to choose whether to speak to the authorities and society's interest in uncovering the truth in crime investigations." She noted that the suspect "may be the most fruitful source of information", concluding:

> It must again be emphasized that such situations are highly fact-specific and trial judges must take into account all the relevant factors in determining whether or not the Crown has established that the accused's confession is voluntary. In some circumstances, the evidence will support a finding that continued questioning by the police in the face of the accused's repeated assertions of the right to silence denied the accused a meaningful choice whether to speak or to remain silent: see *Otis*. The number of times the accused asserts his or her right to silence is part of the assessment of all of the circumstances, but is not in itself determinative. The ultimate question is whether the accused exercised free will by choosing to make a statement: *Otis*, at paras. 50 and 54.

Finally, some mention was made of D/Sgt. Smyth's **angry and aggressive**, not to mention **profane**, intervention during the course of the interview, as support for the proposition that the statement was involuntary. It is clear from watching the videotape, however, that if Officer Smyth's "bad cop" routine was intended to elicit a confession from the accused, it had precisely the opposite effect. Mr. Rafferty virtually "clammed up" after this outburst, and referred to it later in his discussions with Officer Loam as a reason why he was not prepared to say anything further. Officer Smyth's aggressive attitude appeared to energize the accused, and he became much more forceful and sarcastic in his responses and his denials from that point forward. It simply cannot be argued that the will of the accused was overborne through anything said or done by Officer Smyth.

The task of the court is to take a contextual approach to the issue of voluntariness. Justice O'Connor, in ***R. v. L.F.*,** [2006] O.J. No. 658 (S.C.J.) gave a very useful description of the kinds of questions the court should ask itself as it undertakes this task. He said this, at para. 11:

> The classic confessions rule has evolved over time to its current state in *R. v. Oickle* 2000 SCC 38 (CanLII), (2000), 147 C.C.C. (3d) 321 (S.C.C.). The concern of the court focuses on the reliability of a statement made by an accused while in police custody or as the result of police conduct during questioning. The court should direct its inquiries to the effect on the particular accused before it of any threats or promises or inducements made to him, the degree of oppressive circumstances under which the questioning took place, whether the accused had an operating mind during his interrogation, whether he had the benefit of legal advice or whether the police used unfair tricks or lies to gain information or admissions. Thus, **the court should not rely on hard and fast formulae** whereby, for example, any threat or inducement must result in rejection of the statement from admission into evidence. The court should apply a contextual approach. It should explore the nature and the seriousness of a promise or threat or oppressive circumstances surrounding a confession and examine the effect that these factors had on the particular accused before the court. Was he cowed by an alleged threat or did he dismiss it? Was he worn down by a persistent, badgering or excessively aggressive line of questioning such that he finally made admissions he had previously adamantly denied? Did admissions come after a lengthy period of being deprived of food, clothing, water, or sleep or the conditions under which he was being detained or did these circumstances have little effect on his ability to give reasoned and responsive answers? Did false evidence the police said they had rattle him, bringing about an admission or perhaps an apology for having done something "if you say I did it", or did he call their bluff and reject the evidence'?

In considering the four factors mentioned in *Oikle*, the fourth can be quickly dismissed. There is no evidence of "police trickery" that would "shock the community".

The third factor can also be quickly addressed. There is no question that the accused had an operating mind throughout. He was clearly aware of what he was saying, that he was saying it to the police, and that they could use it to his detriment. Indeed, he expressly said more than once that he knew precisely what the police were up to: to get him to say something incriminating that they could use against him.

This leaves the first two factors: threats/promises and oppression. I have already noted some potentially problematic aspects to the interview. The comments of Officer Loam implied that there might be some advantage to the accused in getting a good report in the risk assessment, although no clear *quid pro quo* was offered in that regard. It was also improper to implicitly suggest to the accused that this was the only time he could give his side of the story. It was incorrect to tell the accused that there was no downside to him telling his side of the story.

For reasons already explained, I do not find the circumstances of the interview itself, including the time, duration, or condition of the accused to amount to oppression. Similarly, I do not find the continued questioning of the accused following his assertions that he did not want to say anything more to be oppressive. I am satisfied that the accused continued to talk because he chose to do so.

The features of the interview that I have found to be problematic could suffice to render a statement involuntary in another case. There are, for example, some parallels between this interview and the one conducted in *R. v. Barges*, [2005] Carswell Ont 7463 (S.C.J.), where Glithero J. ruled the statement to be inadmissible. In this case, however, I am satisfied beyond a reasonable doubt that they do not.

I have watched the videotape and have reviewed the transcript of the interview. There is, quite simply, **no point where it can be said that the will of the accused was overborne**. When the interview began, he was weepy and said very little, still reeling, no doubt, from the reality that he was now facing first degree murder charges. Officer Loam did almost all of the talking, true to the technique he was using, but when he did ask the accused for some response he got one. As the interview progressed, the accused got progressively more confident and energetic. He began to ask questions of the officer to seek information about the investigation, particularly as to what McClintic had said. He sarcastically commented on the fact that the job of the interviewer was to get him to incriminate himself. Although he raised the vague suggestion that the only reason he found himself in the position he was in was because of "bad people" from Woodstock, he declined to elaborate, and instead sought to find out whether the police had any other suspects in custody. When Officer Loam offered excuses for Officer Smyth "barking" at him, Mr. Rafferty sarcastically said "maybe then he should have a Coke and a smile and try to talk to me later".

He made it clear, over and over, that he knew he had a right to remain silent, and made it equally clear that he was not prepared to say anything about the case until he retained and consulted with his own lawyer, who would look after his interests. And he did steadfastly refuse to say anything that incriminated him in this crime, either directly or indirectly. The little that he did say that might have probative value, as discussed below, consisted of nothing more than denials of involvement, denials that he was at a certain place at a certain time, and so on.

So he was **not cowed or intimidated** by the tactics employed; he was not worn down by repeated questioning into saying something he might never otherwise have said, but instead got stronger as the interview progressed; he made no admissions because he was tired or hungry, but rather he made no admissions at all; he said nothing in the hope of obtaining a favourable risk assessment from Officer Loam, but instead dismissed Officer Loam's efforts as nothing more than a tactic to get him to say something incriminating. He was, beyond any reasonable doubt, fully in control of what he said throughout the interview. He said what he chose to say, and nothing more.

Considering all of these factors in the context of the entire interview, I am satisfied beyond a reasonable doubt that this statement was **voluntary.**

Finally, the issue must be addressed as to whether the probative value of this statement exceeds its prejudicial effect. Given that the **accused says virtually nothing of an inculpatory nature**, the probative value in proving the Crown's case is very low. However, as with the May 15 statement, it cannot be said to be non-existent. Much of its value lies in things that the accused said that the Crown believes it can prove to be a lie, such as his denial

that he was at the Home Depot in Guelph on the day in question. Although a denial has arguably less probative value than an affirmative statement, this is still potentially relevant to the credibility of the accused, and **can constitute post-offence conduct consistent with guilt**.

As to the prejudicial effect, given that the accused says very little, all of it exculpatory, there is almost no prejudice to him in admitting what he says as evidence. There is nothing that he says that might be used by the jury for an improper purpose, except the discussion about the sexual assault allegation emanating from London, which the Crown does not intend to refer to. However, given that the vast majority of the words spoken on this video come from the police, there is the potential for prejudice. The **Reid technique seems to produce a virtual monologue from the police interviewer outlining their theory of what happened, punctuated with references to evidence, sometimes real and sometimes not, that they intend to use to prove those theories**. This goes on for page after page, often with little more than the occasional grunt from the accused. It would obviously be prejudicial to expose the jury to this.

The Crown does not seek to play this statement as part of its case, and I would not have permitted them to do so for the reason just discussed. However, they may well be able to use the words spoken by the accused, as opposed to the monologue delivered by the police, during the course of the cross-examination of the accused, in a way that eliminates this prejudice. I am not in a position to rule on this in a vacuum, and therefore defer the probative/prejudice analysis until such time as it arises during the course of the trial, if indeed it ever does.

Conclusions and Practical Application:

1. The caution is not a guarantee. It doesn't guarantee exclusion or admission of a statement. The caution is one factor in the admissibility framework. Although the caution helps prove voluntariness, the caution itself doesn't automatically prove it. Similarly, the absence of a caution does not automatically prove that the statement was involuntary.
2. Who do you have to caution? The caution is connected to belief. The new case law guideline is a belief between reasonable grounds and mere suspicion – a nebulous area. Here's what it means: if you believe in your heart that you're interviewing a person connected to the crime, caution him. If you honestly don't believe a connection exists, you don't have to caution. The key is your belief about a connection to a crime.
3. Questioning is not created equal. An interrogation is "questioning intended to get a true confession" when you're reasonably certain you have the right guy. If you have no reason to believe the person is connected, the questioning is only an *exploratory interview.* The dynamics are different than a full-fledge interrogation. Here are some features that characterize an exploratory interview:
    a. Place: other than the police station. An exploratory interview can be conducted at the police station but, by using another place, it helps prove the questioning wasn't an interrogation.
    b. Consent: the suspect has to consent to an exploratory interview. He's not arrested or detained; he is free to leave at any time.
    c. Type of questions: open-ended questions help prove that the questioning was an exploratory interview, not an interrogation.

    d. Tone of the questioning: Non-confrontational, non-accusatory questioning helps prove exploratory interview.
    e. Suspect control: The fact that the suspect could exert control throughout the interview is a big factor in proving that the questioning was not an interrogation.
4. This case is a clear example that conjured "Bad Cop/Good Cop" tactics don't work. "Conjured bad cop" means aggressive questioning that's not from the heart. Acting "mean" is a joke. The suspect in this case saw through the façade, the result being exactly what should have been expected – lack of respect for the officer. Stop acting out someone you're not. "Bad cop" has to come straight from the heart to be effective. I've had partners try acting the bad-cop role and it was comical 100% of the time. **Acting doesn't build rapport. It destroys it**. Be yourself. Let your true self come out. Authenticity is the key to building true rapport.
5. Aggressive questioning is not automatically an illegal inducement. Neither is yelling. Neither is profanity. Whether any of these behaviours can be viewed as an illegal inducement depends on the suspect's response. The key factor is intimidation. Is the suspect intimidated to the point that his free will diminishes? If his free will remains intact, you're fine. Strong evidence that the suspect is not intimidated is acting like an asshole. Answering with smart-ass sarcasm, (like in this case) helps prove that the aggression, yelling, and profanity had no adverse effect or no negative impact on the suspect's free will.
6. Giving the suspect a chance to compare himself with notorious criminals or convicted pathological killers is acceptable because it constitutes a moral/spiritual inducement. No quid pro quo is involved. Nothing is being offered in exchange for a confession.
7. Never tell the suspect that this is the only chance to tell the truth because that is a lie. He can tell the truth anytime including at his trial.
8. Never tell the suspect there is "no downside" to confessing because it's a lie. Obviously.
9. The Court addressed the Reid technique of using a long monologue in an attempt to establish "good cop" rapport, noting that it failed to get a confession. Secondly, the Court cautioned that it may adversely affect the admissibility of an exculpatory statement because of the volume of police speech.
10. Ensure that the interrogation is not becoming oppressive? How do you know if it is? Signs of suspect fatigue. Is he getting weaker or stronger? If he's energized (like in this case) this is strong evidence of no oppression.
11. How many times can you ignore a suspect's invoking his right to remain silent? As long as his free will is not overborne. You have to strike the balance between "browbeating" and quitting on the interrogation. In this case, the suspect invoked the right to silence 20-plus times. But he kept talking, His free will was intact. No Charter violation.
12. Don't get frustrated with lies, alibis, and denials. Exculpatory statements have powerful evidentiary potential. If you disprove them, exculpatory statements have the potential of being relevant to the suspect's lack of credibility. And, exculpatory statements can constitute post-offence conduct consistent with guilt.

Gino Arcaro has written 12 books. He started his writing career by writing 6 best-selling academic law enforcement textbooks. Then he changed his focus and wrote 6 non-academic books to compete on a new stage. The first book is Soul of a Lifter, available in paperback and e-book. The book is about how lifting is a life-saver – lifting others and lifting weight. Dual-purpose lifting. You can review all Gino' books them by clicking "Books" at the top of the S.O.A.L. blog at www.ginoarcaro.com

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