Title: Protecting the Vulnerable: The Right to Counsel during Interrogation

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INTRODUCTION

Under consideration in this paper is the difficult question of whether Canadian law need to evolve to accommodate the particular and peculiar circumstances of mentally disordered suspects by recognizing a constitutional right to have counsel present in the course of an interrogation. Doing so would dislodge decades of jurisprudence, and would undoubtedly present considerable practical challenge to law enforcement actors. The question nonetheless is deserving of consideration given the rights at stake and the vulnerabilities of the persons concerned.

Our American neighbours have adopted an approach to this question which stands in stark contrast to Canadian law. In *Miranda v Arizona*, the U.S. Supreme Court recognized a Fifth Amendment right to have a lawyer present during the interrogation. Underlying this decision is a clear concern about the inherently coercive nature of a custodial interrogation.

What goes on in the interrogation room is very important to the administration of justice. The early advice given to a suspect in the first five minutes is the most important thing they can receive. It is important to have the right to counsel in interrogations as vulnerable individuals, may make false confessions. It is important to look at all false statements to the police, regardless if it amounts to a confession or not. As the statement may be used against the accused.

To that end, this paper will canvas Canadian case law on the right to counsel during interrogation and the right of silence. Attention will be given to certain characteristics of vulnerable population, the importance of the role of counsel, and barriers to expert psychological evidence in the court. The author will recommend a list of best practices.

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1 384 US 436 (1966) ("*Miranda*").
CANADIAN LAW APPLICABLE TO INTERROGATION

Section 10(b) of the Charter provides that everyone had the right on arrest or detention “to retain and instruct counsel without delay and to be informed of that right.” In addition, there is a recognized right to silence within the principles of fundamental justice under section 7 of the Charter. In relation to the latter, in the seminal case of R. v. Whittle, Sopinka J noted that, “[w]hile the confessions rule and the right to silence originate in the common law, as principles of fundamental justice they have acquired constitutional status under s. 7 of the Charter.”

It is apparent from the case law that section 10(b) of the Charter imposes three duties on the police: to inform the accused of the right to retain and instruct counsel without delay, to provide the accused with a reasonable opportunity to exercise the right and to not take evidence from the accused until they do so. The courts have characterized these duties as informational. There is no further duty on the part of the police to assure understanding unless if there is an indication that the accused does not understand due to apparent factors such as intoxication, linguistic difficulties, or mental disability. Otherwise, the onus is on the accused to prove that he asked for but was denied access to counsel or was denied any opportunity to even ask. The courts have recognized a further duty on police to accused person at the pre-charge stage about the

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3 Arguably, the French language equivalent seemed to provide for something more than a mere informational right, but to in fact provide for some level of assistance on the part of counsel on arrest or detention. Unfortunately, however, that argument has yet to be advanced in a Charter challenge in relation to interrogation or otherwise. It remains for enterprising counsel to consider the potential impact of this different in the appropriate case.
6 Ibid; R v Baig, [1987] 2 SCR 537 (SCC).
availability of Legal Aid and duty counsel services.\textsuperscript{7} That said, however, they stop short of imposing any duty on government to provide a free duty counsel system on arrest or detention.\textsuperscript{8}

The decision to speak with authorities must be an informed one.\textsuperscript{9} It is apparent from the following excerpt from the decision of the Supreme Court of Canada in \textit{R v Crawford} that the law recognizes the vulnerability of the accused and the power imbalance inherent in the pre-trial investigative process:

\begin{quote}
[A] clear distinction exists between the right of silence at trial and pre-trial silence. Prior to or on arrest, the accused is in a much more vulnerable position against the coercive power of the state. The environment in the police station is different from that of the courtroom where procedural rules protect the accused. In the police station, the accused may not be represented and he may be overwhelmed by the whole experience. The police possess considerably greater power than the accused and there are no disclosure obligations. The police can disclose some or misleading information or no information at all. Evidential use of silence forces the suspect to cooperate with his interrogators without a reciprocal exchange of information and without placing proper limits on the power of the police to demand cooperation. In contrast, in the courtroom, the accused is represented, he knows the case that he has to meet (due to disclosure) and there are rules regarding admissibility of evidence.\textsuperscript{10}
\end{quote}

Canadian law offers little by way of protection to suspects caught in this imbalance. The confession rule provides that an admission-against-interest made to a person in authority may be subsequently used in evidence if that admission was made voluntarily. Embedded in that is the requirement that the accused have an operating mind. The leading authority on the operating mind concept is the 1994 decision of the Supreme Court of Canada in the case of \textit{R v Whittle}.\textsuperscript{11} In that case, the Court set a low threshold. It held that an accused has an operating mind if they have the cognitive capacity to be aware of what they are saying, what is said to them and of the court process. According to the Court as long as the suspect has a "limited degree of cognitive

\textsuperscript{7} \textit{R v Brydges}, [1990] 1 SCR 190 (SCC).
\textsuperscript{8} \textit{R v Prosper}, [1994] 3 SCR 236 (SCC).
\textsuperscript{9} \textit{R v Hebert}, [1990] 2 SCR 151 (SCC) ("Hebert").
\textsuperscript{11} [1994] 2 SCR 914 (SCC) ("Whittle").
ability”, they may waive their right to counsel and they do not need to "be capable of exercising analytical reasoning in making a choice to accept the advice of counsel or in coming to a decision that best serves [their] interests.”

There is no specific consideration given in this case to the inherent suggestibility – and hence the heightened vulnerability – of individuals who suffer from conditions like fetal alcohol symptom disorder, invisible mental illness and withdrawal from intoxicants.

In the subsequent case of R v Oickle, the Supreme Court of Canada confirmed that a confession will not be admissible if there is reasonable doubt about its voluntariness. Doubt may arise in the face of evidence of inducements on the part of law enforcement and oppressive conditions more generally. Further, a confession will be considered inadmissible if it is the product of police trickery, threats or promises, and/or a lack of an operating mind. To have a statement excluded there is a high threshold to meet as one needs to demonstrate significant threats or promises, lack of an operating mind through a mental impairment or severe intoxication, or physical violence.

As in Whittle, the Court in Oickle largely ignored the personal characteristics of the individual such as susceptibility to suggestion, minor mental impairments, and low intelligence. Instead, it focussed its analysis on the police conduct and the question of whether that conduct was improper. The test, it held, is whether the police's use of trickery to obtain the confession would "shock the community"? The court set the threshold of what would shock the community at a seemingly high level. It offered examples that include “a police officer pretending to be a chaplain or a legal aid lawyer, or injecting truth serum into a diabetic under

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12 Ibid at para 33.
13 2000 SCC 38 ("Oickle").
14 Oickle, supra note 13 at paras 66-67.
the pretense that it was insulin.”¹⁵ Use of false DNA evidence, false polygraph evidence and false witness evidence, has been held by courts to not likely constitute police trickery.¹⁶ In light of these practices, the Court’s conclusion in Oickle that “false confessions are rarely the product of proper police techniques”¹⁷ is questionable.

The Supreme Court of Canada has recognized that false confessions are a cause of wrongful convictions. The Court in Oickle noted: “false confessions are particularly likely when the police interrogate particular types of suspects, including suspects who are especially vulnerable as a result of their background, special characteristics, or situation, suspects who have compliant personalities, and, in rare instances, suspects whose personalities make them prone to accept and believe police suggestions made during the course of the interrogation.”¹⁸ Therefore, there is some room to say vulnerable individuals are more likely to falsely confess.

In R v Singh¹⁹ the majority of the Court held there is no right to stop questioning by the police as a result of asserting the right to counsel under s. 10(b) of the Charter. According to the Court “the confessions rule effectively subsumes the constitutional right to silence” when an accused is questioned by police because, in that context, “the two tests are functionally equivalent.”²⁰ The view adopted by the majority expressed that if the right to silence is given an independent role it would interfere with the state interest in the investigation of the crime. The Court in Singh recognized a statement may be inadmissible under the confession rule if it is elicited by the police through repeatedly questioning in the face of repeated assertions by the

¹⁵ Oickle, supra note 13 at paras 66.
¹⁶ Steven Porter, “Memory and Suggestibility” (Lecture delivered at the Faculty of Law, University of Victoria, 17 February 2016) [unpublished].
¹⁷ Oickle, supra note 13 at para 45.
¹⁸ Oickle, supra note 13 at para 42.
¹⁹ 2007 SCC 48 (“Singh”).
²⁰ Ibid at para 39.
accused of their right to remain silence. *R v Sinclair*\(^{21}\) has since made it clear that the statement may only be inadmissible if the accused’s jeopardy changes.

*The Trilogy*

In 2010 the Supreme of Court of Canada addressed extending the right of counsel in a trilogy of cases. In *Sinclair*, the Court in a 5 to 4 majority held section 10(b) of the *Charter* does not require the presence of defence counsel throughout an interrogation. The Court affirmed that the initial *Charter* warning by police, along with a reasonable opportunity to consult counsel when the accused asks, satisfies the right to counsel. The right to consult with counsel is considered to be exhausted after the initial consultation. The Court noted that the right also requires the accused be given an opportunity to re-consult with counsel once jeopardy changes. *Sinclair* further states that there is nothing to prevent the police from allowing counsel to be present, but section 10(b) does not require it. However, the accused may make counsel’s presence a precondition to giving a statement. The Court held questioning of a suspect does not run contrary to the protection against self-incrimination because the police in performing their duty to investigate crimes have to ask questions, including those suspected of or charged with committing a crime.

The Court unanimously dismissed the appeal for *R v McCrimmon*\(^{22}\) for the same reasons as *Sinclair* for they held s. 10(b) of the *Charter* does not require the police to grant the accused’s request for the presence of counsel during an interrogation. The Court maintained there was no *Charter* violation from the failure of the police to provide the accused with an opportunity to consult with the lawyer of his choice before the interrogation began or from denying his requests to talk to a lawyer throughout the interrogation because the accused’s jeopardy did not change.

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\(^{21}\) 2010 SCC 35 ("Sinclair")
\(^{22}\) 2010 SCC 36 ("McCrimmon").
When the accused’s preferred lawyer was not immediately available, he agreed to the police’s inquiry of whether he wanted to contact duty counsel. By agreeing, he exercised his right to counsel before the interrogation began, expressed satisfaction with the consultation, and at the start of the interrogation he indicated an awareness of his rights. In these circumstances, there was no further obligation on the police to hold off the interrogation until the accused’s preferred counsel became available. Thus the Court held there was no s. 10(b) breach before or during the interrogation.

In *R v Willier,* the Court unanimously held that the accused did not suffer a violation of his s. 10(b) right to counsel. The police did not interfere with the accused’s right to consult with his counsel of choice simply by reminding him about the quick availability to duty counsel when the accused was unsuccessful in calling a particular lawyer. The accused said he wanted to wait and the police told him it was unlikely, as it was a Sunday. The Court found no coercion in the accused’s choice to call duty counsel, as they accused was not told duty counsel was his only option or that he could not wait to hear back from his lawyer. The brief length of time between the accused’s attempt to contact his lawyer and the start of interrogation did not interfere with his reasonable opportunity to contact counsel of his choice. The Court states that unless an accused indicates that the advice they received is inadequate, the police may assume that the accused is satisfied with the exercised right to counsel and can begin the interrogation process. Furthermore, the police are not required to monitor the quality of the advice given to the accused.

*Critique of the Trilogy*

The trend emerging from case law illustrates the unwillingness of the Supreme Court of Canada to extend the right to counsel during custodial interrogation. In *Sinclair* Binnie J held in dissent that “when the decisions are read together the resulting latitude allowed to the police to

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23 2010 SCC 37 ("Willier").
deal with an accused, who is to be presumed innocent, disproportionately favours the interests of the state in the investigation of crime over the rights of the individual in a free society.” Yet the majority in *Sinclair* dismissed the idea that having no ongoing right to counsel during interrogation gave *carte blanche* to the police, holding that the accused retained the protection of the confessions rule and the right to silence under section 7 of the *Charter*. The result of this troubling decision is without there being a special circumstances, the accused has no automatic right to speak with counsel during the interrogation. This places an unfair burden on the accused to exercise their right to counsel, as they may not be aware of when their jeopardy has changed. The implications for the accused in custodial interrogation is keep asking to speak to their counsel in the hope that they may acquire access to counsel.

In addressing *Miranda*, the Supreme Court of Canada in *Sinclair* said many suspects waive their rights in the states. However, this could be for a number of reasons as the accused may not what it means to waive a right, know a lawyer, and/or be embarrassed and not know what to say to a lawyer. We may need to do more than just provide the right to counsel, especially to vulnerable populations.  

The Court’s decision in *McCrimmon* is arguably unjust as it puts the responsibility on the accused to indicate they did not receive adequate legal advice. Reasonably, how will someone

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24 *Sinclair*, supra note 21 at para 76.
26 Canada is party to the *Rome Statute* of the International Criminal Court. Canada took part in the creation and negotiation of the statute. Under article 55 of the *Rome Statute*, the rights of the persons during investigation are listed, most importantly: 1(a) Shall not be compelled to incriminate himself or herself or to confess guilt and 2(d) To be questioned in the presence of counsel unless the person has voluntarily. Canada has adopted t rights that are not made available to accused persons on the national level, however we endorse it for individuals who are accused of the most heinous crimes on an international level. It is interesting to note that the United States is not a party to the *Rome Statute*, yet the right to counsel during counsel is a constitutionally protected right.
with little legal training know they have no received adequate legal advice before an interrogation has started? Especially individuals who are already at a disadvantage. Once an interrogation is over an individual will not be able to take back any statements uttered as they would have already spoken to a lawyer over the phone and extinguished their right to counsel. While police do not monitor the advice given, they would be aware of the length of time an individual spends on the phone with their counsel. Would the length of the phone call whether short or long not be an indication?

**IMPORTANCE OF THE RIGHT TO COUNSEL**

The right to counsel during interrogation in not a novel idea never before seen in the criminal justice system. As noted above, American law includes the right to have counsel present. In our system a young person has the right to consult counsel when making any statement in arrest or during custodial interrogation to a person of authority.\(^{27}\) We have already expanded the right to one group of the Canada’s vulnerable population, and then why not expand it to provide protection for others?

The significance of the legal advice on the right to silence is apparent from the following excerpt from the decision of the Supreme Court of Canada in *Hebert* written by *McLachlin J* (as she was then):

> The most important function of legal advice upon detention is to ensure that the accused understands his rights, chief among which is his right to silence. The detained suspect, potentially at a disadvantage in relation to the informed and sophisticated powers at the disposal of the state, is entitled to rectify the disadvantage by speaking to legal counsel at the outset, so that he is aware of his right not to speak to the police and obtains appropriate advice with respect to the choice he faces. Read together, ss. 7 and 10(b) confirm the right to silence in s. 7 and shed light on its nature.\(^{28}\)

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\(^{27}\) *Youth Criminal Justice Act*, SC 2002, c 1, s 146(2)(b)(iv).

\(^{28}\) *Hebert, supra* note 9 at para 176.
Even if the right to silence caution is understood by the accused, conduct by the police after may have an accused questioning their interpretation of it.\textsuperscript{29} The Court in \textit{R v Singh} has found that even if an accused repeatedly asserts their right to silence, the police can continue to repeatedly question them.\textsuperscript{30} This is problematic because it is arguable whether the choice to make a statement is truly a voluntary one at this point.

It is important to have counsel involved right from the beginning. An accused can be convicted solely on the basis of their own confession without any confirmatory evidence of its truth.\textsuperscript{31} The Supreme Court of Canada in \textit{Hebert} clearly states "[p]resumably, counsel will inform the accused of the right to remain silent."\textsuperscript{32}

The script of the section 10(b) \textit{Charter} warning by the police in British Columbia states:

\begin{quote}
You are not obliged to say anything, but anything you do say may be given in evidence.
It is my duty to inform you that you have the right to retain and instruct counsel in private, without delay. You may call any lawyer you want.
There is a 24 hour telephone service available which provides a legal aid duty lawyer who can give you legal advice in private. This advice is given without charge and the lawyer can explain he legal aid plan to you.
If you wish to contact a legal aid duty lawyer, I can provide you with a telephone number.
Do you understand?
Do you want to call a lawyer?\textsuperscript{33}
\end{quote}

The word “informed” is vague. Though the court has disagreed, the police ought to have more than an informational right. An individual needs to be advised of their right to counsel and the waiver of it in language that is modified to the mental conditions or characteristics of a particular

\textsuperscript{29} TE Moore & Karina Gagnier, “‘You can talk if you want to’: Is the Police Caution on the 'Right to Silence' Understandable?” (2007) 51 CR (6th) 233.
\textsuperscript{30} \textit{R v Singh}, 2007 SCC 48
\textsuperscript{31} \textit{R v Kelsey}, [1953] 1 SCR 220; \textit{R v Singh}, 2007 SCC 48
\textsuperscript{32} \textit{Hebert}, supra note 9 at para 73.
\textsuperscript{33} BC Ministry of Justice, \textit{Charter of Rights} (Card), March 2014.
The words “retain and instruct counsel” are dense legal jargon, which may be difficult to understand. The Court has found that a phone call on the Brydges Line is sufficient to extinguish one’s right to counsel. It is an access to justice problem as this means you can call any lawyer you want and if you wish we can put you in contact with a legal aid lawyer and they will give you advice for free. For people who do not qualify for legal aid or who cannot afford the fees of a lawyer, they may be in limbo.

A phone call is not sufficient time to understand the state of the individual, have they consumed any substances, whether they have any visible or invisible mental health issues or to even develop trust. In the phone call meeting before a client’s interrogation, counsel front loads as much information as they can in advice meaningless in its “one-size-fits-all” approach. Since currently counsel can only advise before the interrogation begins, they will err on the side of caution and strongly advise their client to remain silent. This is not helpful in fostering dialogue and negotiation between counsel and police officers as can often be seen between the Crown prosecutor and defense counsel.

There is a contest between police and counsel, where counsel advises an accused not to say anything, and police use persuasive techniques to move around counsel’s advice. It is a tug-of-war in which the accused is stuck in the middle of. We do not tolerate it if a person waived their s. 8 or s. 9 right where police could search a house without a search warrant or if a person waives right not to be arbitrarily detained, yet how can we say it is okay to waive your right to

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35 McCrimmon, supra note 22.
37 Charter, supra note XX.
remain silence?\textsuperscript{38} An accused can have counsel present in other areas of their life, but not at a
time when their liberty interest may be at stake.

**CIRCUMSTANCES OF THE INTEROGATION ROOM\textsuperscript{39}**

Although the police may believe that through their interrogation techniques they are getting
to the “truth”, these techniques leave much to be desired. Interrogations occur in an environment
that includes: relentless questioning, repetition, sleep deprivation, hunger, physical discomfort,
psychological discomfort, the accused's limited understanding of the law, and resolute insistence
on the accused's guilt.\textsuperscript{40}

An interrogation room in Victoria is divided into three categories (soft, regular, and hard). In
all three, there are usually no wheels on the chair of the person being interviewed. Clock and
windows are absent in the room, thus the accused will have no sense of time. It is used to
disorient the accused. The police interrogation is in the back room for its psychological effect. It
is hard for the “ordinary” person to not respond to questions, even worse if you have
characteristics that may make you more susceptible to tactics employed by the police.

Counsel have indicated that for a major crime case, a deliberate decision may be made to
arrest the accused on Friday afternoon as they know that the suspect will not be able to appear in
court until Monday morning. While the police cannot employ any tactic that may “shock the
community,”\textsuperscript{41} they are allowed to mislead, lie to the suspect, and minimize the moral
seriousness of a crime.

\textsuperscript{38} Robert Mulligan, “Wrongful Convictions” (Lecture delivered at the Faculty of Law, University of Victoria,
18 February 2016) [unpublished].
\textsuperscript{39} Ibid; Remarks in this section are also from observations from a visit to the Victoria Police Department
on
\textsuperscript{40} Robichaud, supra note 36.
\textsuperscript{41} Singh, supra note 19.
CHARACTERISTICS OF VULNERABLE INDIVIDUALS

Individualist characteristics are not given enough attention in the case law when it comes to admissibility of confessions. This is disconcerting as people with different vulnerabilities may be present in the interrogation room and they may be more susceptible to tactics employed by the police.

FASD

Fetal alcohol spectrum disorder ("FASD") is a permanent neurodevelopmental disorder. FASD is an umbrella term describing a range of cognitive deficits associated with disabilities that can occur in an individual whose mother drank alcohol during pregnancy. These permanent disabilities result in a range of symptoms: inability to fully appreciate the consequences of one’s actions, impulsiveness, lower IQ, poor memory and being easily influenced or taken advantage of by others. Physical facial features are produced by FASD in only some cases: short eye slits, thin upper lips and slightly recessed jaw. If someone with FASD without physical symptoms encounters the justice system, there is a danger they will held “to higher standards than those with obvious developmental delays, facial dysmorphology, and mental retardation. Recognizing that something is absent is far more difficult than recognizing something is present.” Hence, police officers will not be able to distinguish on physical characteristics to determine if they are interrogating someone with FASD, a form of a permanent brain damage, consequently the voluntariness of their statements is in question.

There is an assumption in our criminal justice system that when people commit a crime or exercise a right, they make an informed and voluntary choice and that they act in a voluntary

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43 R v Ramsay, 2012 ABCA 257 at para 15 cites Roach, supra note 34.
44 Roach, supra note 34.
45 Ibid.
46 R v Gray, 2002 BCPC 58.
This assumption is rebutted by someone with FASD, as they may not appreciate their right to counsel, their right to remain silent and/or the consequences of their statements. An abstract concept such as “waiving rights” may be interpreted as “waving right.”48 FASD individuals may have a short-term memory hence continual Charter warnings are necessary. It important to ensure that in the investigative process a person with FASD is not taken advantage of. There are a disproportionate number of people with FASD within the criminal justice system.49

FASD individuals “have a limited ability for abstract thinking; may have an inability to relate one question to another; may not understand the consequences of providing police with incriminating statements; are easily led and therefore likely to interpret words and actions as inducements or threats or be overwhelmed by questioning; and are willing to please and comply.”50 On repeated questioning, “the individual with FAS/FAE [Fetal Alcohol Syndrome/Fetal Alcohol Effects], who is often susceptible to suggestions of what might have happened, may incorporate these suggestions into his or her own retelling of the event.”51 FASD individuals may confess to get out of the interrogation room in order to go home.52 Thus not understanding the consequences of their behavior.

By extending the right to counsel to custodial interrogation, defence counsel can be present to ensure that the accused understands their rights and to ensure the police conduct does not become oppressive. Police conduct may not be oppressive if the accused has a normal

47 Roach, supra note 34.
49 Ibid at 37.
51 Conroy, supra note 12 at 22.
52 Ibid at 33.
developmental state, however it can be oppressive for someone with FASD. FASD takes away someone's "ability ... to act within the norms expected by society." It is important to focus on the mental condition of the accused as police techniques may affect FASD individuals differently.

**Intoxication**

There is not much known yet about the effect of suggestibility with individuals suffering withdrawal while in custodial interrogation. There is not first research about whether withdrawal may increase suggestibility. More research needs to be done about when it is safe to assume the effects of an intoxicant have worn off, along what the possible varied effects of withdrawal are from different intoxicants. However, the Crown will not meet their burden of proof that the statement tendered was voluntary when there is evidence presented that the police knew of the accused’s condition and took advantage of it by the possibility of deliberate withholding of medical treatment.

If an accused is intoxicated at the time of the statement, it goes to weight rather than to admissibility. A trial judge can conclude that an accused had an operating mind when making a statement to a police officer despite their disorientation as a result of alcohol consumption. An individual may not meet the requirement of having an operating mind, only when an individual is a “state of extreme intoxication” or a “very high degree of intoxication.”

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53 *R v Bohemier*, 2002 MBQB 198
55 *R v SLS*, 1999 ABCA 41
57 *R v Robyn*, 2003 179 Man R (2d) 221 (MBPC).
58 *R v Parrott*, [2001] 1 SCR 178, 150 CCC (3d) 449
59 *R v Groves*, 2013 BCCA 446
Signs of intoxication do not “assist in determining the degree of intoxication.”\(^{61}\) Even if an accused claims to have been intoxicated during an interview, the statement is still admissible as long as accused had the limited cognitive ability to know what they were saying and to understand that they may be speaking to their detriment.\(^{62}\) Intoxication will not undermine an individual’s operating mind where there is other available evidence related to their actions and behaviour to show that they had one.\(^{63}\)

*Mental Illnesses*

*Whittle* takes away the discretion of the trial judge to determine the voluntary nature of confession through considering whether the accused has an awareness of the consequences, as only a limited cognitive ability is needed for this contextual factor.\(^{64}\) An individual may be able to have the limited cognitive ability, but they may not be able to distinguish between fantasy and reality. A person who does not have a visible mental illness, they are assumed to have an operating mind. Currently, they need to let their counsel know so that they can keep a record of it. However, someone may not be open to sharing such information over a phone call with counsel they have never met. Counsel will not be able to build rapport in the same fashion over the phone as they can in person. The fitness to stand trial test is not enough to protect people who will not go to trial.

**PSYCHIATRIC EVIDENCE**

The extent of the problem of false confessions is unknown and cannot be estimated, as there is no adequate method to calculate incident rates in any country.\(^{65}\) Why someone would falsely

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\(^{61}\) *R v Maracle*, 2015 ONSC 600 at para 34.

\(^{62}\) *R v Pelletier*, 2015 NBQB 23

\(^{63}\) *R v Fagnan*, 2015 MBQB 144.


\(^{65}\) *R v Pearce*, 2014 MBCA 70 at para 54.
confess is often difficult to determine as there is an assumption that individuals will not make a statement against their own self-interest. A combination of factors are cited in by academic and legal sources such as: “(1) the vulnerability of a suspect (e.g., low intelligence, poor memory, mental illness, youth or extreme age, a significant personality trait or disorder, the fulfillment of a psychological need such as a desire for notoriety or a temporarily diminished condition for reasons such as hunger, sleep deprivation or intoxicant withdrawal); (2) the circumstances and nature of the custodial confinement and interrogation; and (3) the manner of police interrogation (e.g., use of fabricated evidence).”  

Vulnerable accuseds need to have their Charter rights extended to include the right to legal counsel during interrogation to ensure they fully understand their jeopardy.

Cognitive Psychology Studies

It is problematic to think that because we can detect lies in our daily lives, we will be able to do so in the courtroom. Research suggests that judges are no more able than the average individual to assess if someone is credible. Hence when a false confession is elicited in an interrogation, its impact can both be unpredictable and dangerous.

The potential impact of a false confession on an individual in the justice system can be tremendous, as confession evidence can bias juries, judges, lay witnesses, and forensic examiners. There are three types of false confessions: the person who says it without any coercion (voluntary), the physical or psychological stress of an interrogation leads someone to

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66 Ibid at para 56; Oickle supra note 13 paras 38-43.
confess (coerced-compliant), and a person who says they did it and truly believes they did it (coerced internalized (coerced-internalized)).

Of particular concern in this regard is recent research on the apparent ease with which false memories can be implanted through techniques often used by law enforcement officers in the course of interrogation. In a study of university student at the University of British Columbia (Okanagan), 70% of participants admitted to crimes they had not committed through the implantation of false memories through the Reid technique. While this study is not generalizable to the population, it is worrisome. It would be interesting to see if a defence counsel could have a psychologist implement a false memory using similar police techniques in order to create a strong enough evidentiary record at trial to challenge the confession.

Barriers to Expert Evidence

Expert evidence in cognitive psychology is often not admitted into court in the voir dire. It may be seen that the expert will usurp the role of the trier of fact. There are concerns that the expert’s opinion is based on research which is not before the court to test. Relying on the expert’s opinion could lead to miscarriage of justice and wrongful convictions. Experts could potentially be immune to effective cross examination is the lawyer does not have the same knowledge or an expert witness of their own. Access to justice issues are raised as experts can be quite expensive. While the court may be able to appoint an expert, this is rarely done and legal aid does not provide funds for experts in some cases.

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70 This is demonstrated in the infamous shaken baby cases.
There are barriers to getting evidence into court because of the high threshold for novel science. The Court in *R v Abbey*\(^71\) outlines the preconditions to admissibility: a) proposed opinion must relate to a subject matter that is properly the subject of expert opinion evidence; b) the witness must be qualified to give the opinion; c) the proposed opinion must not run afoul of any exclusionary rule d) the proposed opinion must be relevant to a material issue. The Court articulates that in the second stage of the analysis the judge in their gatekeeper role turns their mind to the cost-benefit analysis which takes into account factors such as the probative value, prejudicial value and reliability.\(^72\)

When it comes to novel science the Supreme Court of Canada states there is a greater reliability threshold requirement as the judge turns their mind to: (1) whether the theory or technique can be tested — a theory or technique is not science if it can be falsified, refuted or is not testable; (2) whether the theory or technique has been subject to peer review and publication — dissemination helps detection of flaws in methodology; (3) the known or potential rate of error of the theory or technique; and(4) whether the theory or technique is "generally accepted" in the relevant scientific community.\(^73\)

An example of the barriers to expert evidence of suggestibility is seen in *R v Pearce*\(^74\). The Court of Appeal upheld the trial judge’s finding that Dr. Peterson's evidence regarding how suggestive or leading interviewing techniques affect the reliability of responses did not meet the necessity and relevance criteria as he had no background reground regarding police interrogations. The Court held the jury could assess the reliability of confession through the

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\(^71\) *R v Abbey*, 2009 ONCA 624 (leave to the SCC refused) ("Abbey").
\(^72\) Ibid
\(^74\) 2014 MBCA 70.
video of the interrogation and the accused's testimony. The Court also found the expert evidence of Dr. Moore that the suggestive Reid technique risks false confessions was found not to be necessary because it concerned credibility, a matter for the jury. Both experts in *Pearce* were found to lack scientific foundation.

There needs to be a shift in focus from the narrow attention on methodology to take into consideration the experience and specialized knowledge of the expert. The Court in *Abbey* held that not all expert opinion requires scientific validity for its admissibility. Social scientists need to work with lawyers for the purposes of facilities the admission of their expert evidence on suggestibility and vulnerability in appropriate cases.

**WHAT CAN ACTORS IN THE JUSTICE SYSTEM DO IN THE MEANTIME?**

What follow is a list of recommendations and best practices to be adopted by counsel, researchers, law enforcement and the courts.

1. **Counsel:**
   a. Assess whether or not the client is able to trust you. If they don't trust you, your advice to them will be easily overcome.
   b. Create record of the state of your client when meeting or talking to your client and ascertain to the best of your abilities whether your client:
      i. Are they in a state of intoxication or under the influence of a substance?
      ii. If yes, let the police know that this is not the appropriate time for an interview with your client and that you will return the next day. The client has not extinguished their right to counsel.
      iii. Ask the clients questions to ascertain whether they have FASD as most people do not have visible physical characteristics associated with FASD.

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75 *Abbey, supra* note 70.
c. Seek to establish a consultation process with police and Crown counsel in order to develop guidelines and practice points around when counsel is in the interrogation room.

d. Ask in what situations would the police consent to the presence of counsel in the interrogation room. Seek consent. Advocate for the opportunity to attend.

e. Work with researchers for the purposes of facilities the admission of their expert evidence on suggestibility and vulnerability in appropriate cases.

2. To Researchers:

   a. Consider further research on the following:
      
      i. Whether there varying levels of susceptibility for people with low mental capacity, FASD, and different types of mental illness?

      ii. The different disorders under the umbrella term FASD and susceptibility in interrogations;

      iii. What the possible varied effects of withdrawal are from different intoxicants?

      iv. When it is safe to assume the effect(s) of an intoxicant has worn off?

   b. Training needs to occur with lawyers around what is needed in the court room.

3. To Police:

   a. Funds need to be set aside to have hours dedicated to training of police officers with vulnerable people. Police routinely encounter individuals with different mental barriers and need training in order to be able to identify when they have

   b. All police interrogations across Canada should be mandatorily recorded.
c. Police warnings should be adapted to the mental conditions of a particular individuals, so that the accused is advised of their right to counsel in plain language.
   i. FASD individuals may have a short-term memory hence continual Chartter warnings are necessary.

4. To Courts:
   a. The 10(b) Charter should be expanded to include the right to counsel during interrogation. As when the appellate courts speak, trial courts follow, and so do the police.
   b. The courts ought to sit through the whole recording of a statement, from start to finish, without breaks in order to rule on the admissibility of the statement.
   c. When looking at the voluntariness of a confession, the court needs to expand from the existence of an operating mind to include characteristics of the accused.76 As once the existence of an operating mind is found, the individual’s statement will only be exempt due to police conduct.

CONCLUSION

Today, through DNA exoneration we know that individuals confess, make incriminating statements, and plead guilty to offences they did not commit.77 The common law voluntary confession rule is not enough to rule a statement inadmissible as it assumes that the matter will be taken to trial. The statements can be used in other purposes other than a confession from pre-trial to sentencing.

77 Robichaud, supra note 36.
There should be a right to have counsel present for interrogation of individuals who present with FASD, intoxication, or other mental barriers. The case law is highly problematic for individuals who are highly susceptible to suggestibility, such as those who present with FASD, intoxication, or a low mental capacity. Under police interrogation, these individuals may not be able to fully comprehend their right to stay silent or their ability to assert their right to counsel. By having counsel present during the duration of a police interrogation, we can be assured that the statements of the accused are voluntary. Thus, helping to ensure that the vulnerable are protected in our criminal justice system. The mature, well educated, experienced may be able to handle the police interrogation, however the vulnerable almost never can. We already have an exception for youth in our criminal justice system. It will not be a leap to expand this exception to the vulnerable. Each exception can be seen as a building block that may eventually lead to right for everyone to have counsel present in custodial interrogation.