Excluding Admissions on the Basis of Oppressive Conduct

- An Anarchist's Guide to Section 84 of the *Evidence Act 1995 (NSW)*

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This paper is written from the defence perspective. It represents something of a "cheat sheet", "skeleton outline" or summary of the essential law pertaining to section 84 of the *Evidence Act 1995 (NSW)* for those contemplating challenging the admissibility of admissions made or allegedly made by an accused person in criminal proceedings.

For further information on this area of the law practitioners would consult the usual texts and online services. In addition, this author has also written an earlier paper on the topic entitled "Oppressive Conduct and Section 84 of the *Evidence Act 1995 (NSW)* – A Case Study Concerning *R v Sumpton* [2014] NSWSC 1432". That paper can also be found on the Evidence page of www.CriminalCPD.net.au.

Section 84 of the *Evidence Act 1995 (NSW)* reads as follows:

84 Exclusion of admissions influenced by violence and certain other conduct

(1) Evidence of an admission is not admissible unless the court is satisfied that the admission, and the making of the admission, were not influenced by:
- *(a) violent, oppressive, inhuman or degrading conduct, whether towards the person who made the admission or towards another person, or*
- *(b) a threat of conduct of that kind.*

(2) Subsection (1) only applies if the party against whom evidence of the admission is adduced has raised in the proceeding an issue about whether the admission or its making were so influenced.

Definition of Oppressive Conduct

In *R v Sumpton* [2014] NSWSC 1432 Hamill J noted with approval the definition of "oppression" as found in *R v Fulling* [1987] 2 All ER 65. His Honour stated:

"[128] The Court also referred to the case of R v Fulling (supra) and the differences between s 84 and the relevant provisions in s 76 of the PACE Act. It noted that in R v Fulling (supra) the Court adopted the dictionary definition of "oppression" namely "... [the] exercise of authority or power in a burdensome, harsh or wrongful manner; unjust or cruel treatment of subjects, inferiors etc.; the imposition of unreasonable or unjust burdens "

"[129] The Crown accepts that this is an appropriate basis upon which to consider the question of whether the impugned admissions were influenced by "oppressive" conduct."

His Honour went on to accept and apply this definition at [134]:

> *"[134] Having considered the matter anxiously, I have concluded that the accused was subjected to conduct that can properly be described as "oppressive". It involved the exercise of authority and power in a burdensome, harsh and wrongful manner and imposed on the accused unreasonable and unjust burdens."*

Note that this is the ONLY decided case in NSW that provides a working definition for oppressive conduct for the purposes of section 84 of the *Evidence Act* at the time of writing (March 2021).

For a summary of the facts that were cumulatively held to amount to oppressive conduct in *Sumpton* see Hamill J at [135].

The Level of Oppressive Conduct Need Not Be Significant

In *Habib v Nationwide News Pty Limited* [2010] NSWCA 34, the Court rejected the proposition set forth by Refshauge J in *R v JF* [2009] ACTSC 104 at [37], that the level of impropriety of the conduct should be relatively significant, as it is not warranted by the language of the section. Their Honours stated at [241]:

> *"The only question s 84(1) poses is whether the "admission and [its] making" were "not influenced by" conduct of the nature identified. At best, as was said in R v Heffernan (at 22), the wide scope of the section in its application in both civil and criminal proceedings is a reason for not giving "an expansive meaning to 'oppression' in s 84"."*

What Amounts to Oppressive Conduct May Not Be Any Single Factor, But May Be An Accumulation of Factors.

Simpson J in *R v Ye Zhang* [2000] NSWSC 1099 stated at [44]:

> *"…However, s 84 does not require the isolation of a single reason, or a single event or incident or instance of conduct provoking the confession; there may be a number of factors working together that, combined, cause the admission to be made..."*

This statement was later approved of by the NSWCCA in *Higgins v R* [2007] NSWCCA 56 - see Hoeben J at [26] (Sully and Bell JJ concurring). See also Rothman J in *R v Spiteri-Ahern; R v Barber; R v Zraika (No 10)* [2017] NSWSC 1380 at [38].

Oppressive Conduct Need Not Be The Only, Nor The Dominant Factor When The Issue Is Raised

In *Habib v Nationwide News Pty Ltd* [2010] NSWCA 34, 76 NSWLR 299 the Court in a joint judgment (Hodgson JA, Tobias JA and McColl JA) at [238] cited with approval the remarks of Simpson J in *R v Ye Zhang* [2000] NSWSC 1099 at [44]:

> *"If oppressive conduct on the part of police is one of those factors (or, more accurately, if the Crown has failed to negative such conduct as one of those factors) then the evidence is inadmissible."*

In *R v Spiteri-Ahern; R v Barber; R v Zraika (No 10)* [2017] NSWSC 1380 ('*Spiteri-Ahern*') Rothman J stated at [38]:

> *"'Influence" is a broad term, which requires that the impugned is a cause for making (or the content of) the admission. The conduct needs to be a factor that is not wholly ephemeral, but need not be the major factor and other factors may also be causative."*

Oppressive Conduct Need Not be That of a Person Intending to Obtain the Admission, Nor Conduct of Authority Figures

The legislation does not only target the conduct of an investigating officer or people in authority. Rather, it includes any conduct that may influence the making or content of an admission. As Rothman J, in *R v Spiteri-Ahern; R v Barber; R v Zraika (No 10)* [2017] NSWSC 1380 noted at [20]-[22]:

> *"[20] The provisions of s 84 of the Act expressly* ***focus upon the state of mind of the person making the admission****. The verb used is in the passive voice and relates to the effect on the admission, not the purpose of the conduct to which paragraph (a) and (b) refer.*
>
> *[21] Further, s 84 of the Act does not refer or require a particular person or class of persons to influence the admission or its making. The improper influence to which paragraphs (a) and (b) refer* ***is not limited to people in authority****.*
>
> *[22]* ***Nor is the reach of s 84 of the Act limited to people who are questioning for the purpose of obtaining an admission****: R v Douglas [2000] NSWCCA 275, per Mason P, Sully and Sperling JJ agreeing."*

His Honour concluded, at [27], that:

> *"The provisions of s 84 of the Act are* ***not*** *limited to admissions made (or the content of admissions obtained) by the improper conduct of a person seeking to obtain an admission."*

The proposition that the conduct is not limited to that of the person intending to obtain the admission was also seen in *R v HG; R v WE (No 1)* [2019] NSWSC 473. The Court excluded evidence of admission in an interview that took place in an immigration detention facility in Egypt with two people, one of whom is a representative from the Australian Embassy in Cairo. WE had been subjected to improper conduct at the hands of the Egyptian authorities and was thus fearful of them. Although Egyptian authorities were not present during the interview, they remained immediately outside the room. Given his fear of the Egyptian authorities, albeit they were not actually present in the room, the Court, at [122], was satisfied that the making of the admissions was influenced by the conduct and excluded them.

Oppressive Conduct is Not Limited to Physical Acts and May Include Psychological or Emotional Pressure

Hoeben J in *Higgins v R* [2007] NSWCCA 56 stated at [26]:

> *"I also accept that there is no definition of "oppressive" in the Act and that the concept should not be limited to physical or threatened physical conduct but can encompass mental and psychological pressure."*

The Issue of Oppressive Conduct Must Be Raised by the Defence

A reading of subsection (2) of section 84 indicates that the issue of oppressive conduct must be raised in the evidence by the accused.

The accused DOES NOT have to positively prove the facts relied upon in the evidence. For support from the decided cases see the passage from *R v Ye Zhang* [2009] NSWSC 1099 at [44] immediately below, as affirmed by the NSW Court of Appeal in *Habib v Nationwide News Pty Ltd* [2010] NSWCA 34, 76 NSWLR 299 at [229].

Once Raised the Issue Must Be Negatived By the Prosecution on the Balance of Probabilities

In *R v Ye Zhang* [2000] NSWSC 1099 Simpson J stated at [44]:

> *"[44]….If oppressive conduct on the part of police is one of those factors (or, more accurately, if the Crown has failed to negative such conduct as one of those factors) then the evidence is inadmissible."*

This passage was approved of by the NSW Court of Appeal in *Habib v Nationwide News Pty Ltd* [2010] NSWCA 34, 76 NSWLR 299 at [229].

The need for the prosecution to prove that the evidence was not so obtained on the balance of probabilities arises as a result of section 142 of the *Evidence Act 1995 (NSW)* which states:

> *142 Admissibility of evidence: standard of proof*

(1) Except as otherwise provided by this Act, in any proceeding the court is to find that the facts necessary for deciding:

(a) a question whether evidence should be admitted or not admitted, whether in the exercise of a discretion or not, or

(b) any other question arising under this Act,

have been proved if it is satisfied that they have been proved on the balance of probabilities.

(2) In determining whether it is so satisfied, the matters that the court must take into account include:

(a) the importance of the evidence in the proceeding, and

(b) the gravity of the matters alleged in relation to the question.

If Oppressive Conduct is Not Negatived, There is No Discretion to Allow the Evidence

Section 84 does not provide a discretion to allow the evidence.

Should there be a need for authority in support of this proposition see Simpson J in *R v Ye Zhang* [2000] NSWSC 1099 at [44]. See also Hamill J in *R v Sumpton* [2014] NSWSC 1432 at [140]-[141] where his Honour stated:

> *"[140] I am not satisfied, as a matter of fact, that the confession was not influenced by oppressive conduct which is to say conduct whereby the accused was subject to the exercise of police powers that was wrongful, burdensome, unjust and harsh."*
>
> *"[141] Having reached that conclusion, there is no discretion. The evidence must be excluded."*

Any "Threat" – Is the ACTUAL threat NOT the PERCEIVED threat

The contention that the reference to 'threat' in s84(1)(b) includes perceived threat, due to a deluded mind, was rejected by the Supreme Court in *R v Tarantino (No 6)* [2019] NSWSC 1174 at [186]. His Honour Beech-Jones J stated that the "*ordinary meaning of the word 'threat' is an* ***actual threat and not a perceived threat*** *that is only the product of a person's mental processes*". His Honour concluded that the terms of s84(1)(a) supports this and the legislative history of s84 confirms this construction.

Causation – Voluntariness Is NOT the Test

In *Habib v Nationwide News Pty Ltd* [2010] NSWCA 34, 76 NSWLR 299 the Court (Hodgson JA, Tobias JA and McColl JA) stated at [237]

> *"[237] As we have said, under the common law voluntariness rule, the question was whether the will of the confessionalist was overborne by the allegedly improper conduct. This language is still used in some judgments. In Higgins v R [2007] NSWCCA 56 (at [28]) Hoeben J (Sully and Bell JJ agreeing) referred to the lack of evidence that "[the maker's] will was overborne in any way". However, as Adams J observed in R v Ul-Haque [2007] NSWSC 1251; (2007) 177 A Crim R 348 (at [120]), that is not the relevant test under s 84."*

Causation – "Not Influenced By" IS the Test

In *R v Ul-Haque* [2007] NSWSC 1251, 177 A Crim R 348 Adams J at [120] stated:

> *"[120] It was submitted that I should infer from the fact that there were occasions during the interviews when the accused did not accept a suggestion from the officers that he was therefore not really compliant and his will had not been overborne by what had earlier occurred. **Firstly, this is not the relevant test under s84 of the Evidence Act 1995. The question is whether the prosecution can show that the accused was not influenced by the oppressive conduct."***

This passage was approved of by the NSW Court of Appeal in in *Habib v Nationwide News Pty Ltd* [2010] NSWCA 34, 76 NSWLR 299 the Court (Hodgson JA, Tobias JA and McColl JA) at [237].

What Does "Not Influenced By" Actually Mean?

In *Habib v Nationwide News Pty Ltd* [2010] NSWCA 34, 76 NSWLR 299 the Court (Hodgson JA, Tobias JA and McColl JA) stated at [238]

> *"[238] The Macquarie Dictionary Online defines "influence", relevantly, to mean "modify, affect, or sway", while the Oxford English Dictionary Online refers to "influence" as to "affect the mind or action or; to move or induce by influence" and also "to affect the condition of, to have an effect on". Neither of these definitions evokes a particularly high test of causation."*

Causation - The Threshold is Not High

In *Habib v Nationwide News Pty Ltd* [2010] NSWCA 34, 76 NSWLR 299 the Court (Hodgson JA, Tobias JA and McColl JA) stated at [238]-[240]:

> *"[238] The Macquarie Dictionary Online defines "influence", relevantly, to mean "modify, affect, or sway", while the Oxford English Dictionary Online refers to "influence" as to "affect the mind or action or; to move or induce by influence" and*

*also "to affect the condition of, to have an effect on****". Neither of these definitions evokes a particularly high test of causation."***

"[239] In R v Zhang [2000] NSWSC 1099 (at [44]), Simpson J held that:

> *"…s 84 does not require the isolation of a single reason, or a single event or incident or instance of conduct provoking the confession; there may be a number of factors working together that, combined, cause the admission to be made. If oppressive conduct on the part of police is one of those factors (or, more accurately, if the Crown has failed to negative such conduct as one of those factors) then the evidence is inadmissible." (emphasis added)"*

[240] Hoeben J cited Simpson J's statement with approval in Higgins (at [26]). Refshauge J cited Simpson J's comments in R v JF (at [32]), as establishing that ***"the test to determine the causal relationship between the conduct and the admission is not a stringent test".***

In *R v Barber* [2016] NSWSC 1394, Fagan J reiterated this stating, at [47], that

> *"… The statutory exclusion is engaged by a low threshold of causation. All that is required is that the conduct was a factor working to cause the admission."*

Further, this causal link does not have to be direct or single as the Supreme Court in *R v Blackman* [2018] NSWSC 395 pointed out, at [451]:

> *"By adopting the broad concept of "influence", Parliament has not required a direct or single causal link between the threat and the admissions and the making thereof."*

The Temporal Nexus Between Oppressive Conduct and Admissions?

It is the author's humble opinion that whilst the time between the alleged "oppressive conduct" and the alleged admission is relevant, there is no "bright line" test for temporal nexus. The question of causation is a question of fact, and each matter will have its own unique facts. This is borne out by the decision of Rothman J in *R v Spiteri-Ahern; R v Barber; R v Zraika (No 10)* [2017] NSWSC 1380 at [40].

In *R v Blackman* [2018] NSWSC 395 the accused stood charged with murder. It was found as a fact on the voir dire that the accused had been threatened with violence by a civilian witness unless he confessed to the murder of the deceased. The accused was in hospital at the time of receiving this threat. In the hours that followed the threat, the accused made a number of admissions. His Honour Button J excluded the admissions pursuant to section 84. Regarding the temporal nexus between the threats and the admissions his Honour stated at [450]:

> *"To recap: the first of the admissions were made less than 12 hours after the hospital visit. The last of the admissions was made less than 60 hours after the hospital visit (as I have said,* ***as opposed to, for example, 60 days or 60 weeks thereafter****). No admissions had been made by the accused before the hospital visit."*

In *R v Tarantino (No 6)* [2019] NSWSC 1174 the accused stood charged with murder. He had made a number of admissions in 2016. On the voir dire it was asserted that all of the admissions were false and had been the result of threats from "bikies". Mr Tarantino suffered drug induced schizophrenia with a resultant paranoid psychosis from about 2000 onwards. His Honour Beech-Jones found on the voir dire that whilst Mr Tarantino had indeed been subjected to threats prior to 2000, there were no such threats since that time. His Honour allowed the evidence of admissions. His Honour stated:

> *"[148] … I do not accept that there have been threats or intimidation of Mr Tarantino on behalf of or directed by the Rebels (or anyone) since 2000. …"*
>
> *"[185] … In relation to the conduct prior to 2000, I am satisfied that his conversation with Constable Mungovan, attendance at the police station and subsequent confessions to the police were not influenced or affected in any way by any actual threat he might have received before 2000. …"*

In *R v Spiteri-Ahern; R v Barber; R v Zraika (No 10)* [2017] NSWSC 1380 one of the co-accused, Ms Barber, was charged as an accessory before the fact to murder. The defence sought to have two different admissions excluded on the basis that Ms Barber had been the victim of ongoing domestic violence at the hands of another of the co-accused. Rothman J at [30] found as facts that one of the admissions had been made at or about the time violence had been perpetrated, and the other at a time when there was no violence. His Honour Rothman J allowed the evidence of both admissions, finding that the Crown had satisfied the onus that the admissions had not been influenced by the behaviour complained of.

Rothman J stated:

> *"[32] In circumstances where there is a continuing relationship of violence or the threat of violence, **the fact that on one particular occasion no violence was perpetrated does not mean that the admission, if made on that occasion, was not "influenced by" violence or its threat**.*
>
> *[33] Last, in a circumstance where domestic violence is being perpetrated, the continuing threat of violence towards the victim in such a relationship may constitute a threat of violence and fall within the terms of s 84 of the Act."*

However, as previously stated, the evidence of both admissions was allowed – see at [39]-[41].

Section 84 and section 138 Can Be Engaged Simultaneously

In *R v Sumpton* [2014] NSWSC 1432 the defence submitted that conduct that was "oppressive" for the purposes of section 84 could also be unlawful or improper for the purposes of s.138. In essence the submission was that the two sections could be considered

simultaneously, and that evidence may fall to be considered under either of both sections. This submission was accepted by his Honour Hamill J – see at [105] to [119]. His Honour noted a number of Australian authorities where it appeared that the bench had proceeded on the basis that could be regarded as relevant for the purposes of s.138 could also be regarded as relevant for the purposes of section 84. However none of the authorities referred to explicitly found this to be so. These decisions included *R v Ul-Haque* [2007] NSWSC 1251; 177 A Crim R 348, *R v LL* NSWCCA 1 April 1996 unrep., and R v Troung (1996) 86 A Crim R 188. His Honour also noted that Simpson J in *R v Ye Zhang* [2000] NSWSC 1099. His Honour also drew some assistance form the English decision of *R v Fulling* [1987] 2 All ER 65 (cited in *Sumpton* at [115]) where the court stated:

> *"We find it hard to envisage any circumstances in which such oppression would not entail some impropriety on the part of the interrogator."*

Hamill J noted the different statutory regime under consideration in *Fulling.* It is the author's humble view that this explicit finding of principle by Hamill J, though implicit in some earlier Australian authorities, represents an important development in the law favourable to defence practitioners.

The Forensic Advantages of Section 84

Depending on the evidence, the forensic advantages of relying on section 84 may be three-fold:

Firstly, once an issue under the section is raised by the defence, it falls to the prosecution to show that the admission was not influenced by oppressive conduct (or one of the other matters raised in the section). The defence only has to raise the issue based on evidence on the voir dire; it does not have to positively establish facts. Once raised it is for the Crown to negative. This is amply borne out by the decision of *Habib v Nationwide News* [2010] NSWCA 76 NSWLR 299 where the NSWCA held (Hodgson JA, Tobias JA, and McColl JA) held as follows:

> *"[227] Returning to the respondent's submission the critical issue is whether, before s 84(1) could apply, the appellant had to adduce evidence positively establishing a causal nexus between the proscribed conduct and the alleged admission.*
>
> *"[228] In our view, the language of s 84(2) does not support that proposition. The expression "has raised" does not import any notion that the s 84(2) party has to prove the issue being "raised", namely whether "the admission or its making" were influenced by the s 84(1) conduct."*

The Court further held at [234]:

> *"[234] We would conclude from the language of s 84, the statutory context and legislative history and the common law position when s 84 was enacted that in order to raise a s 84 issue, that there must be some evidence that indicates through legitimate reasoning that there is a reasonable possibility an admission or its making*

> *were influenced by proscribed conduct (cf Colosimo v Director of Public Prosecutions (NSW) [2006] NSWCA 293 (at [19](1) per Hodgson JA, Handley and Ipp JJA agreeing). However it is not necessary that that evidence prove as a fact that an admission or its making were so influenced."*

Secondly the section does not have any scope for discretionary admission of the evidence (in sharp contrast to section 138). If the issue is raised, and the Crown and the fails to negative the issue, then the evidence is out.

Thirdly, unlike section 85, the reliability of the admission does not come in to issue - this is *extremely helpful* when you are *obviously* representing a guilty man :-b

The Forensic Disadvantages of Section 138

Depending on the evidence, the disadvantage of reliance on section 138 may be two-fold:

Firstly, if the defence wishes to allege an impropriety or illegality for the purposes of section 138, then the defence bears the onus of establishing the fact of that impropriety or illegality on the balance of probabilities - see *Evidence Act 1995 (NSW)* section 142.

Secondly, even if the defence is successful in establishing an illegality or impropriety, the section allows the court to exercise a discretion to allow the evidence. A further difficulty arises in this regard in that the case law in essence states that the more serious the offence alleged, the greater weight is to be given to the public interest in the conviction and punishment of offenders - see especially s.138(3)(c) and *R v Dalley* [2002] NSWCCA 284, 132 A Crim R 169.

A Word of Caution – Each Case Turns on the Available Evidence

It is important for defence practitioners to be mindful that whether or not the available evidence is capable of raising the issue of "oppressive conduct" by police or others will ultimately turn on the available evidence. (Note that I DID NOT say “available facts” – you do not have to prove facts on the voir dire – the issue only has to be *raised in evidence*). Not every case of impropriety or illegality by police or others will automatically lend itself to being characterised as "oppressive". Section 84 *is not* a "one size fits all" remedy to the problems besetting defence practitioners seeking to have evidence of admissions excluded.

Acknowledgment

I would like to acknowledge my very clever research assistant Lujain Fayad for her contribution in preparing this edition of the paper. All errors and omissions remain the sole responsibility of the author.

Need Help?

If you are a criminal defence lawyer with a headache concerning this area of the law I am happy to help. I am best caught on my mobile – **0408 277 374.** Please respect the "no fly zone" on my phone in the hour or so leading up to the commencement of the court day – I am busy sweating on my case too :-b. Other than that you are fine to ring anytime including out of hours if it is an urgent headache. Alternatively, you might wish to email me. I will almost always reply within 24 hours. My email remains:

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I have endeavoured to state the law of New South Wales as at 14 March 2021.

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