Discuss discretion to exclude a voluntary confession by the accused.

I. Introduction

A fundamental rule of evidence[1] involves determining the admissibility of evidence by balancing the probative value of that evidence and the prejudicial effect of admitting it. In *R v Swaffield*[2] the High Court addressed this fundamental issue in the context of voluntary confessions and the degree to which they are admissible in respect of voluntariness, unfairness and public policy considerations.[3] Central to the High Court's ruling in this case, was whether a voluntarily confessional statement - made to a person whom the confessionalist did not know was a police officer or a person acting for the police - could be admitted into evidence in a trial against the confessionalist for an offence relating to the statement.[4] Most importantly, the High Court considered this in light of the confessionalists exercised right to silence. Toohey, Gaudron and Gummow JJ delivered a joint judgment in respect to the facts in this case holding that - following a determination that a confession was voluntary, the judge should firstly consider the discretion to reject such a confession on the grounds of unreliability before balancing this consideration on the principles of unfairness and public policy.

Consequently, it has been established that decision in *R v Swaffield*[5] was idealistically a threefold test.[6] The first question being one of 'voluntariness' - which requires an examination of whether the statement in issue was made to a person known to the confessionalist as a person of authority. The second question being the consideration of an exclusion of the confession based upon of the notion of 'basal voluntariness'.[7] Finally, the question of the Courts use of discretion to exclude the confession as evidence because of fairness, reliability and public policy.[8] The application of such a test has since been applied broadly in a plethora of cases which have required the Court to consider whether a voluntary confession should be inadmissible on the basis of the evidence presented before it. Many of these cases, as will be seen, rely on questions of reliability and fairness to the accused.

This paper aims to consider the manner in which voluntary confessions are excluded as a corollary of the High Court's ruling in *R v Swaffield*[9]. It will seek to define the concepts of voluntariness and fairness in light of arguments relating to the public policy discretion as a basis for justifying the exclusion of a confession. A brief review of the relevant statutory implications of voluntary confessions will also be examined in the context of the *Evidence Act 1958 (Vic).* A conclusion will then be drawn, in light of this analysis, combining the relevant common law and statutory deliberations.

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[1] Cross on Evidence, Looseleaf, LexisNexis Ltd, 2004 at [13.24].
[2] *R v Swaffield* (1998) 192 CLR 159.
[3] Ibid at 69.
[4] Ibid 2 at 1.
[5] Ibid 2.
[6] *Tofilau v The Queen* (2007) 231 HCA 396 at 412.
[7] *McDermott v R* (1948) 76 CLR 501 at 511–512 per Dixon J.
[8] Ibid 2 at 188-189 per Toohey, Gaudron and Gummow JJ.
[9] Ibid 2.

II. The concept of Voluntariness

The concept of voluntariness is protean, that is, it is open to variable and inconsistent interpretation. In *Ryan v R*[10], Windeyer J explained that this was primarily because

> *'of ambiguities in the word 'voluntary' and its supposed synonyms, partly because of imprecise, but inveterate, distinctions who have long dominated means ideas concerning the working of the human mind.'*[11]

It is implicit from such a statement that the law must operate as a normative science which evaluates human conduct for practical purposes, and accepts working hypotheses which includes free will.[12] The act of making a voluntary statement must be borne from a person's free will and cannot be actively elicited or induced. In *Cornelius v R,*[13] a wide statement was provided by Dixon, Evatt and McTiernan JJ regarding the definition of voluntariness. They considered that '[i]f a statement is made a result of violence, intimidation, or of fear, then such a statement cannot be voluntary'.[14] In *McDermott v R*[15], Dixon J referred to both a 'definite rule'- which excludes an accused statements if they are derived from threats or inducements by persons in authority such that

> *'[a] definite rule of the common law is that a confessional statement cannot be voluntary if it is preceded by an inducement held out by a person in authority and the inducement has not been removed before the statement is made'*[16]

and a wider rule

> *'If he speaks because he is overborne, his confessional statement cannot be received in evidence and it does not matter by what means he has been overborne. If his statement is the result of duress, intimidation, persistent importunity, or sustained or undue insistence or pressure, it cannot be voluntary.'*[17]

In Dixon J's judgment he explicitly states that the expression 'person in authority' includes 'officer of police and the like, the prosecutor and other concerned in preferring the charged'.[18] This has been held to only extend 'when the accused believes himself or herself to be under pressure from the unique coercive power of the state'[19] such that the states 'coercive power must be engaged'.[20] Consequently, it is evident that when a person in authority is not 'engaging the power of the state', then the voluntariness of the accused statement is not 'induced' and any statement made by the accused must be voluntary.

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[10] *Ryan v R* (1967) 121 CLR 205.
[11] Ibid at 244.
[12] *Tofilau v The Queen* (2007) 231 HCA 396 at 405.
[13] *Cornelius v R* (1936) 55 CLR 235.
[14] Ibid at 245.
[15] *McDermott v R* (1948) 76 CLR 501.
[16] Ibid 511.
[17] Ibid 15 at 511.
[18] Ibid.
[19] Ibid 12 at 407.
[20] *R v Grandinetti* [2005] 1 SCR 27 at 42 [44].

The wider rule that Dixon J proposes[21] relates to the concept of basal voluntariness and this was commented upon by Toohey, Gaudron and Gummow JJ in *R v Swaffield*[22] where they stated that its application is afforded wide operation in the Courts.[23] The term 'basal voluntariness' derives itself from the notions underpinning the wider meaning that Dixon J stated in *McDermott v R*,[24] and its application is only useful when relating to persons not in a position of authority. The basal principle referred to in *R v Swaffield*[25] is 'a principle the application of which is flexible and is not limited by any category of inducements that may prevail over a man's will'.[26] The principle is concerned primarily with confessions which are made under compulsion in a manner that '[p]revails over a man's will' and removes the voluntary aspect of a confessionalists right to speak or remain silent.[27]

Such confessions fall within the ambit of the wider principle described by Dixon J previously and they stem from the application of compulsion which is ubiquitous with 'duress, intimidation, persistent importunity, or sustained or undue insistence or pressure'.[28] Evidently, in accordance with the direct and basal rules of voluntariness that Dixon J proposed, statements which are made to a person who is not in a position authority and which are not made under compulsion are statements which are voluntary.[29] The degree to which compulsion is in operation or absent is the primary factor in determining whether a confessional statement is deemed voluntary. If it is absent, then it is clear that any statements made by an accused can be deemed voluntary according to the Dixon J's wider rule.[30]

Evidently, the application of the rules of direct and basal voluntariness creates a limited number of scenarios in respect to the conduct of voluntariness. The modern application was discussed by, in part, in Gummow and Hayne JJ in *Tofilau v R*[31] which has been subsequently interpreted. Accordingly, if a person of authority has induced the accused into making confessional statements against their free will – such statements are not voluntary in accordance with the direct rule proposed by Dixon J.[32] If a person is not acting in a position of authority, but engages in compulsion and the confessionalists free will is overborne - then the confessionalists statements are not deemed to be voluntary in accordance with the wider 'basal voluntariness' rule.[33] Finally, if a person is not acting in a position of authority, and does not engage in compulsion such that the confessionalists free will is not overborne – then the confessionalist right to speak or remain silent is their own, and such statements should be deemed to voluntary.

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[21] *McDermott v R* (1948) 76 CLR 501 at 511.
[22] *R v Swaffield* (1998) 192 CLR 159
[23] Ibid at 198.
[24] Ibid 21.
[25] Ibid 22 at 159.
[26] Ibid 22 at 198.
[27] Ibid.
[28] Ibid 21.
[29] *Tofilau v The Queen* (2007) 231 HCA 396 at 407.
[30] Ibid 21.
[31] Ibid 29 at 411.
[32] Ibid 21 at 511.
[33] *McDermott v R* (1948) 76 CLR 501 at 511.

Importantly, in *R v Swaffield*[34] it was commented by Brennan CJ that

> *'in determining objections to the admissibility of a confession … the court does not attempt to determine the actual reliability of the confession. Rather, it assesses the nature and effect of any inducement to make the confession in order to determine whether the confession was made because the will of the confessionalist was overborne by the conduct of a person or persons in authority'*[35]

Evidently, if the ambit of basal voluntariness applies, then onus still remains on the prosecution to establish, on the balance of probabilities, that a confessional statement made by an accused person is to be regarded as admissible.[36] If the prosecution is able to prove on the balance of probabilities that a statement is voluntary, then such a statement is considered to be admissible relevant to any probative or 'public policy' discretions as suggested in *R v Lee*,[37] *Cleland v R*[38] and *R v Swaffield*.[39]

III. Discretion to exclude

The nature of the unfairness discretion, and its underlying purpose and application, were addressed by Brennan CJ in *R v Swaffield*[40] where he stated

> *'A discretionary category of exclusion arose after the rule against admission of involuntary was established and in response to a new set of circumstances. It came to be known as the discretion to exclude for unfairness.*

His Honour then further explained the principle by drawing on the judgment in *R v Lee*[41]

> *'The purpose is, of course, to safeguard a person from the unfairness of using his confession in evidence against him at his trial. The relevant unfairness is not so much in 'the use made by the police of their position in relation to the accused', as Dixon J said in McDermott … but in the admission into evidence against an accused of a confession obtained by improper or illegal means.'*[42]

Thus, it is axiomatic that the fundamental ideology behind the probative, or public policy, discretion is to permit the Courts to exclude or constrain any voluntary confessions which have been obtained by law enforcement authorities through illegal or improper conduct which would be rejected in public interest.[43] In *Cleland v The Queen*,[44] a case regarding the procurement of a confession through improper conduct on behalf of law enforcement officers, the majority of the Court accentuated that the purpose of the rules of confession

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[34] *R v Swaffield* (1998) 192 CLR 159.
[35] Ibid at 172.
[36] *Cleland v R* (1982) 151 CLR 1 at 19.
[37] *R v Lee* (1950) 82 CLR 133.
[38] Ibid 36 at 1.
[39] Ibid 34.
[40] Ibid 34 at 171-72.
[41] Ibid 37.
[42] Ibid 34 at 173.
[43] *R v Swaffield* (1998) 192 CLR 159 at 179.
[44] *Cleland v R* (1982) 151 CLR 1.

were to ensure that accused has a fair trial and not, as Gibbs CJ stated[45] 'to insist that those who enforce the law themselves respect it.' In this regard, Gibbs CJ agreed with the comments of Brennan J in *Collins v R*[46]

> *'it is difficult to conceive of a case … where a voluntary confession which might fairly be admitted against an accused person would be rejected in the public interest because of unlawful conduct leading to the making of the confession.'*[47]

It is apparent that such a contention by Brennan J in *Collins v R*[48] is a logical one. As stated previously, if a person is not acting in authority and does not engage in compulsion such that the confessionalists free will is not overborne – then the confessionalist right to speak or remain silent is their own. When framed in this light, it is difficult to envisage how, in light of Brennan J's comments, public policy discretion could rule such a confession inadmissible. The correlation between the admissibility of voluntary confessions and the Courts power to reject such confessions appear to be highly correlated.

However, as Toohey, Gaurdron and Gummow JJ stated in *R v Swaffield*,[49] it is not always possible to treat voluntariness, reliability, unfairness to the accused and the public policy considerations as separate and discrete issues.[50] In *R v Amad*,[51] Smith J rejected admissions that were voluntary and which the accused accepted were true because the manner in which he had been questioned lead to inconsistencies which would have impaired his credit. Evidently, this consideration was simply not encompassed within the ambit of the direct or basal voluntariness rules and could only be excluded on the basis of probative considerations. In *R v Swaffield*,[52] it was stated that

> *'unreliability is an important aspect of the unfairness discretion but it is not exclusive. The purpose of that discretion is the protection of the rights and privileges of the accused.'*[53]

Thus, it seems apparent that the underlying purpose of the public policy discretion is to ensure that the rights of the accused are maintained from a procedural perspective, and the focus of the discretion is on the accuseds out of Court statements.[54] The inference drawn from *R v Swaffield*[55] is one which suggests that High Court established a narrow operation of the discretion for the purpose of maintaining the accused rights in respect to voluntary confession and procedural fairness - rather than to encompass arguments relating to the techniques of policing.[56] This seems to be consistent with the arguments

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[45] *Cleland v R* (1982) 151 CLR 1 at 8.
[46] *Collins v R* (1980) 31 ALR 257.
[47] Ibid at 317.
[48] Ibid 46.
[49] Ibid 43 at 159.
[50] Ibid 43 at 196.
[51] *R v Amad* [1962] VR 545.
[52] Ibid 43 at 159.
[53] Ibid 43 at 197.
[54] Mathias, Don, *Probative value, illegitimate prejudice and the accused's right to a fair trial* (2005) 29 Crim LJ 8 at 15
[55] *R v Swaffield* (1998) 192 CLR 159 at 197.
[56] Ibid at 184.

presented in *Malgil v Western Australia*[57] where the Supreme Court of Western Australia rejected an appeal which unfoundedly alleged that the police acted with impropriety during the process leading up the accused interview.

IV. Victorian Statutory Provisions

s149 of the *Evidence Act 1958 (Vic)* is a provision which relates to admissibility of a confession after a promise or threat. The provision expressly provides that evidence shall not be rejected if a promise or threat is placed on the person confessing unless the Court deems that the inducement is calculated to cause an untrue admission of guilt. The High Court has attempted to limit this section to statements which amount to an actual admission of guilt, and which were induced by a threat or promise from a person in authority as per *Cornelius v R.*[58]

In *R v Lee*,[59] the High Court commented that

> *'it applies only to cases in which the common law would have rejected the confession as non-voluntary on the sole ground that it was induced by threat or promise, not to cases in which the common law would have rejected the confession as non-voluntary on any other ground'*

It seems that this statement is the reason for the comments proposed in *Tofilau v R*,[60] by Callinan, Heydon and Crennan JJ, who stated[61] that

> *'it may be controversial whether s149 is capable of applying to evidence which does not offend the inducement rule but is affected by basal involuntariness.'*[62]

Evidently, it seems that the scope of s149 of the *Evidence Act 1958 (Vic)* may not apply in some circumstances involving the 'basal voluntariness' aspect. It follows that such a consideration would mean that when a confessional statement is made out of court by the accused, then it *may or may* not be admitted into evidence against this person in their trial for the crime which it relates unless it is shown to have been voluntarily made.[63] This seems to provide that the 'basal voluntariness' aspect of voluntary confessions is restricted under s149[64] and diverges from the accepted judgment of Dixon J in *McDermott v R.*[65] In *Director of Public Prosecutions v Toomalatai*,[66] Bell J commented that there are two meanings to an admission – a broad meaning which includes any admission and a narrow meaning including only an actual admission. His Honour provides that

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[57] *Malgil v Western Australia* [2008] WASC 290.
[58] *Cornelius* v R (1936) 55 CLR 235 – it is noted that the High Court discussed s141 of the *Evidence Act 1928 (Vic)* which has become s149 of the *Evidence Act 1958 (Vic)*.
[59] *R v Lee* (1950) 82 CLR 133 at 151; s141.
[60] *Tofilau v The Queen* (2007) 231 HCA 396.
[61] Ibid.
[62] Ibid 60 at 524.
[63] Waight P. K, Williams C. R, *Evidence Commentary and Materials*,7th Edition, Lawbook Co, 2006 at pg. 699, 704-5.
[64] *Evidence Act 1958 (Vic)*, s 149.
[65] *McDermott v R* (1948) 76 CLR 501.
[66] *Director of Public Prosecutions v Toomalatai* (2006) 13 VR 319.

> *'Someone may say "yes I stole the watch". This is an actual admission of guilt and a confession under its narrow meaning. Someone may say "I was there but my mate did it". This is only an admission of presence and could be a confession only under its broad meaning.…… I think we can see from the language of s 149 that it applies only to a confession in the sense of an admission of actual guilt. The section refers to a "confession" as an "admission of guilt", making it clear the narrow meaning was the one intended.'*[67]

It is the author's opinion that this restriction is no longer consistent with the High Court's judgments in *R v Swaffield*[68] and *Tofilau v R*,[69] and should be repealed so that uniformity is created with other Australian jurisdictions and with the *Evidence Act 1995 (Cth)*.

V. Conclusion

In the eleven years since *R v Swaffield*[70] was decided, and in light of the High Court's decision in *Tofilau v R*,[71] it seems that the public policy discretion has still been retained as a clear discretion if somewhat narrowed. It is apparent from *Tofilau v R*[72] that the definition of 'persons in authority' has now been adequately refined to such persons that are 'exercising their authority' in order to fall within the ambit of the discrete rule regarding voluntary confessions. It appears that the principle discussed by the High Court in *R v Swaffield*[73] regarding elicited confessions by persons who have exercised their right to silence are still inadmissible,[74] and this remains consistent with the direct rule proposed by Dixon J in *McDermott v R*[75] and the judgments in *Tofilau v R*.[76] The High Court's decision in *Tofilau v R*,[77] has refined the decision presented in *R v Swaffield*[78] such that questions of fairness, and the need to control police conduct are now said to be relevant to the exercise of discretion to exclude evidence but not as much to admissibility. The legal rules of admissibility of confessions seem to rely entirely on the principle of reliability and the apprehension that the Courts hold in potentially admitting a confession which is untrue.[79] The probative aspect of voluntary confessions relies on a fair balance between establishing the truth in respect to any improper or unfair law enforcement practices. Consequently, it seems consistent that the Courts have now adopted a multi-layered approach which acknowledges that each case must be judged on individual circumstances regarding admissibility, and the discretion to exclude must be based on the evidence presented before it by fairly balancing relevancy and reliability.

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[67] *Director of Public Prosecutions v Toomalatai* (2006) 13 VR 319 at 325-26.
[68] *R v Swaffield* (1998) 192 CLR 159 at 197.
[69] *Tofilau v The Queen* (2007) 231 HCA 396.
[70] Ibid 68 at 159.
[71] Ibid 69.
[72] Ibid.
[73] Ibid.
[74] Palmer, Andrew, *Apply Swaffield: covertly obtained statements and the public policy discretion* (2004) 28 Crim LJ 217 at 218.
[75] Ibid 65 at 511.
[76] *Tofilau v The Queen* (2007) 231 HCA 396.
[77] Ibid.
[78] *R v Swaffield* (1998) 192 CLR 159 at 197.
[79] Williams, C, *An Analysis of Discretionary Rejection in Relation to Confessions* (2008) 32 Melbourne University Law Review 302 at 330.

Bibliography

Books

Waight P. K, Williams C. R, *Evidence Commentary and Materials*,7th Edition, Lawbook Co, 2006

Journals

Mathias, Don, *Probative value, illegitimate prejudice and the accused's right to a fair trial* (2005) 29 Crim LJ 8

Palmer, Andrew, *Apply Swaffield: covertly obtained statements and the public policy discretion* (2004) 28 Crim LJ 217

Williams, C, *An Analysis of Discretionary Rejection in Relation to Confessions* (2008) 32 Melbourne University Law Review 302

Looseleaf

Cross on Evidence, Looseleaf, LexisNexis Ltd, 2004

Legislation

Evidence Act 1958 (Vic)

Internet Sources

LexisNexis, *Hallsbury's Laws of Australia – Evidence* http://www.lexisnexis.com.ezproxy.lib.monash.edu.au/, at 15st Feb – 19th March

Thomas Reuters Legal Online, *Evidence*, http://legalonline.thomson.com.au.ezproxy.lib.monash.edu.au at 15st Feb – 19th March

Cases

Cleland v R (1982) 151 CLR 1

Collins v R (1980) 31 ALR 257

Cornelius v R (1936) 55 CLR 235

Director of Public Prosecutions v Toomalatai (2006) 13 VR 319

Malgil v Western Australia [2008] WASC 290

McDermott v R (1948) 76 CLR 501

R v Amad [1962] VR 545

R v Lee (1950) 82 CLR 133

R v Swaffield (1998) 192 CLR 159

R v Grandinetti [2005] 1 SCR 27

Ryan v R (1967) 121 CLR 205

Tofilau v The Queen (2007) 231 HCA 396