

IN THE MATTER OF an Application Under Section 696.1 of the *Criminal Code*

B E T W E E N:

HER MAJESTY THE QUEEN

RESPONDENT

- and -

ROMEO PHILLION

APPLICANT

APPENDIX 2

**THE ADMISSIBILITY OF
EXPERT EVIDENCE ON FALSE CONFESSIONS**

1. INTRODUCTION

1. The difficult task of persuading the jury that Phillion's confession was false was the reason Arthur Cogan sought out the expertise of Dr. Arboleda, a forensic psychiatrist, and Dr. Girodo, a clinical psychologist, to establish Phillion's personality disorder, and his propensity to make up stories. However, Phillion's conviction is not surprising considering what social science tells us about the power of confession evidence on juries, combined with our present knowledge that key exculpatory evidence was not disclosed to the defence.

2. Although new evidence has been obtained from the archival files leading to the conclusion that Mr.

Phillion did not murder Mr. Roy, it remains important to examine why he confessed to the crime. To this end, Dr. Gisli Gudjonsson, a forensic psychologist, and a leading expert in the psychology of false confessions, and Dr. Graham Turrall, a well-respected clinical psychologist in Toronto, were retained to evaluate Mr. Phillion, and his confessions, and to take advantage of new developments in social science which explain why people confess to crimes they did not commit.

2. THE POWER AND EFFECT OF CONFESSION EVIDENCE

3. The intrinsic power of confession evidence has long been recognized by legal scholars. In *Bigaouette v. The King*, it was described as “the highest and most satisfactory proof of guilt”. A confession is so persuasive that, according to Professor McCormick, “the introduction of confession evidence makes a trial in court superfluous.” It is counterintuitive to human nature that persons confess to crimes they have not committed, because, as *Wigmore* states:

“[t]he confession of a crime is usually as much against a man’s permanent interests as anything well can be; . . . no innocent man can be supposed ordinarily to be willing to risk life, liberty or property by a false confession. Assuming the confession as an undoubted fact, it carries a persuasion which nothing else does, because a fundamental instinct of human nature teaches each one of us its significance.”

In *Oickle*, Iacobucci J. said under the heading “The Problem of False Confessions”:

“The history of police interrogations is not without its unsavoury chapters. Physical abuse, if not routine, was certainly not unknown. Today such practices are much less common. In this context, it may seem counterintuitive that people would confess to a crime that they did not commit. And indeed, research with mock juries indicates that people find it difficult to believe that someone would confess falsely. See S.M. Kassin and L.S. Wrightsman, “Coerced Confessions, Judicial Instructions and Mock Juror Verdicts” (1981), 11 J. Applied Soc. Psychol. 489.”

Bigauoette v. The King (1926), 46 C.C.C. 311 (Que KB) at 320, quoted by Arbour, J. dissenting in *R. v. Oickle*
R. v. Oickle (2000), 147 C.C.C. (3d) 321(SCC)
McCormick on Evidence (2nd ed.) St. Paul. MN: West at 316
Wigmore, John H. *Evidence in Trials at Common Law*, vol. 3. Revised by James H. Chadbourn. Boston:
Little, Brown, 1970.

4. As acknowledged by Iacobucci, J. writing for the majority of the Supreme Court of Canada in *R. v. Oickle*, a voluminous body of psychological and sociological research on the subject of false confessions has developed in the last twenty years documenting hundreds of cases in which confessions have been proven false. Studies have measured the effect of confessions on the criminal process, and have concluded that:

- false confessions have always been one of the primary causes of miscarriages of justice;
- the extreme biasing effect of false confessions on the perceptions and decision making of jurors and other persons in the administration of justice is likely to lead to miscarriages of justice;
- confessions (apart from situations where the perpetrator is caught in the act) are the most powerful evidence of guilt the prosecution can bring against an accused;
- the presumption of guilt set in motion in jurors and the administration of justice by a suspect's confession is all but irrefutable. Because of this presumption, those who confess are treated more severely at every level of the criminal process;
- once police obtain a confession, they usually stop investigating other leads, and declare the case solved, even when the suspect's guilt is far from certain;
- police and prosecutors rarely consider the possibility that a confession may have been mistakenly

elicited or coerced, because they are reluctant to admit mistakes and are committed to the principle that innocent people do not falsely confess;

- retracted confessions are viewed with derision by prosecutors. Prosecutors tend to make confessions the dramatic centrepiece of their cases; charge the defendant with the most severe offence(s), and the largest number of counts possible, and are less likely to initiate or accept plea bargains in such cases;
- because police and prosecutors are so convinced by a suspect's guilt once a confession is obtained, they often selectively ignore exculpatory evidence;
- all players in the criminal justice system are equally affected by confession evidence. This includes judges, prosecutors, defence lawyers and police who presume that a confessing suspect is guilty and treat him/her more harshly as a result;
- defence lawyers are more likely to pressure their clients to accept a plea to a lesser charge in a confession case because they realize that a confession, even if coerced or unreliable, will likely ensure a conviction at trial;
- judges are conditioned to disbelieve claims of innocence in confession cases;
- jurors treat a confession as more probative than any other type of evidence – even more so if the confession received pretrial publicity. Jurors are so unwilling to accept that someone would falsely confess to a crime that they are likely to convict on the basis of a confession alone, even if no credible evidence confirms it and there is considerable evidence suggesting the confession is false;
- a person who falsely confesses is sentenced more harshly once convicted because of the sheer nerve he has shown in attempting to repudiate his confession.

R. v. Oickle (supra)

Bedau, Hugo Adam and Michael L. Radelet. 1987. "Miscarriages of Justice in Potentially Capital Cases." *Stanford Law Review* 40: 21-179.

Borchard, Edwin. 1932. *Convicting the Innocent*. New Haven: Yale University Press.

Leo, Richard A., and Richard J. Ofshe. 1998. "The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation." *Journal of Criminology and Criminal Law* 88: 429-96.

Kassin, Saul M., and Holly Sukel. 1997. "Coerced Confessions and the Jury An Experimental Test of the 'Harmless Error' Rule." *Law and Human Behaviour* 21: 27-46.

Wrightsmann, Lawrence, and Saul Kassin. 1993. *Confessions in the Courtroom*. Newbury Park, Calif.: Sage.

Kassin, Saul M., and Lawrence Wrightsmann. 1985 "Confession Evidence." In *The Psychology of Evidence and Trial Procedure*, edited by Saul Kassin and Lawrence Wrightsmann, 67-94. Beverly Hills, Calif.: Sage.

Leo, Richard A. 1996a. "Inside the Interrogation Room." *Journal of Criminal Law and Criminology* 86: 266-203.

Johnson, Gail. 1997. "False Confessions and Fundamental Fairness: The Need for Electronic Recording of Custodial Interrogations." *Boston University Public Interest Law Journal* 6: 719-51.

Ofshe, Richard J. and Richard A. Leo. 1997b "The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions." *Studies in Law, Politics and Society* 16: 189-251.

Givelber, Daniel. 1997. "Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?" *Rutgers University Law Review* 49: 1317-96.

Kassin, Saul M., and Katherine Neumann. 1997. "On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis." *Law and Human Behaviour* 15: 233-51.

Miller, Gerald R. and F. Joseph Boster. 1977. "Three Images of the Trial: Their Implications for Psychological Research." In *Psychology in the Legal Process*, edited by Bruce Sales, 19-38. New York: Pocket Books.

Pratkanis, Anthony and Elliot Aronson. 1991 *Age of Propaganda: The Everyday Use and Abuse of Persuasion*. New York: Freeman.

White, Welsh. 1997. "False Confessions and the Constitution: Safeguards to Prevent the Admission of Untrustworthy Confessions." *Harvard Civil Rights and Civil Liberties Law Review* 32: 105-57.

3. ADMISSIBILITY OF EXPERT EVIDENCE ON FALSE CONFESSIONS IN THE UNITED KINGDOM

5. A review of the admissibility of false confession expert evidence should begin with an examination of the United Kingdom experience. In the last twenty years there have been a legion of wrongful convictions exposed in that country that were dependent on false confessions. This experience has caused the U.K. courts to consider and reconsider the rules of admissibility of expert evidence on false confessions

on several occasions.

6. Prior to the recognition of the prevalence of false confessions, the admissibility of expert psychological evidence in English courts was governed by the decision of the Court of Appeal in *R. v. Turner*. In *Turner*, the court held that expert opinion evidence was admissible to furnish the court with scientific evidence likely to be outside the experience or knowledge of a jury, but was not admissible to show the manner in which an “ordinary” person was likely to respond to different situations or to lend credence to the testimony of a non-mentally disordered accused. The *de facto* rule developed that expert psychological evidence as to the veracity of an accused was admissible in cases if there was evidence that he was developmentally handicapped so long as the accused’s IQ fell below a threshold of 69.

R. v. Turner, (1974) 60 Cr. App. R. 80

R. v. Masih (1986) Crim L.R. 395.

7. Several celebrated cases of miscarriages of justice lead to a sea change in police and court procedures to avoid wrongful convictions in general, and wrongful convictions based on false confessions in particular. These changes in police practice and the admissibility of false confession expert evidence have, in Dr. Gudjonsson’s words “been unparalleled anywhere else in the world.” The changes began with the *Fisher Inquiry into the Maxwell Confait*¹ case, followed by the 1981 Royal Commission on Criminal

¹ In the *Maxwell Confait* case, three young men were convicted in 1972 of murder and arson on the basis of their uncorroborated confessions. Their convictions were subsequently quashed by the Court of Appeal after a public campaign was conducted on their behalf. The subsequent inquiry into the case, conducted by Sir Henry Fisher, criticized the police but concluded that the three men probably committed the crimes. Three years later, as a result of further new evidence, the Attorney General repudiated the Inquiry’s findings and declared the men innocent.

Procedure, and changes in the law mandated by the introduction of the *Police and Criminal Evidence Act 1984*.

Gudjonsson, Gisli. 2001. "False Confession." *The Psychologist*. Vol. 14, No. 11, November 2001.

8. The scope of the admissibility of expert testimony in cases of false confessions was first expanded following a Reference by the Home Secretary in the case of the *Tottenham Three*, who were convicted of murdering a police officer during the Tottenham Riots in 1985. One of the three, Engin Raghip, had confessed to the murder. He was convicted at trial. Following his trial and unsuccessful appeal, Dr. Gudjonsson assessed Mr. Raghip and found him to be illiterate, and of low intelligence. Allott, J. of the Court of Appeal said:

"Dr. Gudjonsson went on to test Raghip's suggestibility, compliance and anxiety. As to the first he said: "The memory scores are quite poor and somewhat below what would be expected from Mr. Raghip's borderline intelligence. The suggestibility scores indicate that Mr. Raghip becomes abnormally suggestible when placed under pressure." As to the remainder, Dr. Gudjonsson found Raghip's acquiescence score in the low average range consistent with his borderline intelligence assessment, his compliance score well outside the normal range proving him exceptionally compliant and his anxiety scores demonstrated a very anxious individual who could not be expected to cope with lengthy and demanding police interviews. In a test of self-assessment, Raghip demonstrated a reasonably favourable self-esteem but viewed himself as weak and submissive. Taking into account all the conclusions he had drawn, Dr. Gudjonsson stated that Raghip's intelligence was significantly impaired."

The Court of Appeal criticized its earlier decision in *Masih* as using the "wrong approach" and decided that the fresh psychological evidence should be admitted on the Reference:

"The state of the psychological evidence before us as outlined earlier in this judgment – in contradistinction to that which was available to the defence at Raghip's trial and before this court on the renewed application – is such as to demonstrate that the jury would have been assisted in assessing the mental condition of Raghip and the consequent reliability of the alleged confessions. Notwithstanding that Raghip's IQ was 74 just in the borderline range, a man chronologically aged 19 years 7 months at the date of the interview with a level function equivalent to that of a child of 9 years 9 months and the reading capacity of a child of 6 years

6 months cannot be said to be normal. It would be impossible for the layman to divine that data from Raghip's performance in the witness box, still less the abnormal suggestibility of which Dr. Gudjonsson spoke."

The court further stated that in assessing the admissibility of expert opinion evidence regarding the voluntariness of Mr. Raghip's confession:

"It will be for the trial judge to decide the issue upon the facts of the case before him unfettered by any borderline or cut off point or classification of intelligence. Posing that question and applying those criteria in the instant case we consider that the psychological evidence as deployed before us was required to assist the jury and would have been admissible at Raghip's trial."

R. v. Raghip, Silcott and Braithwaite, Unreported (1991 C.A.) at pp. 16, 22 (On-line Lexis-Nexis)
R. v. Masih (supra)

9. The test for admissibility was further refined following the decision in *R. v. Ward*. Judith Ward's confession to being an I.R.A. bomber who had caused explosions resulting in the death of 15 people was conceded to have been voluntarily given to the authorities but she claimed at her trial that its contents were false. She was convicted on all counts. Eighteen years later, following a Reference by the Home Secretary, the Court of Appeal had to decide the admissibility of fresh evidence (from Dr. Gudjonsson and others) that established that Ms. Ward was suffering from a personality disorder so severe that none of her admissions to the police could be relied on. After an analysis of the relevant caselaw, the court concluded that the law whereunder expert opinion evidence relating to the voluntariness of a confession was ruled admissible should be similarly applied where an accused sought to challenge the reliability of the statements.

The Court first said:

"In our experience, cases in which it is accepted that a confession was made voluntarily but nevertheless it is asserted that the confession was wholly untrue are rare in the extreme. This of course is such a case. No doubt because of this rarity, there is but little authority on issues

of this kind.”

The Court then reviewed the evidence of the three experts, including Dr. Gudjonsson. Glidewell, L.J. said:

“Dr. MacKeith’s evidence was supported by that of Dr. Gudjonsson, a senior lecturer in clinical psychology, who has evolved a technique for seeking to measure suggestibility and confabulation. By suggestibility Dr. Gudjonsson means the extent to which a person can be persuaded to adopt a leading question or give an answer which is affected by verbal pressure, and by confabulation he means the extent to which a memory of an event or statement can have added to it some other material which is conscious or unconscious invention. His opinion as to suggestibility was that Miss Ward was “abnormally yielding to the misleading questions. She had an abnormal tendency to accept the suggestions offered.” On the second matter he said that Miss Ward’s “tendency to confabulate fell well outside the normal range”.²

The Court then held:

“We agree with what Lawton, L.J. said in *Turner*, that *Lowery* is not an authority for the proposition that in all cases psychologists and psychiatrists can be called to prove the probability of the accused’s veracity. Nor is the decision of this Court in *Raghip* authority for such a wide-ranging proposition. But we conclude on the authorities as they now stand that the expert evidence of a psychiatrist or a psychologist may properly be admitted if it is to the effect that a defendant is suffering from a condition not properly described as a mental illness, but from a personality disorder so severe as properly to be categorized as a mental disorder ... In our view, such evidence is admissible on the issue of whether what a defendant said in a confession or admission is reliable and therefore likely to have been true.

We emphasize that the occasions on which such evidence will properly be admissible will probably be rare. This decision is not to be construed as an open invitation to every defendant who repents of having confessed and seeks to challenge the truth of his confession to seek the aid of a psychiatrist. But where evidence of the quality and force of that of Dr. MacKeith and Dr. Bowden is tendered, it is in our view properly admissible. For that reason we admitted it and have taken account of it.”

² Dr. Gudjonsson’s report on Judith Ward brings to mid several aspects of his report on Romeo Phillion.

R. v. Ward (1992) 96 Cr. App. R. 1 at 58, 61 and 66

10. In *R. v. David Stuart Mackenzie*, Mr. Mackenzie was convicted, *inter alia*, of two killings, one in 1984 and the other in 1985. He had confessed to these two, and twelve other murders, but had not been prosecuted for the latter because the Crown did not believe he had committed them. Expert evidence established that the Appellant suffered from a personality disorder and from a degree of mental handicap. The Court of Appeal then held that, even if the confession was otherwise admissible, in those cases in which:

“(1) the prosecution case depends wholly on confessions; (2) the defendant suffers from a significant degree of mental handicap; and (3) the confessions are unconvincing to a point where a jury properly directed could not properly convict upon them, then the judge, assuming he has not excluded the confessions earlier, should withdraw the case from the jury. “

Lord Taylor C.J. added:

“The confessions may be unconvincing, for example, because they lack the incriminating details to be expected of a guilty and willing confessor, or because they are inconsistent with other evidence, or because they are otherwise inherently improbable.”

R. v. David Stuart Mackenzie, (1993) 96 Cr App R 98 at 108

11. In 1998, in *R. v. Roberts*, the Court of Appeal further refined the test for the admissibility of expert evidence articulated in *Ward*. Mr. Roberts was convicted in 1983 of murders based on his confessions to the police. His case was referred in 1996 to the Court of Appeal by the Home Secretary. In his judgment, Henry, J. began by pointing out how “much has changed since this trial took place

since 1982 there has been much research and learning applied to the psychology of interrogation, and the phenomenon of false confessions. Particularly significant in that regard are the psychometric tests pioneered by Dr. Gudjonsson, which the medical profession (and latterly the

courts) today accept as capable of providing a measure of the suggestibility and/or compliance of the accused such as might lead him to make a false and unreliable confession.

With the recognition of the potential utility (and so the admissibility) of such evidence came the consequent recognition first that the court might need help in the form of expert medical or scientific evidence to identify the vulnerable, and second that for the vulnerable the requirements of the Judges' rules or PACE were necessary protections, not bureaucratic formalities."

Expert evidence from psychiatrists and psychologists on the Reference cast doubt on the reliability of Mr.

Robert's confession. Henry, J. cautioned:

"As will be seen, the evidence of each of [the experts] cast doubt on the reliability of the confession obtained in the police station in this case. *As will be seen, in our judgment all turned on this confession, and therefore the interests of justice required us to hear that evidence.* The important factor for us was the potential effect on the reliability of the confession of the personality disorder described in the medical reports, and not whether that personality disorder was "so severe as properly to be categorised as a mental disorder" (see *Ward* above). Reliability is the issue that we are concerned with, and on that issue, judges and juries when there is a personality disorder which might tend to render any confession unreliable require the assistance of expert witnesses to alert them as to dangers that they might not otherwise be aware of. In our judgment, it would have been quite wrong for us not to consider this evidence. The appellant has referred us to the unreported case of *R v Long* (a judgment given by the Court presided over by the Lord Chief Justice, Lord Taylor on 13 July 1995, a pages 9-10 of the transcript) which stressed that the importance was not on the diagnostic label attached to the condition, but whether the confession might have been unreliable. This evidence went directly to the reliability of the confession, and in those circumstances the limitation suggested in *Ward* does not apply." (emphasis added)

The experts variously described Mr. Roberts as "a dependent personality" with a passive and submissive nature", as being "highly suggestible and compliant", and as being "naive, suggestible, submissive and passive". The Court concluded:

"We have to consider whether, in the light of what is known to us now, his confessions on that night can be regarded as reliable. In our judgment this obliges the Crown to satisfy us beyond a reasonable doubt that the confession was not obtained in consequence of anything said or done which was likely in the circumstances existing at the time to render unreliable that confession. While those words are a paraphrase of part of s. 76 of PACE, they also represent the common law at the time. We can and must take into account all that is now known as to the phenomenon of false confessions, and the expert evidence we have heard as to the mental condition of the appellant, in deciding whether this conviction can now be regarded as safe.

The expert evidence is agreed as to the *excessively compliant personality* of this appellant, and

his consequent *vulnerability*. He pre-eminently needed the attendance and support of a solicitor.

There were no grounds for holding him incommunicado. While there was no obligation to make a verbatim note of all police interviews, the absence of such a note from 6.33 pm to 8.30 pm in the initial interview cannot help the Crown to discharge their burden of showing that nothing was said or done in that time to render his confession unreliable. We know the extent that the appellant moved over that period – from an attempt to say nothing to a full statement.

Nor have the Crown persuaded us that the Detective Chief Superintendent's entry at about midnight was not linked with a perceived need to obtain a confession before the solicitor would have been admitted. Nor have they persuaded us that the decisive intervention of DCI Poulton at 12.10 am, interrupting the orderly sequence of reducing a statement already made to writing, was not likely to render the subsequent confession or confessions unreliable given all that is now known of the phenomenon of false confessions, and the vulnerability of the appellant; because of his compliant personality, because of his predicament, and because of his physical and mental condition on the day of his arrest.

Had the new psychiatric and psychological evidence been before the Court, the trial judge would have been bound to exclude the evidence of the confessions, and without that evidence there was no case to go before the jury.

.....

A grave injustice was done to Mr. Roberts. We are conscious that the unreserved apology we offer him for it, and our profound regret that it should have occurred, will not give him back those lost years of life and liberty.

Medical science and the law have moved a long way since 1982. We hope that the safeguards now in place will prevent others becoming victims of similar miscarriages of justice. But the trial process is human and therefore fallible. The courts must ensure that lessons learnt are translated into more effective protections. Vigilance must be the watchword of the criminal justice system if public confidence is to be maintained." (emphasis added)

R. v. Roberts, [1998] EWCA Crim 998 at 15-16

12. The following year, in *R. v. Ashley King*, the Court of Appeal again acknowledged the significant changes in scientific knowledge concerning false confessions. Mr. King had been convicted in 1986 of the murder of a 58 year old lady who was beaten to death in her home during a robbery. His conviction rested solely on his confession to the police. More than 12 years later, the Court of Appeal granted him leave to appeal. The Court heard evidence from Ms. Tunstall, a psychologist, who assessed the appellant and found him to be abnormally suggestible and compliant. The Crown obtained an opinion from Dr. Gudjonsson,

who expressed serious reservations as to the reliability of King's confessions. There was, however, no suggestion that Mr. King suffered from any form of personality disorder. In quashing the conviction, the

Lord Chief Justice said:

“There is, however, the additional finding that the appellant was suggestible and compliant to an abnormally high degree. *That was not a matter which could, practically speaking, have been tested, assessed or quantified in 1985 to 1986. Although there had been some published work on the subject, this was a new and embryonic science.* Nor was the appellant's *suggestibility and compliance* a matter which it would have been at all easy for a jury to judge because when they saw him in the witness box he was not accepting suggestions made by the prosecution and was not setting out to do what they wanted. The jury would have had to consider whether there was a doubt about the reliability of these psychological findings, and would have involved consideration of the question whether a man might behave in one way when he found himself in a police station, tired, alone, devoid of support, and desperate to get home, and in a different way when appearing to defend a murder charge in the Crown Court with the support of leading and junior counsel and the protection of a High Court judge. In the light of that new evidence the case is still one in which the sole evidence against the appellant is his confessions. They were confessions obtained in the breach of the rules prevailing at the time and the issue turns, still, on the reliability of those confessions. There is, however, now evidence that the appellant was significantly less intelligent and more vulnerable than was understood at the time, and abnormally ready to accept what was put to him. That is exactly what the appellant claimed had happened and his suggestion, and that of Mrs. Tunstall, received some additional support from a report obtained by the Crown from Dr Gudjonsson dated November 17, 1999, in which he concluded by expressing serious reservations about the reliability of the confessions which the appellant made to the police in November, 1985.” (emphasis added)

R. v. Ashley King, [1999] E.W.J. No. 6913 (CA) at paragraphs 56-57

13. The test for admissibility was further refined in *Regina v. O'Brien, Hall and Sherwood*. In that case, the deceased had been murdered in 1987 during the course of a robbery. Mr. Hall was one of many interviewed by the police. He told them that he and his two co-accused had been the ones who had murdered the deceased. At their trial, Mr. Hall maintained that he had been a lookout, and the other two had actually robbed and killed the man. His co-accused, Mr. O'Brien and Mr. Sherwood, however, testified that, while they had been with Mr. Hall that evening, none of them had been near where the deceased was attacked and none of them had anything to do with his death. Not surprisingly, all three men

were convicted of murder. Thirteen years later, in 2000, their cases were reviewed by the Court of Appeal after a referral from the Criminal Cases Review Commission (C.C.R.C.).

R. v. O'Brien et al, [2000] E.W.J. No. 153

14. In 1996, Mr. Hall had recanted his confessions for the first time. He was subsequently assessed by four experts, including Dr. Gudjonsson, who variously diagnosed him as having an “anti-social personality disorder”; having “many of the features of a pathological liar”; having “a tendency to be suggestible and compliant”; “vulnerable”; having “an abnormally strong predisposition to criminality”; “impulsivity and acting without properly considering the consequences of his actions”; his “lying was likely to serve his psychological need of self esteem enhancement and attention seeking”; “he did not think of the consequences of making a false confession either to himself or to his two co-defendants. He did not think he would be convicted of murder and receive a life sentence”. Hall had also attempted suicide. Lord Justice Roch, in quashing the convictions of all three men, said:

“Admissible evidence from psychiatrists or psychologists is not confined to evidence of “a personality disorder so severe as properly to be characterised as a mental disorder” see *R. v. Long* unreported but decided on the 13th July 1995 by this court presided over by Lord Taylor, Chief Justice, and *R. v. Roberts* [above]. The evidence which we heard related to matters which would be outside the experience of a jury. It was evidence which was not adduced at the appellant’s trial which, in our view, it is necessary in the interests of justice that we should receive. In reaching that view, we have taken account of the four matters set out in s. 23(2) of the Criminal Appeal Act, 1968 as amended by the Criminal Appeal Act 1995. In our judgment the evidence of the four expert witnesses is capable of belief; it may afford a ground for allowing these appeals; there is a reasonable explanation for the failure to adduce the evidence in those proceedings. Moreover, one issue indeed the principal issue in this appeal is the reliability of the evidence and admissions of the Appellant Hall, and this evidence would have been admissible under the law as it now stands at the appellant’s trial.

.....

This is, in our judgment, such an exceptional case, because of the convictions of Sherwood and O’Brien. It has to be remembered that it was their case at trial that Hall’s admissions and evidence were false. They have maintained that consistently since that time. We have been informed by Mr. Elias that the prison records relating to Sherwood and O’Brien have been seen

and show that they have consistently maintained their innocence over the 11 or more years that they have been in jail. Those acting for Sherwood and O'Brien were not in a position to call the evidence which this court has heard concerning the personality traits of Hall. Any evidence by such an expert would have been based on the flimsiest foundation. In the light of the reports of Dr Anna Thomas and Dr Kellam and taking into account that the knowledge of the psychology of interrogation and the phenomenon of false confession was developing in 1987 and 1988, it is unsurprising that those acting for Hall did not seek such evidence. Finally, in 1988 it was generally thought that such evidence could only be admitted if it showed a recognised mental illness, this being the interpretation placed on *R. v. Turner* [1975] Q.B. 834. Consequently we admit this evidence and take it into account when deciding these appeals.

.....

Despite what was said..... in the case of *Ward*, the test cannot, in our judgment, be whether the abnormality fits into some recognised category, such as anti-social personality disorder. That is neither necessary nor sufficient. It is not necessary, because as *R. v. Roberts* showed, the real criterion must simply be whether the abnormal disorder might render the confession or evidence unreliable. It is not sufficient because an anti-social personality disorder does not necessarily mean that the defendant is a compulsive liar or fantasist or that his confession or evidence might be unreliable.

The members of this Court, as were all counsel who addressed us, are conscious of the need to have defined limits for the case in which expert evidence of the kind we have heard may be used. *First the abnormal disorder must not only be the type which might render a confession or evidence unreliable, there must also be a very significant deviation from the norm shown. In this case the abnormalities identified by the experts were of a very high level, Hall's test results falling within the top few percentiles of the population. Second, there should be a history pre-dating the making of the admissions or the giving of evidence which is not based solely on a history given by the subject, which points to or explains the abnormality or abnormalities.*

If such evidence is admitted, the jury must be directed that they are not obliged to accept such evidence. They should consider it if they think it right to do so, as throwing light on the personality of the defendant and bringing to their attention aspects of that personality of which they might otherwise have been unaware.” (emphasis added)

R. v. O'Brien et al (supra) at paragraphs 105, 107, 126-128

15. *Fell*, another reference to the Court of Appeal, applied the test developed in *O'Brien et al.*. Mr. Fell had been convicted in 1984 of the 1982 murders of two women who were stabbed as they were walking in a park. The case against him was based “to a very large extent” on admissions that he made to the police. His case was reviewed by the Court of Appeal in 2001. Once again, Dr. Gudjonsson’s expertise was employed. The Court said:

“Dr Gudjonsson has a *considerable reputation* in the field of Forensic Psychology, and he has a *particular expertise* in the area of confessions, having developed certain techniques for measuring “Suggestibility”, “Compliance” and the like.” (emphasis added)

Dr. Gudjonsson concluded that as a result of Mr. Fell’s personality disorder, his high level of compliance, anxiety proneness, introversion and low self-esteem, and his psychological vulnerability, his confessions were unreliable. In quashing the convictions, Waller L.J. said:

“Following the approach of Roch L.J. in O’Brien to the admissibility of this type of evidence, the questions are (a) whether the psychiatric evidence now available demonstrates something well outside the norm, and (b) whether there is something in the history of the appellant which supports the psychiatric evidence. To these questions, if they are answered in favour of the appellant, we would add, so far as the Court of Appeal is concerned, (c) whether an examination of the admissions in the light of the psychiatric evidence leads to the view that they may have been false or indeed that they were false so as to render the verdict of the jury unsafe.” (emphasis added)

R. v. Fell, [2001] E.W.J. No. 1324 (CA) at paragraphs 108-109

16. There was also substantial evidence that Mr. Fell was elsewhere at the time of the murders. Waller L.J. said:

“If the evidence we have heard had been before the jury, would the only reasonable and proper verdict of the jury have been one of guilty? We are clear that the answer to that question must be in the negative, and indeed, the longer we listened to the medical evidence, and the longer we reviewed the interviews, the clearer we became that the appellant was entitled to more than a conclusion simply that this verdict is unsafe. There are strange features of the case, not least his failure to support his own alibi, *but the alibi exists from an independent source*. But more important, since our reading of the interviews and the evidence we have heard leads us to the conclusion that the confession was a false one, that can only mean that we believe that he was innocent of these terrible murders, and he should be entitled to have us say so.” (emphasis added)

R. v. Fell (supra) at paragraph 121

17. In the recent case of *Smith*, Mr. Smith had been convicted in November, 1997 of rape and

burglary, and sentenced to eight years' imprisonment. He had confessed to both crimes to the authorities.

As the judge had told the jury at his trial:

“... you are going to have to determine ... whether you are satisfied so that you feel sure that the Prosecution has established that these are genuine confessions and not some contrived fantasies.”

The Court of Appeal quashed his convictions. Mantell L.J. said:

“Since his release from prison the Appellant has been seen by two psychologists both pre-eminent in their field. Professor Gudjonsson was instructed on behalf of the Appellant, Ms. Jackie Craissati by the Respondent. Each has interviewed the Appellant and conducted the necessary and appropriate tests. Each has analysed the series of interviews which culminated in the confessions. It is unnecessary to rehearse the detail of their reports. Each has concluded that there are serious doubts as to the reliability of those confessions.

Their evidence is plainly capable of belief and affords a ground for allowing the appeal. It would have been admissible at trial. Without investigating the explanation for the failure to adduce such evidence at trial, this Court concludes that it is necessary in the interests of justice to receive that evidence.

.....

The evidence of both psychologists is that the Appellant on testing, produced abnormally high confabulation scores, both on immediate and delayed recall. He is “abnormally suggestible and compliant on testing” (per Professor Gudjonsson).

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The question for this Court is whether, in the light of the new and uncontested evidence, this conviction can be regarded as safe. That question permits only of one answer. The conviction is not safe and must be quashed. Given that the Appellant has served his sentence, there is no public interest in ordering a re-trial.”

R. v. Smith, [2003] E.W.C.A. Crim. 927 (April 2/03)

4. THE LAW IN CANADA

Introduction

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- (a) *Regina v. Dietrich* (1970), 1 C.C.C. (2d) 49 (Ont.C.A.)
Leave to Appeal Refused 1 C.C.C. (2d) 68 (S.C.C.)³

19. In *Dietrich*, the appellant had, in 1945, shot the deceased in the head while they were in a taxi together. He then drove to the Kitchener police station where he told them the shooting had been an accident. He was believed and no charges were laid.

³ *Dietrich* was cited by Mr. Cogan at Mr. Phillion's trial as an authority in support of his submission that Mr. Reid's polygraph evidence should be admitted.
See Vol. 6, 1104/40

20. Twenty years later, Mr. Dietrich confessed to friends and to the police in a series of confessions that he had killed the deceased in the course of a robbery. He was charged with capital murder. At his first trial, he pleaded guilty to non-capital murder and the plea was accepted. On appeal, his conviction was set aside on what can be best described as a technicality, and a new trial was ordered.

21. At his second trial, Dietrich pleaded not guilty but was convicted of non-capital murder. The Ontario Court of Appeal described his defence as follows:

“By way of defence, the appellant gave evidence that his statements to his friend and the police were false, as was his plea of guilty which was moved by reason of the penalty for capital murder and the fact that he wanted to leave the local jail, and that really he had said these things to obtain attention and some notoriety or publicity. At the trial he insisted that the death of Battler had been accidental and certain psychiatrists, Doctors Barker, Johnson, Nicholson and Scott were called on his behalf. It was the theory of the defence that the accused was a psychopathic personality with a propensity for confessing to things which he did not do and that one ought not to believe his confessions were true at all. Generally, it was the view of all of the psychiatrists that by November, 1965, the accused had become a psychopathic personality and that both false confessions and the truth would be consistent with his personality.

Dr. Barker, who is the assistant superintendent of the Ontario Hospital at Penetanguishene, gave it as his opinion that the appellant could say anything he wanted to say and that he would not believe anything the appellant said unless it was verified by external facts.

In Dr. Scott’s opinion any statement made by Dietrich might be true or false.

Dr. Whittaker, a psychiatrist called by the Crown on this subject was the superintendent of the London Psychiatric Hospital who dealt with the accused during the years 1957 to 1959, and again from 1963 to 1966. He gave it as his opinion that he would be unable to place confidence in what the appellant stated unless his statements were confirmed by some external or objective evidence.”

The trial judge allowed the defence to call the psychiatrists, finding their evidence to be relevant and

admissible, but refused to allow the bases for their opinions to be led in evidence. This meant that the jury did not hear about a number of matters, some of which pertain directly to Romeo Phillion's case, including (in the words of Gale C.J.O.):

- “(a) Evidence as to statements of the accused made some years ago while under the control of hallucinatory drugs.
- (b) Opinions as to the accused's condition in 1945, long before any of the witnesses saw him.
- (c) References to other crimes or acts of violence to which the accused had falsely confessed.
- (d) Opinions as to the accused's tendency, or lack of tendency, to commit other crimes or acts of violence.
- (e) Statements made to the doctors by the accused.
- (f) References to attempts at self-mutilation or suicide.”

Gale C.J.O. explained that “all of the doctors said some of the foregoing matters had had varying parts to play in the formation of their opinion that Dietrich was unworthy of belief unless corroborated.”

R. v. Deitrich (supra) at 60-61, 63

22. The Ontario Court of Appeal upheld the trial judge's admission of the evidence. Gale C.J.O. said:

“Consequently, in my view, the learned trial judge was right in admitting in evidence the psychiatrists' opinions as the credibility of the accused man.”

He continued:

“I am also of the opinion that the judgment in *Lupien* confirms the decision of the trial Judge here to permit Dr. Scott to give in evidence his opinion regarding the aggressive tendencies or lack of such tendencies in the accused man. It does not in my opinion, however, furnish an answer to the further question of how far, if it all, an expert witness will be allowed to go in referring to factors or matters not before the Court, but upon which his opinion is based.

I turn then to that question. As to this it would seem to me that once the decision was made to admit psychiatric evidence as to the accused's credibility, it would follow that the psychiatrists should be allowed to state the factors upon which they relied in reaching their opinions. Put

shortly, if an expert is permitted to give his opinion, he ought to be permitted to give the circumstances upon which that opinion is based.”

The decision in *Dietrich*, in many ways, can be viewed as anticipating the recent developments in the United Kingdom Law.

R. v. Deitrich (supra) at 65

See also *R. v. Harley* (Unreported) April 16/85 (Ont.S.C.)

R. v. Thawer, [1996] O.J. No. 989

(b) *Regina v. Warren* (1995), 35 C.R. 4th 347 (N.W.T.S.C.)
aff'd (1997), 117 C.C.C. (3d) 418 (N.W.T.C.A.)

23. In *Warren*, the appellant was convicted of causing an explosion in an underground mine which resulted in nine deaths. The Crown's case was dependent on his confessions to the crime. At his trial, the defence sought to introduce evidence from a psychologist as to “the probability or possibility” that the appellant's confession was unreliable. The expert, Dr. Ley, had administered three tests, namely “compliance”, “suggestibility” and “confession” tests, which he testified had been developed by Dr. Gudjonsson. de Veerdt J. reviewed some literature, in particular a 1994 article from *The Lancet*, and noted Dr. Ley's “candid” acknowledgment that “he had used the tests on less than a half dozen occasions and that this is the first instance in which he has appeared as a witness in court in that connection”. He said:

“Dr. Ley, who is apparently as knowledgeable as anyone in Canada in reference to the work of Dr. Gudjonsson and its impact on the forensic scientific community, frankly acknowledged that the present status of the research in this area of psychometry is “still in the toddler stage”. No published research in the field is yet available other than that of Dr. Gudjonsson.”

de Veerdt J. spoke of a serious defect “regarding questions posed in the tests.”

R. v. Warren (supra) at 352

24. de Veerdt J. made reference to two British wrongful conviction cases. He said:

“A most disquieting feature of these tests is that there is no indication that they have ever been independently assessed to determine whether they are in fact capable of showing anything more than that those who claim to have made a false confession of some crime at some time in the past tend to score well on the tests. There is apparently nothing to show how far those claims are truthful other than the anecdotal accounts of the subjects themselves. Such cases are not to be confused with those where an individual has been the victim of forged or perjured evidence of a “confession” not in fact made to the police. *And they are likewise to be distinguished from cases such as Re Judith Ward (1992), 96 Cr.App.Rep. 1 (C.A.) and R. v. Raghip; R. v. Silcott; R. v. Braithwaite, where convictions based in part upon confessions were set aside as “unsafe” following inquiry and judicial review going beyond the evidence at trial.* ⁴

He adopted the evidence of Dr. Arboleda-Florez⁵ who was called on the *voir dire* by the Crown saying:

As I understand the evidence of Dr. Arboleda-Florez, it is as yet too early to regard the tests propounded by Dr. Gudjonsson, as outlined by Dr. Ley, as being forensically reliable for their intended purpose in this case. The tests are not as yet widely used and the results of any

⁴ The fact that the British cases included “inquiry and judicial review going beyond the evidence at trial” seems to be a reason to pay particular deference to them, rather than a reason to distinguish them. The decisions were presumably made after the utmost inquiry. As it happens, Mr. Phillion’s case could fairly be described in the same terms as those used here by de Veerdt J. to describe the British cases.

⁵ Ironically, this is the same Dr. Arboleda who testified in Mr. Phillion’s defence at his trial.

ongoing research into their validity as yet unpublished. Moreover, The Lancet article is not to be taken as other than a cautionary alert to the medical profession at large to maintain its professional objectivity when dealing with individuals accused or convicted of crime.”

R. v. Warren (supra) at 351

25. de Veerdt J. found that Dr. Ley’s evidence failed two of the tests set out in *Mohan*. It did not meet the relevance test because it did not meet the criteria of legal relevance, and its probative value was “overborne” by its prejudicial effect. It did not meet the necessity test in that it was likely to “distort” the fact-finding process.

R. v. Warren (supra) at 353

26. de Veerdt J.’s ruling was upheld on appeal by the Northwest Territories Court of Appeal in two short paragraphs of the judgment. They approved the trial judge’s position that it was “not for Dr. Ley or any other expert to say whether the confession is or is not a true one, or whether it is to be looked on as reliable or unreliable.”

R. v. Warren (C.A.) (supra) at 435-436

(c) *Regina v. L. (D.B.G.)*(1998), 17 C.R. (5th) 70 (B.C.S.C.)

27. In *Leland*, the accused confessed to undercover officers that he had committed a murder. The defence sought to call two experts (one of whom was Dr. Ley) to testify about the accused’s personality disorder, and how it might have caused him to confess falsely to the officers. Davies J. said:

“The two proposed experts suggest that the accused has a personality disorder which might classify him as a pathological liar or a compulsive liar. The accused says that this evidence is relevant and necessary because the potential existence of such personality disorder which might

affect his interaction with the role playing RCMP officers is not a matter which would be within common knowledge of the jury, and is therefore, properly the subject of scientific opinion.

This is a very troubling issue because in many respects the evidence sought to be led does go to the ultimate issue which is to be decided by the jury. That is, the credibility of a witness, in this case, the accused, and in particular, whether the Crown has proved the guilt of the accused beyond a reasonable doubt, in circumstances where the alleged confession is by far the most significant evidence.”

Davies J. reviewed the Ontario Court of Appeal decision in *Dietrich*, and the *Warren* decision, and held

as follows:

“Accordingly, I have determined that on the basis of the authorities, and notwithstanding the potential for confusion with the ultimate issue, the two experts may testify to:

1. The accused’s personality disorder to the extent it may affect his credibility (*R. v. Dietrich*).
2. His personality disorder, as it may relate to his interaction with the undercover police officers, in the roles played by them, but only to the extent that his responses might be different than what might be expected because of his personality disorder. That is, the extent to which he might not respond, in what the jury might consider to be a normal way (see *R. v. Warren*).”

He would not, however, allow the experts to testify as to whether the confessions could be considered as reliable or unreliable because

“Those are conclusions which the jury must assess, based on all of the evidence.”

R. v. Leland (supra) at 71, 74

5. HOW WOULD THE ISSUES BE DECIDED IF MR. PHILLION’S CASE WERE TO COME BEFORE THE ONTARIO COURT OF APPEAL TODAY?

28. Two perspectives are pertinent to a consideration of how the courts in the Canada today would rule on the admissibility of the type of expert evidence provided by Dr. Gudjonsson and Dr. Turrall in Mr. Phillion's case. The first is to view it from a general policy perspective; the second is to critique the particular objections of *Warren* to the admissibility of the expert evidence.

(a) The Admissibility of False Confessions
Looked at from a General Policy Perspective

29. It accords with public policy to admit evidence such as that proposed in Mr. Phillion's case for two reasons. First, and most significantly, we now know that miscarriages of justice in general and, in particular, those caused by false confessions are not aberrations. Second, there is now a body of reliable science, and experience in using that science, that makes identifying a case in which a false confession has led to a miscarriage of justice possible. That knowledge and experience has already been recognized in some of Iacobucci J.'s comments in *Oickle*. It would be unfortunate and remarkable if the research which has exposed so many miscarriages of justice in the United Kingdom continued to be banned from Canadian courtrooms.

30. In *Oickle*, Iacobucci J. made the direct link between wrongful convictions and false confessions.

He said:

“One of the overriding concerns of the criminal justice system is that the innocent must not be convicted: see, *e. g.*, *R. v. Mills*, [1999] 3 S.C.R. 668 at para 71, 139 C.C.C. (3d) 321, 180

D.L.R. (4th) 1; *R. v. Leipert*, [1997] 1 S.C.R. 281 at para. 4, 112 C.C.C. (3d) 385, 143 D.L.R. (4th) 38. Given the important role of false confessions in convicting the innocent, the confessions rule must understand why false confessions occur.”

He made passing reference to the “voluntary” type of false confession:

“Ofshe & Leo (1977) ... provide a useful taxonomy of false confessions. They suggest that there are five basic kinds: voluntary, stress-compliant, coerced-compliant, non-coerced persuaded, and coerced-persuaded. Voluntary confessions *ex hypothesi* are not the product of police interrogation. It is therefore the other four types of false confessions that are of interest.”

However, he later said:

“From this discussion, several themes emerge. *One is the need to be sensitive to the particularities of the individual suspect.* For example, White [in “False Confessions and the Constitution: Safeguards against Untrustworthy Confessions”] notes the following:

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.” (emphasis added)

R. v. Oickle (*supra*) at 342-3

31. Arbour J., in dissent, commented indirectly on the issue at hand. Speaking in the context of whether a confession was voluntary or involuntary, she said:

“Where, as here, the confession has been recorded, there can be little doubt that it was made. The only remaining issue for the jury is whether it is reliable as proof of guilt. It is because of its “conclusive effect with respect to guilt” that the criminal standard of proof beyond a reasonable doubt is applied to the question of voluntariness, whereas proof on a balance of probabilities is the relevant standard with respect to the admissibility of evidence generally. See *R. v. Egger* (1993), 82 C.C.C. (3d) 193; Sopinka, Lederman and Bryant, [“*The Law of Evidence in Canada*”]. Given the overwhelming weight that jurors are likely to attribute to confessions, as a simple matter of human intuition, and, relatedly, given the skepticism and suspicion with which they will normally approach the proposition that a person may, absent torture, falsely confess to a serious crime, it must be open to the accused to exhaustively explain any inducements or “discrediting circumstances”, Wigmore [“*Evidence in Trials at Common Law*”], which may cast doubt on its truthfulness.”

R. v. Oickle (supra) at 384

(b) A Critique of Objections to Admitting Expert Evidence on False Confessions

32. In *Warren* and, to a lesser extent, in *Leland*, a number of objections were raised regarding the admissibility of the expert evidence.

(i) *The expertise of the expert whom it is proposed give the evidence*

33. In *Warren*, de Weerd J. noted that the Crown did not challenge Dr. Ley's general qualifications as a psychologist. The Crown, however, disputed his expertise when it came to Dr. Ley's ability to assess the probability a confession was unreliable. The trial judge noted Dr. Ley's lack of experience in the field, and that this was the first occasion that he was being called as an expert in false confessions.

34. In the case of Dr. Gudjonsson, his expertise is unsurpassed in the world. He is Professor of Forensic Psychology at the Institute of Psychiatry, and Head of the Forensic Psychology Services at the Maudsley Hospital in London, England. He has over 200 scientific publications, and has been consulted in over 1000 criminal cases for police, prosecutors and defence counsel: including the seminal wrongful

conviction/ false confession cases of the Guildford Four and the Birmingham Six. He has testified in over 140 criminal cases including several prominent references to the Court of Appeal: Judith Ward, Engin Raghıp, Idris Ali, Donald Pendleton, Andrew Evans, Derek Bentley, Darren Hall, Peter Fell, Shane Smith and the UDR 4, and Patrick Kane in Northern Ireland. He has also testified in the United States, Norway, Israel, and the Hague. In December of 1999, he acted as an expert for the Council of Europe on a CPT inspection to Northern Ireland.

R. v. Silcott, Braithwaite and Raghıp, (unreported) 1991 (Lexis-Nexis)

R. v. Ward [1993] 96 Cr. App. Rep. 1

R. v. Pendleton, [2001] UKHL 66

R. v. O'Brien, Hall & Sherwood [2000] E.W.J. No. 153 (CA)

R. v. Fell, [2001] E.W.J. No. 1324

R. v. Evans, [1997] EWCA Crim 3145

R. v. Derek William Bentley, [1998] EWCA Crim 2516

R. v. Ali, [1994] E.W.J. No. 298

35. On December 17, 2002, the article "*Confessions of a Forensic Pathologist*" was published in *The Guardian* newspaper. The reporter, after referring to the television stereotype of police interrogations of suspects, said:

"The man who put a stop to all that is Gisli Gudjonsson, now professor of forensic psychology at the Institute of Psychiatry in London. Working originally with Dr James MacKeith (today a commissioner at the criminal cases review commission, which refers cases of possible wrongful convictions to the court of appeal), Gudjonsson conducted pioneering research into how people might be induced to make "confessions" to crimes they hadn't committed. He identified a range of important emotional and psychological factors, such as compliance, suggestibility and personality disorders that had been ignored through the entire history of criminal justice. This led him to produce the Gudjonsson Suggestibility Scales (GSS), which are now used throughout the world when the issue of false confessions arises.

It used to be thought that people only made false confessions if they were mentally defective or suffering from severe learning disabilities," explains Gudjonsson. "But that's not the case. Most of the vulnerabilities have nothing to do with intelligence. In the cases I looked at, the people were pretty ordinary and their intellectual functioning wasn't of much relevance. Personality characteristics are more significant."

"Confessions of a forensic psychologist", *The Guardian*, Dec. 17/02

36. Dr. Gudjonsson's publications include *The Psychology of Interrogations, Confessions and Testimony* (John Wiley & Sons, 1992), *The Gudjonsson Suggestibility Scales Manual* (Psychology Press, 1997), *Forensic Psychology: A Guide to Practice* (Routledge, 1998, co-written with Lionel Haward), and *The Causes and Cures of Criminality* (Plenum Press, co-written with Hans Eysenck). The Guardian article spoke of the impact of his 1992 book:

"However, it was his original work, and his first book on the subject, published 10 years ago, that had a seminal effect. First of all, it established false confessions as an issue that needed to be properly addressed. In the years since, there has been considerable worldwide research. "Fifteen to 20 years ago, this subject was not being written about at all," says Gudjonsson, "Now it's difficult to keep up with the literature."

The second impact has been on the legal process. For years, the courts had taken the view that expert evidence from psychologists and psychiatrists was not admissible. Matters such as how an ordinary person was likely to react to stressful situations were held to be within the everyday experience of jurors. Even where some degree of mental incapacity could be shown, the judges were not interested. An IQ of 69 or below is necessary for a formal description of "mentally handicapped". In 1986, the Lord Chief Justice, Lord Lane, held that expert evidence in the case of a defendant with an IQ of 72 was not needed.

The landmark appeal of Engin Raghip, Mark Braithwaite and Winston Silcott in December 1991, in the PC Blakelock murder case, broadened and clarified the criteria for the admissibility of psychological evidence. The Court of Appeal ruled that it was not necessary to rely on an arbitrary IQ score for defining "mentally handicapped" and, additionally, accepted the concept of suggestibility under interrogation.

Crucially, the court conceded that neither high suggestibility nor intellectual limitations could necessarily be perceived merely by an observation of the defendant's demeanour in the witness box. Gudjonsson says it was a "groundbreaking judgment for the admissibility and role of expert psychological evidence". Judges now routinely admit evidence about psychological vulnerabilities.

Gudjonsson and MacKeith won the respect of the judiciary, and by the mid-90s their evidence would frequently prove decisive in overturning convictions. Gudjonsson has testified at 10 appeals in London, and been involved altogether in 22 cases in which the convictions have been overturned on the basis of false confessions.

At the same time, policing has changed dramatically. There are now far better safeguards for suspects in police custody - of which the tape-recording of interviews is the most vital - and far more awareness by police forces of what can go wrong. "There has been a tremendous

improvement," says Gudjonsson, "both in terms of the interviewing, which is less aggressive and coercive, and in terms of the quality of information obtained.

"The Metropolitan Police came to me for advice. They've accepted that mistakes have been made, and have wanted to learn from those mistakes. I think that's quite remarkable - you don't see that in any other country"."

His most recent book, *The Psychology of Interrogations and Confessions: A Handbook*, (2003) has just been published. The unique feature of this book is that it provides a comprehensive review of the theory and practice of interrogation and confessions, the relevant English and American law, the psychological assessment relevant to disputed confessions, and leading judicial judgments. In addition, Dr. Gudjonsson has also co-authored two research reports commissioned by the *Royal Commission on Criminal Justice* and published by Her Majesty's Stationery Office (HMSO): "*Persons at Risk During Interviews in Police Custody: The Identification of Vulnerabilities*" and "*Devising and Piloting a New 'Notice to Detained Persons.'*"

10 Dr. Gudjonsson has developed the *Gudjonsson Suggestibility Scale* (GSS 1), which measures the extent to which an individual can be misled by leading questions ("yield"), and how he or she responds to interrogative pressure ("shift"). The test also measures verbal memory, and the extent to which an individual fills in gaps in his or her memory with imagined material ("confabulation"). He has also developed the *Gudjonsson Compliance Scale* (GCS-D), which measures the extent to which individuals are motivated to please others and avoid conflict and cooperation with people. In 2002, he administered these tests to Romeo Phillion.

37. The remarkable quality of Dr. Gudjonsson's research, expertise and integrity have been recognized repeatedly by the Courts in England. For example, in *Fell*, he was described by the Court of Appeal as having a "considerable reputation" as a forensic psychologist with a "particular expertise" in the area of confessions. In *Ali*, the same Court referred to him as "the well-known consultant criminal psychologist at the Bethlehem Royal and the Maudsley Hospitals." Elsewhere, in the same judgment, the Court wrote of his "expert view". In *Pendleton*, the House of Lords referred to him as "a distinguished forensic psychologist". In the case of *Brennan*, the trial judge accepted "the great expertise of Dr. Gudjonsson and his integrity as a witness". In *Warren*, Dr. Ley described him as "being by far the outstanding expert in the field."

R. v. Fell (supra) at p. 109

R. v. Pendleton (supra) at para. 22

R. v. Brennan (Unreported), N.I.C.A. (Crim.Div.) Sept. 24, 1996 (Lexis-Nexis)

R. v. Ali, [1994] *E.W.J. No. 298* (C.A.) at p. 12

R. v. Warren, (supra) at p.2

38. In the case of Dr. Turrall, he has no previous direct experience in the field of false confessions. However, his opinions are not being led as the primary proof that Mr. Phillion's confessions are unreliable – that is the role played by Dr. Gudjonsson. Rather, his opinions, as a clinical neuropsychologist and clinical psychologist, play an important supportive and research role in the assessment of Mr. Phillion's personality which Dr. Gudjonsson has used as an aide in forming his opinion about the unreliability of Mr. Phillion's confessions. Dr. Turrall, who has had professional discussions with Dr. Gudjonsson about Mr. Phillion's case, is highly qualified, a member of the Ontario Review Board, and has been consulted as an expert in

scores of cases all over Canada.

(ii) *Is expertise in assessing the reliability of false confessions a novel science?*

39. There is no doubt that de Veerdt J. considered the expertise to be a novel science. He also questioned the viability and effectiveness of the tests that had been developed by Dr. Gudjonsson, as well as challenging the absence of independent review of the assessment methods.

40. In *Roberts*, the prosecution provided their own descriptive term for the change in attitude in the United Kingdom since 1982 towards expert evidence on false confessions. Henry J. related this in the judgment:

“The recognition of this change caused Mr. Baughan QC for the Crown to refer to the position in 1982 as *the dark ages*. In that forensic over-statement there is an element of truth. This change adds significance to the question whether, in light of all that has happened between 1983 and 1998, this court should look at matters through 1982 or 1998 spectacles.” (emphasis added)

R. v. Roberts (supra) at p. 3

41. There is no reason why Canadian appellate courts need to go through a similar “dark ages” period. The Court of Appeal in *Roberts* explained how since 1982 there had been considerable research and learning applied to, *inter alia*, false confessions. Any concerns about Dr. Gudjonsson’s tests were

dispelled by Lord Justice Henry. He said:

“Particularly significant in that regard are the psychometric tests pioneered by Dr. Gudjonsson, which the medical profession (and latterly the courts) today accept as capable of providing a measure of the suggestibility and/or compliance of the accused such as might lead him to make a false and unreliable confession.”

In *Oickle*, Iacobucci referred to the “large body of literature” that had developed in the field, citing articles commencing in 1988 by American and British experts, including Dr. Gudjonsson.

R. v. Roberts (supra) at p. 2

R. v. Oickle (supra) at p. 341

42. Dr. Gudjonsson’s book, *The Psychology of Interrogations, Confessions and Testimony* (1992), references between 900 and 1,000 separate articles on the subject. The primary method of study in this field is systemic observation of real-world interrogations. This method is accepted as reliable by the community of social psychologist (Ofshe and Leo, 1997a). Observational studies are also conducted in laboratory settings. These methods are complemented by psychological and psychiatric analysis of individual subjects. Statistical analysis of correlations between documented personality traits and instances of false confessions have also been undertaken.

Ofshe, Richard J. and Richard A. Leo. 1997a. “The Decision to Confess Falsely: Rational Choice and Irrational Action” *Denver University Law Review* 979 note 2 at 981

Gudjonsson, Gisli H. 1993 “The Psychology of False Confessions: Research and Theoretical Issues” in *The Psychology of False Confessions*, Chichester, UK: John Wiley & Sons.

2. The *Gudjonsson Suggestibility Scales* (GSS), as the Court said in *Roberts*, are a valid psychometric tool. The GSS has been studied many times, and the manual provides normative data for a number of populations. Studies have found intelligence to correlate negatively with GSS suggestibility scores. Poor assertiveness, evaluative anxiety, state anxiety, and avoidance coping strategies correlate

positively with GSS scores. Most importantly, research indicated that “resisters” (subjects who persistently denied their involvement in the crimes they were charged with) scored significantly lower than “false confessors” (subjects who confessed and then subsequently retracted their confessions), and that these differences remain even once intelligence and memory capacity are taken into account.

Clare I.C.H and Gisli Gudjonsson. 1993. “Interrogative Suggestibility, Confabulation and Acquiescence in People with Mild Learning Disabilities (Mental Handicap): Implications for Reliability During Police Investigations.” *British Journal of Clinical Psychology*. 32, 295-301.

Gudjonsson, G.H. 1997. *The Gudjonsson Suggestibility Scales Manual*. East Sussex, UK: Psychology Press.

Richardson, G. and T.P. Kelly. 1995. “The Relationship Between Intelligence, Memory and Interrogative Suggestibility in Young Offenders.” *Psychology, Crime and Law*, 1, 283-290.

Gudjonsson, G.H. 1984b. “Interrogative Suggestibility: Comparison Between ‘False Confessors and ‘Deniers’ in Criminal Trials.” *Medicine, Science and the Law*, 24, 56-60.

Gudjonsson, G.H. 1991a. “Suggestibility and Compliance Among Alleged False Confessors and Resisters in Criminal Trials.” *Medicine, Science and the Law*, 31, 147-151.

Gudjonsson, G. H. 1991b. “The Effects of Intelligence and Memory on Group Differences in Suggestibility and Compliance.” *Personality and Individual Differences*, 121, 503-505.

(iii) The Mohan principles

43. The *Mohan* tests for the admissibility of expert evidence fall into four categories. Dr. Gudjonsson’s evidence meets all four criteria.

Relevance

44. In *Warren*, de Veerdt J. acknowledged the logical relevance of the proffered expertise, but not its legal relevance. He found that its introduction would be out of proportion to its reliability. This is an ironic given that, as Iacobucci J. pointed out in *Oickle*, it is counter-intuitive that someone would confess to a crime he did not commit, and most find it “difficult to believe” that anyone would do this. This is the precise type of circumstance that requires assistance from an expert. Denying the defence a primary tool in

demonstrating that a confession may be false is to invite miscarriages of justice.

45. This is not unlike the issue that arose in *Lavallee*. In that case, the Crown argued in the Supreme Court of Canada that expert evidence of a psychiatrist concerning the battered-wife syndrome ought not to have been admitted at trial. In rejecting this submission, Wilson J. said:

“The bare facts of this case, which I think are amply supported by the evidence, are that the appellant was repeatedly abused by the deceased but did not leave him (although she twice pointed a gun at him), and ultimately shot him in the back of the head as he was leaving her room. The Crown submits that these facts disclose all the information a jury needs in order to decide whether or not the appellant acted in self-defence. I have no hesitation, in rejecting the Crown’s submission.

Expert evidence on the psychological effect of battering on wives and common law partners must, it seems to me, be both relevant and necessary in the context of the present case. *How can the mental state of the appellant be appreciated without it? The average member of the public (or of the jury) can be forgiven for asking: Why would a woman put up with this kind of treatment? Why should she continue to live with such a man? How could she love a partner who beat her to the point of requiring hospitalization? We would expect the woman to pack her bags and go. Where is her self-respect? Why does she not cut loose and make a new life for herself? Such is the reaction of the average person confronted with the so-called “battered wife syndrome”. We need help to understand it and help is available from trained professionals.”* (emphasis added)

R. v. Lavallee (1990), 55 C.C.C. (3d) 97 (S.C.C.) at 112

46. There can be no real doubt today that the evidence of an expert like Dr. Gudjonsson is reliable when he says that a confession may be unreliable. The remarkable thing about the wrongful conviction false confession cases in the United Kingdom is the extent to which the Court of Appeal has, in a relatively short period of time, come to rely on the expertise of Dr. Gudjonsson and others to uncover cases of miscarriages of justice. Were it not for that reliance, many wrongful convictions would have remained undetected. And in the majority of the cases the jury had convicted on the basis of a false confession without the benefit of

and, more often than not, due to the lack of, expert evidence to assist them in their fact finding task.

Necessity

47. To be necessary, expert evidence must provide information

“...which is likely to be outside the experience and knowledge of a judge or jury.” (see Sopinka J. in *Mohan* at p. 9)

de Veerdt J. was of the view that the proffered evidence did not meet this test. It is submitted that he was wrong. Iacobucci J.’s comment in *Oickle* make the point in the strongest possible terms – confessions provide the potential for miscarriages of justice because juries cannot comprehend that confessions can be false.

The absence of any exclusionary rule

48. The third *Mohan* pre-condition, the absence of any exclusionary rule, has no bearing on the admissibility of false confession expert evidence.

A properly qualified expert

49. Dr. Gudjonsson, and Dr. Turrall who assisted him, meet any definition of properly qualified experts.

**6. SPECIAL CONSIDERATIONS DUE TO THIS
BEING AN APPLICATION FOR A REFERENCE**

50. It is well settled law that on an appeal heard by an appellate court as a result of a Reference from the Minister, the rules of admissibility can be relaxed. In *Gorecki (No. 2)*, the Ontario Court of Appeal said:

“We consider... that the correct approach in deciding whether to admit new evidence on an appeal which comes before the Court by a Reference under s. 617(b) is to deal with each case on the merits, bearing in mind, of course, the policy considerations previously mentioned, but the Court not considering itself bound by inflexible rules. In our view, the principle upon which the Court should act in a case such as this is the one enunciated by Donovan J., speaking for the Court of Criminal Appeal in *R. v. Sparkes*, [1956] 1. W.L.R. 505. After referring to *R. v. McGrath* and *R. v. Collins*, *supra*, he refused to deduce any general rule applicable to the reception of fresh evidence on a reference, and he said at p. 514:

On the one hand, it might well be undesirable to stultify such a reference at the outset by a refusal to receive evidence which was available at the trial. On the other hand it is clearly undesirable to encourage astute criminals dishonestly to by-pass the court after conviction in the hope that fresh evidence, genuine or otherwise, might be got before the court as the result of a petition to the Home Secretary, and a reference of the matter by him to the court. Each case must, therefore, be decided upon its merits, although the court will not treat itself as bound by the rule of practice if there is reason to think that to do so might lead to injustice or the appearance of injustice.

The Court, however, did look at fresh evidence: “lest the impression might arise that a review of his case had been refused for a reason which was merely procedural”. A similar view was expressed by the New Zealand Court of Appeal in *R. v. Morgan*, [1963] N.Z.L.R. 593, in relation to the reception of further evidence on a reference under s. 406 of the *Crimes Act, 1961*, which contains provisions similar to s. 61 of the *Code*.”

Reference Re Regina v. Gorecki (No. 2) (1976), 32 C.C.C. (2d) 136 (Ont.C.A.) at 146

51. *Gorecki (No. 2)* has been approved in subsequent appellate decisions. In *Gruenke*, the Manitoba Court of Appeal agreed that “in the interests of fairness, a more flexible standard than that normally applied on an application to introduce fresh evidence can be employed on a reference...” Accordingly, any doubts that the Minister may have as to the admissibility of the expert evidence on false confessions (and it is submitted there should be none) should be resolved in favour of Mr. Phillion.

Reference Re Regina v. Gorecki (No. 2) (*supra*)
R. v. Nepoose (1992), 71 C.C.C. (3d) 419 (Alta.C.A.)

R. v. Gruenke (1999), 131 C.C.C. (3d) 72 (Man.C.A.) at 87aff'd (2000), 146 C.C.C. (3d) 319 (S.C.C.)

CONCLUSION

52. The Supreme Court of Canada has made a number of pronouncements in recent years about the phenomenon of recent wrongful convictions. The most powerful pronouncement was made in the opening paragraph of the Court's judgment in *United States v. Burns*:

"Legal systems have to live with the possibility of error. The unique feature of capital punishment is that it puts beyond recall the possibility of correction. In recent years, aided by the advances in forensic sciences, including DNA testing, the courts and governments in this country and elsewhere have come to acknowledge a number of instances of wrongful conviction for murder despite all of the careful safeguards put in place for the protection of the innocent. The instances in Canada are few, but if capital punishment had been carried out, the result could have been the killing by the government of innocent individuals. The names of Marshall, Milgaard, Morin, Sophonow and Parsons signal prudence and caution in a murder case. Other countries have also experienced revelations of wrongful convictions, including states of the United States where the death penalty is still imposed and carried into execution."

False confessions are a well known source of wrongful convictions, and have been acknowledged as such by the Supreme Court of Canada in *Oickle*. There is every reason to conclude that when the opportunity arises the appellate courts will uphold the principles expressed by Iacobucci J. in *Oickle* and by the Ontario Court of Appeal in *Dietrich*, and allow juries to hear expert psychological and/or psychiatric evidence in cases in which the truthfulness of confessions can be called into question.

United States v. Burns [2001] C.R. (5th) 205 (S.C.C.) at 213
R. v. Brown (2002), 162 C.C.C. (3d) 257 (S.C.C.)
R. v. Hibbert (2002), 163 C.C.C. (3d) 129 (S.C.C.) at 147-8
R. v. Lifchus [1997] 9 C.R. (5th) 1 (S.C.C.) at 6
R. v. Biniaris [2000] 32 C.R. (5th) 1 (S.C.C.) at 17