
S 85 ENULA and linguist approaches to reliability

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NORTHERN TERRITORY OF AUSTRALIA

EVIDENCE (NATIONAL UNIFORM LEGISLATION) ACT 2011

85 Criminal proceedings – reliability of admissions by defendants

(2) Evidence of the admission is not admissible unless the circumstances in which the admission was made were such as to make it unlikely that the truth of the admission was adversely affected.

Subjective vs objective analysis – a source of confusion

F. Subjective or Objective?

So far discussion about the meaning of s 85 has concentrated on whether it sets up a subjective or an objective test for admissions, which is an unproductive discussion that “unnecessarily complicates discussion of this issue”.⁷² The difference is sometimes itself obscure and the labels misleading – some

made by the suspect is likely to be unreliable. While the distinction is not always clear and the law reform commissions themselves seem confused about it,⁷⁵ this distinction arises, or is said to arise, because s 76(2)(b) of *PACE*, while otherwise similar to our s 85, states that the question is whether

Greg Taylor, "The Difference Between ss 84 and 85 of the Uniform Evidence Acts" (2019) 93 *Australian Law Journal* 53, 64 & 65

10.69 Questions have been raised in respect of the requirement in s 85(2) that the court consider the ‘circumstances’ in which an admission was made. The issue is whether these ‘circumstances’ are to be considered under a so-called ‘subjective’ or ‘objective’ analysis. This raises the question whether a court can consider evidence as to the truth of the admission made by the defendant (the subjective analysis); or if the inquiry is instead a hypothetical examination as to the likely truthfulness of any admission made in such circumstances (the objective analysis).

Uniform Evidence Law, ALRC Report 102 (2005)

Usage 1 (Prof Greg Taylor & Stephen Odgers*):

- Subjective = whether ***the actual admission*** made was likely to be unreliable (Australian approach)
- Objective = whether ***any possible admission*** made by the suspect is likely to be unreliable (UK approach)

Usage 2 (eg ALRC 102 at 10.69):

- Subjective = evidence about the truth of the admission
- Objective = hypothetical examination about likely truthfulness of any admission made in those circumstances

Usage 3 (*R v Munce*, *R v Rooke* contrast *R v Taylor*):

- Objective = objective likelihood that the interrogators' conduct would affect reliability (setting aside subjective characteristics of accused); must be some overt act on behalf of police; more similar to the UK position
- Subjective = taking into account subjective factors of the accused, even when police are unaware of those factors or there is not improper conduct by police.

Usage 4 (eg ALRC 102 at 10.73, *R v Esposito*, *R v Moffatt*, Odgers):

- Subjective = consider actual truthfulness of admissions
- Objective = do not consider the actual truthfulness of admissions

Arguably a strict dichotomy between subjective and objective approaches under s 85(2) is not necessary, nor beneficial. Rather, a holistic approach incorporating both approaches is more appropriate, and can be tailored to the specifics of the case. Subjective issues, including characteristics of the accused such as age and language capacity, together with the manner of questioning and any additional evidence as to whether (and why) the accused made statements that are demonstrably false are all potentially relevant to the assessment. Equally, an objective assessment as to how those subjective issues may have impacted upon the circumstances in which the admission was made is necessary. It is not the purpose of s 85(2) to determine whether the truth of the admission was in fact impacted, but rather to consider whether the admissions are objectively reliable taking into account all the subjective considerations unique to the circumstances of the admissions.¹³¹

Odgers – 3 propositions

1. As a general rule, the question is not whether the circumstances did in fact adversely affect the truth of the admission (resulting in an admission that is in fact untrue), but whether they were likely to do so.
2. The court should not consider evidence as to the actual truth of the admission when determining its admissibility under s 85(2), unless that issue is raised by the defendant pursuant to s 189(3)
3. Section 85(3) requires the court to consider the personal characteristics of the defendant in analysing the “circumstances” in which the admission is made. The “circumstances of the admission” include, among other things, the characteristics and conditions of the defendant independently of any actions taken by the police. In addition, s 85(3) does not confine those characteristics and conditions to those that are known to the investigating officials. An admission may be unreliable (or likely to be unreliable) even in the absence of police misconduct or irregularity.

objective

objective

subjective

[29] Section 85 of the ENULA is concerned with whether the circumstances adversely affected the “truth of the admission”. It is not directly concerned with whether the evidence has been improperly or illegally obtained, or general considerations of fairness. Nor is the provision concerned with the voluntariness of the confession, except to the extent that it might bear on the assessment of reliability in the relevant sense.

[30] The enquiry also does not raise any consideration of whether the admissions made were, in fact, true. The relevant enquiry is whether circumstances such as the accused's personal characteristics and the level of compliance with procedural safeguards may have affected the truth of the confession.¹⁰ In other words, the enquiry is whether the circumstances were such that it was unlikely that the accused made a false confession.¹¹

11 *R v Esposito* (1998) 45 NSWLR 442 at 459-460; *R v Rooke* (Unreported, NSW Court of Criminal Appeal, Newman, Levine and Barr JJ, No 60550/96, 2 September 1997).

The Queen v Layt [2018] NTSC 36

[54] Section 85 of the ENULA is concerned with whether the circumstances adversely affected the “truth of the admission”. The enquiry does not raise any consideration of whether the admissions made were, in fact, true. The relevant enquiry is whether circumstances such as the accused’s personal characteristics and the level of compliance with procedural safeguards may have affected the truth of the confession: see *R v GP* [2015] NTSC 53 at [30]. In other words, the enquiry is whether the circumstances were such that it was unlikely that the accused made a false confession: see *R v Esposito* (1998) 45 NSWLR 442 at 459-460.

R v GP [2015] NTSC 53

Accused charged with sexual intercourse with underage female

Articulation of s 85(2) at paras [29]– [30].

[37] I am satisfied on the balance of probabilities that the accused's admissions were made in circumstances that were not likely to adversely affect the truth of the admissions he made. In other words, there was nothing about the circumstances in which the admissions were made which would lead me to conclude that the admissions were not true. I add that the identified

R v ESPOSITO --(1998) 45 NSWLR 442 at 460

The remaining question is whether by inverting the language of s 85(2), so as to approach the test for admissibility in terms whether “the circumstances were not such as to affect the likelihood of the admission being true”, his Honour posed for himself the wrong test. It is not easy to discern why his Honour thought that there was any advantage in posing a test that in any way differed from the express terms of s 85(2).

“Whether by inverting the language of s 85(2)...His Honour posed for himself the wrong test?”

The negative of a thing is not necessarily the opposite of the thing.

Opposites: Guilty and innocent

Therefore

NOT guilty = innocent? (No).

Blue is NOT red.

Therefore

Blue is the opposite of red? (No).

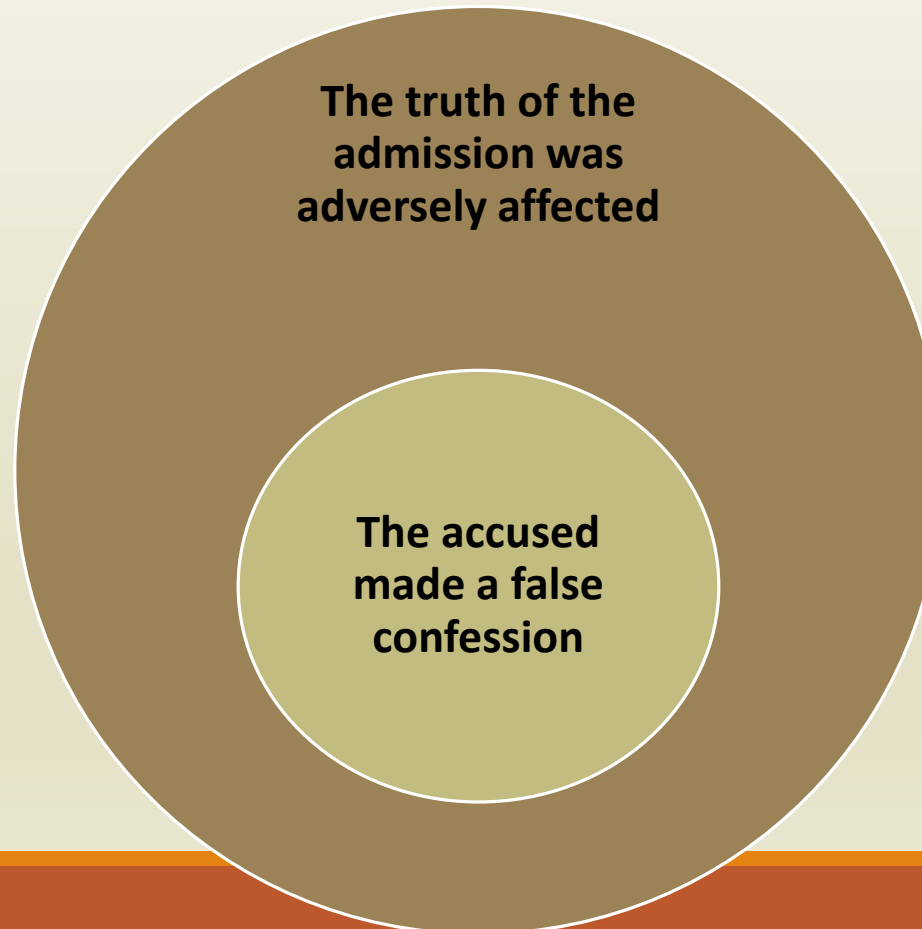
S 85(2)	<u>Layt</u> (2018) & <i>Downs</i> (2019)	<i>R v GP</i> (2015)
<p>Evidence of the admission is not admissible unless</p> <p>the circumstances in which the admission was made</p> <p>were such as to make it unlikely that</p> <p>the truth of the admission</p> <p>was adversely affected.</p>	<p>Whether</p> <p>the circumstances</p> <p>were such that it was unlikely that</p> <p>the accused made a false confession.</p>	<p>There was</p> <p>nothing about the circumstances in which the admissions were made</p> <p>Which would lead me to conclude</p> <p>That the admissions were not true.</p>

The truth of the admission was adversely affected.

Agentless Passive (= any agent)
Things/people other than the accused
can adversely affect the truth of the
admission

The accused made a false confession.

Active (accused must be the agent)
Requires the accused to make a false
confession.



“adversely affected” vs opposite

The colour of the photo was adversely affected.

You made a colourless photo.

The taste of the meal was adversely affected.

You cooked a tasteless meal.

The courage of the soldiers was adversely affected.

You made the soldiers fearful.

The coherency of the statement was adversely affected.

You made an incoherent statement.

His arrival was adversely affected by Airnorth.

He didn't arrive.

R v Yirrawala [2015] NTSC 37

- charged with causing a bushfire, spontaneous admissions to police while in custody.

[12]

(b) English is not the first language of the defendant. Again, I do not see how this can be said to adversely affect the truth of the alleged admission (as distinct from its possible comprehensibility) in any way.

(e) The arrest and admission were not electronically recorded, in spite of the fact that the police officers were on “a specific mission” to arrest the accused. Once more, this seems to me to be completely irrelevant to the question posed by s 85(2). It is not a circumstance which is likely to adversely affect the truth of the admission. On what logical basis could it be suggested that a person in Mr Yirrawala’s circumstances would be more likely to make a true admission if he was being recorded and a false one if he was not?

S 85(2)	<i>R v GP</i> (2015)	<i>R v Yirrawala</i> (2015)
<p>Evidence of the admission is not admissible unless</p> <p>the circumstances in which the admission was made</p> <p>were such as to make it unlikely that</p> <p>the truth of the admission</p> <p>was adversely affected.</p>	<p>There was</p> <p>nothing about the circumstances in which the admissions were made</p> <p>Which would lead me to conclude</p> <p>That the admissions were not true.</p>	<p>A person in [these] circumstances</p> <p>Would be more likely to make a true admission.</p>
<p>Unlikely (adverb)</p> <p>Truth (noun)</p> <p>Affected (verb)</p> <p>Therefore, unlikely modifies (refers to) 'affect', not truth.</p> <p>'how likely was it that it was affected?'</p> <p>Focus of sentence is on 'circumstances'</p>	<p>Omits any discussion of likelihood or affect (impact);</p> <p>Focus of the sentence is on 'the admissions were not true'.</p>	<p>Likely modifies 'make a true admission'</p> <p>'How likely was it to be true?'</p> <p>Focus of the sentence is on 'make a true admission'</p>
Requires an analysis of circumstances	Analysis of truth	Analysis of truth

“Whether by inverting the language of s 85(2)...His Honour posed for himself the wrong test?”

Yes.

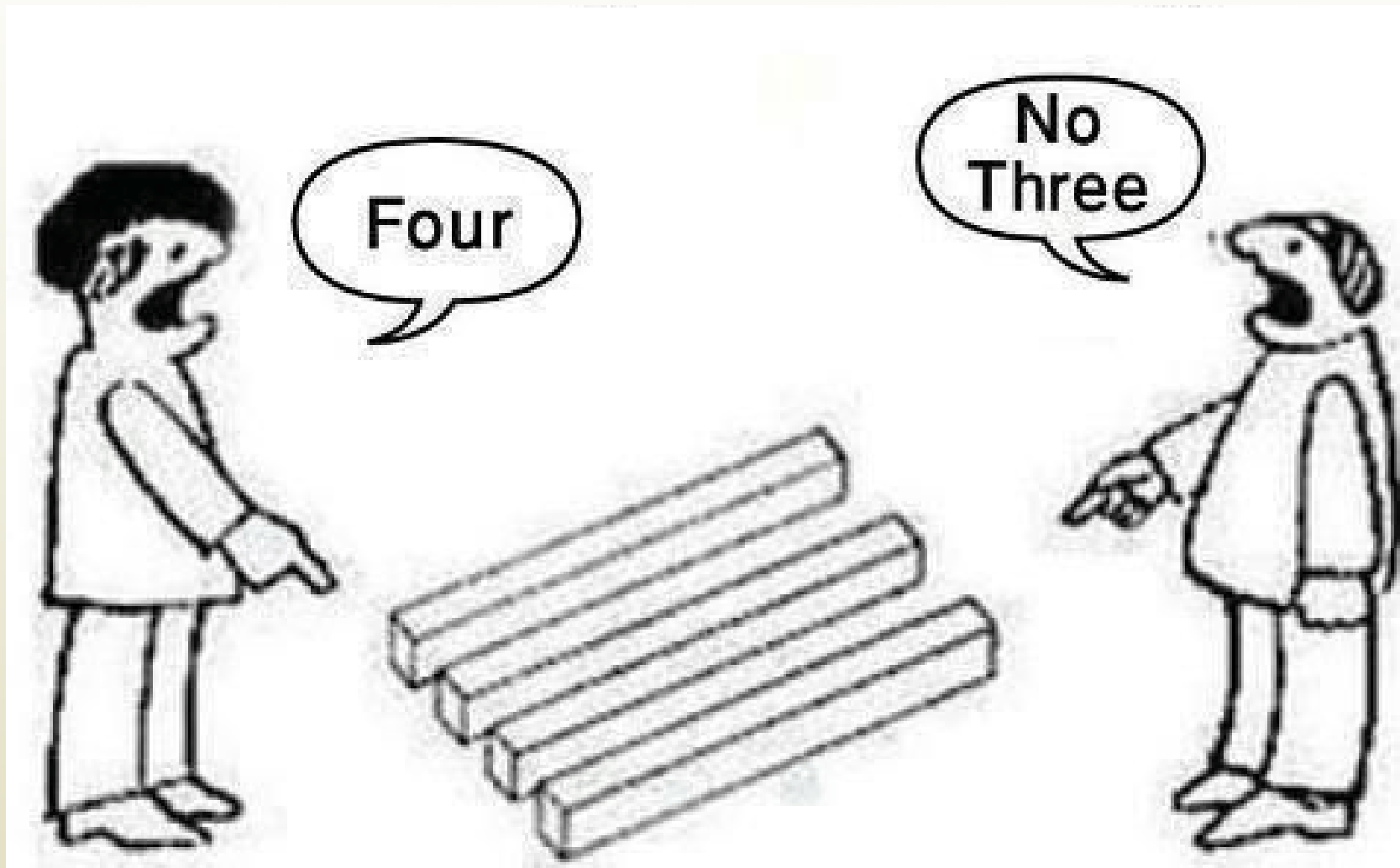
1) narrowed the scope of what is being considered.

2) shifted the focus away from circumstances and onto truth.

What is truth?

Can a person be honestly untruthful?
Or truthfully inaccurate?

What does 'truth' look like when
communicating across languages?



<https://softunderbelly.com/objective-vs-subjective-truth-and-the-human-brain/>

An illusion of understanding: how native and non-native speakers of English understand (and misunderstand) their *Miranda* rights

Aneta Pavlenko,^a Elizabeth Hepford^b and Scott Jarvis^c

of the Miranda rights. The purpose of the present study was to compare understanding of the Miranda rights among native ($n = 82$) and advanced L2 speakers of English ($n = 183$) to determine whether standardised assessments of L2 proficiency can predict comprehension of the Miranda rights. Our results show that most of our L2 participants failed to understand their Miranda rights and displayed significant disadvantages in basic level processing in comparison to native speakers. Furthermore, they were unaware of the failure: using linguistic resources at their disposal these advanced L2 speakers constructed alternative meanings that created an illusion of understanding.

Strikingly, our L2 participants were not always conscious of their own challenges. Our qualitative analysis revealed that, while some participants left blank spaces in place of legal terms, other participants filled the spaces with the words they inferred or thought they heard. Thus, in the sentence *Jurors decide who is guilty*, the unfamiliar term *jurors* was commonly substituted with *judge* or, alternatively, *Joe, Judy, George or Jews*. In turn, the sentence *The American legal system depends on the precedents set by previous cases* was rendered by several participants as *The American legal system depends on the President*. These substitutions – based on phonological similarity and approximate semantic fit – remind us that word meanings are not simply ‘retrieved’ from the bilingual lexicon but actively constructed online, with the mind filling in the gaps based on pre-existing knowledge. Insofar as this is true, did these compensatory strategies affect the L2 speak-

L2 speakers' accuracy rates	Examples of adequate paraphrases	Examples of inadequate paraphrases
You have the right to remain silent. (25.3%)	<p>You don't have to talk with us.</p> <p>You have the opportunity to say nothing.</p>	<p>You have to stay quiet.</p> <p>You have to do something (write).</p> <p>You have to write your own.</p>
You have the right to talk to a lawyer ... (53.5%)	<p>I have the right to talk to my lawyer.</p> <p>Wait for your lawyer if you want when they ask you.</p>	<p>You have the right to talk to a presenter.</p> <p>Have right to do smth such as talk to president.</p> <p>You can talk to the president.</p>
... and to have him present with you while you are being questioned. (10.0%)	<p>You get a lawyer for your questioning.</p> <p>When I ask your question you have right not to talk until your lawyer come.</p>	<p>It's OK to bring lawyer to court.</p> <p>Talk to lawyer why you are questioned.</p> <p>If you have question you can ask your lawyer.</p>
If you cannot afford an attorney, one will be appointed to represent you ... (7.0%)	<p>If you can't get afford to buy for a lawyer they may just give you any lawyer, and maybe he can't help you.</p> <p>If you don't have money to hire a lawyer they will send you a free one if you say yes.</p>	<p>You can sign any time.</p> <p>If you have ability to pay to it (tonight?)</p> <p>If you cannot afford it, you can have a conversation to talk about it if you want.</p> <p>We will answer your question if you want.</p>

... before any questioning
if you wish. (0%)

N/A

You can get an appointment before you
present if you went.

You will in the prison if you can afford
that.

You can decide at any
time to exercise these
rights and not answer
any questions or make
any statements.
(18.3%)

You can choose to use
your right at any time.
You have the right to talk
or keep silent anytime
you want.

You should answer.

You can write any time.

You can practise any time.

You can decide at any time to do exercise
right.

You can exercise without do other
things.

You can choose the time for exercises
any time you want.

What we saw then was consistent reliance on compensatory strategies that created plausible alternative meanings to fill the gaps created by incomplete vocabulary knowledge and weak listening skills, both involving BLC. The resulting errors were facilitated by phonological, morphological and semantic properties of high-frequency English words:

1. homophony and phonological similarity (*right/write, present/prison/president*);
2. derivational morphology (*questioned/questioning/question*);
3. polysemy (*right* as *correct*, e.g., *to do exercise right*; *exercise* as *practice*, e.g., *You can practice any time*).

Nearly 40% of participants giving incorrect responses indicated that they had a high level of confidence that they correctly understood.

Levels of language

Phonology
(sounds)

Semantics
(words)

Syntax (grammar)

Discourse (conversation, stories,
logic)

Different sound systems

z, s, ch, sh
→ dj/tj

p = b

k = g

t = d

v, f → p/b

Bought = port = bot = pot = board =
poured

See Andy Butcher, 'Linguistic aspects of Australian Aboriginal English' (2008) 22:8 *Clinical Linguistics & Phonetics* 625, 628.

Interpreting for the transcript: problems in recording Aboriginal land claim proceedings in northern Australia¹

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Aboriginal people commonly anglicize to [ndʒ]. As it happens there is a quite different place represented in the spelling conventions as Ngandjin. This place is on the east coast of a largish island called Indian Island which forms part of a chain of islands to the west of the mainland. For the land claim proceedings the significant part of the mainland is the Cox Peninsula along the northern coast of which is a place called Ngan.giyn. In summary:

	Pronunciation	Conventional spelling	‘Expected’ location
Barrister	[ŋʌndʒin]	??	north coast of Cox Peninsula
Witness in 11/89	[ŋʌngiːn]	Ngan.giyn	north coast of Cox Peninsula
Witness in 3/90	[ŋʌŋʃin]	Ngandjin	east coast of Indian Island

ALC BARRISTER:

I think you gave us – told us some – some of your story at Ngandjin. Remember that?

WITNESS:

Yes.

ALC BARRISTER:

And I think you said: when you were a little girl you lived there for a little while with your – with your mum and dad?

WITNESS:

Yes.

(Transcript p. 2295)

ALC BARRISTER:

How – approximately how long did you live at that place [thinking of the place on the north coast of Cox Peninsula viz. Ngan.giyn but pronouncing it as Ngandjin]?

WITNESS:

Long time.

ALC BARRISTER:

Long time. Many years?

WITNESS:

Before the war. Before the war.

ALC BARRISTER:

Before the war. Yes. And, how long did you stay there?

WITNESS:

We stay for that long time [thinking of the place on the east coast of Indian Island].

ALC BARRISTER:

You stayed there for a long time.

WITNESS:

Go to Indian Island.

ALC BARRISTER:

And you went across to Indian Island.

WITNESS:

We used to footwalk from there.

ALC BARRISTER:

Footwalk from Ngandjin ...

WITNESS:

Ngandjin to Indian Island.

ALC BARRISTER: Yes. How did you get across the water?
WITNESS: We go land – through the land.
ALC BARRISTER: Oh, you went right round the land. Did you do
that very often?
WITNESS: Yes. We walk up and down all the time.
(Transcript, p. 2296)

Ordinary words with multiple meanings

Q: Did you **take** your medicine?

A: Yes. (thinking I took it and put it in my bag)

Did the patient make a false statement?

The statement is neither true or false, or alternatively it is both true and false (depending on Dr or patient's point of view).

A Venn diagram with two overlapping circles. The left circle is light orange and labeled 'Buma (v)'. The right circle is light brown and labeled 'Kill (v)'. The intersection of the two circles is a darker shade of brown. A horizontal line is drawn across the top of the circles. The background is a light beige color with a solid orange bar at the bottom.

Buma (v)

- Hunt
- Hit
- Cause death
- Weave
- Pinch (a child)
- Dolphins jumping

Kill (v)

- Murder
- Cause death

An 'untrue confession' for murder?

Q: We have two witnesses who say they saw you kill John. Did you kill him?

A: *Yes.*

Q: Where were you when you killed him?

A: *At the BP servo.*

Q: How did you kill him?

A: *Punched him.*

Q: Did you mean to kill him?

A: *Yes.*

answering the question. Because of this the truth of the witness's answers remains dubious. Within the context of the questions, to translate *could see* into Djambarrpuyngu requires reference to a time, since the present tense form of Djambarrpuyngu verbs is the same as the recent past form. In English the verb *see* is also a pres-

[This witness demonstrated difficulty with the English construction *could see*. He does not use the expression himself. The significance of this difficulty becomes apparent below.]

2] Page 370, 17/9/90.

Counsel: *When he turned around where were the task force men?*

Witness: *They was there already where the trees.*

Counsel: *Could you see all the task force men?*

Witness: *Now I can see this man — and that bloke there, I don't know his name.*

[Perhaps the witness heard this question as *Can you now see (or identify) all the task force men?* Either way the witness has not demonstrated an understanding of the point of the question — namely, whether or not all five task force members were visible to him.]

Counsel: You **could see one** task force man?

Witness: **Yes. (Witness identifies Police Officer Grant in court.)**

Counsel: *And the task force man you could see, what was he doing?*

Witness: *He was sitting there.*

...

Counsel: And you **couldn't see** any of the other task force men?

Witness: *No.*

Counsel: *What about the man that had been sitting by the tree before, could you see him?*

Witness: *Yes, he walked out from the tree, walked out through the beach.*

Counsel: *Yes?*

Witness: *Yes.*

Counsel: *And that was the only task force man you could see at that time?*

Witness: *Yes, that's him.*

[Was the witness pointing out the only task force member he was able to identify in court at that time, or was he actually saying that there was only one task force member visible to him on the beach?]

within which he is setting his response. Thus there is every possibility that the witness limited his description of what he saw on the beach to encompass only those whom he could now identify in court.]

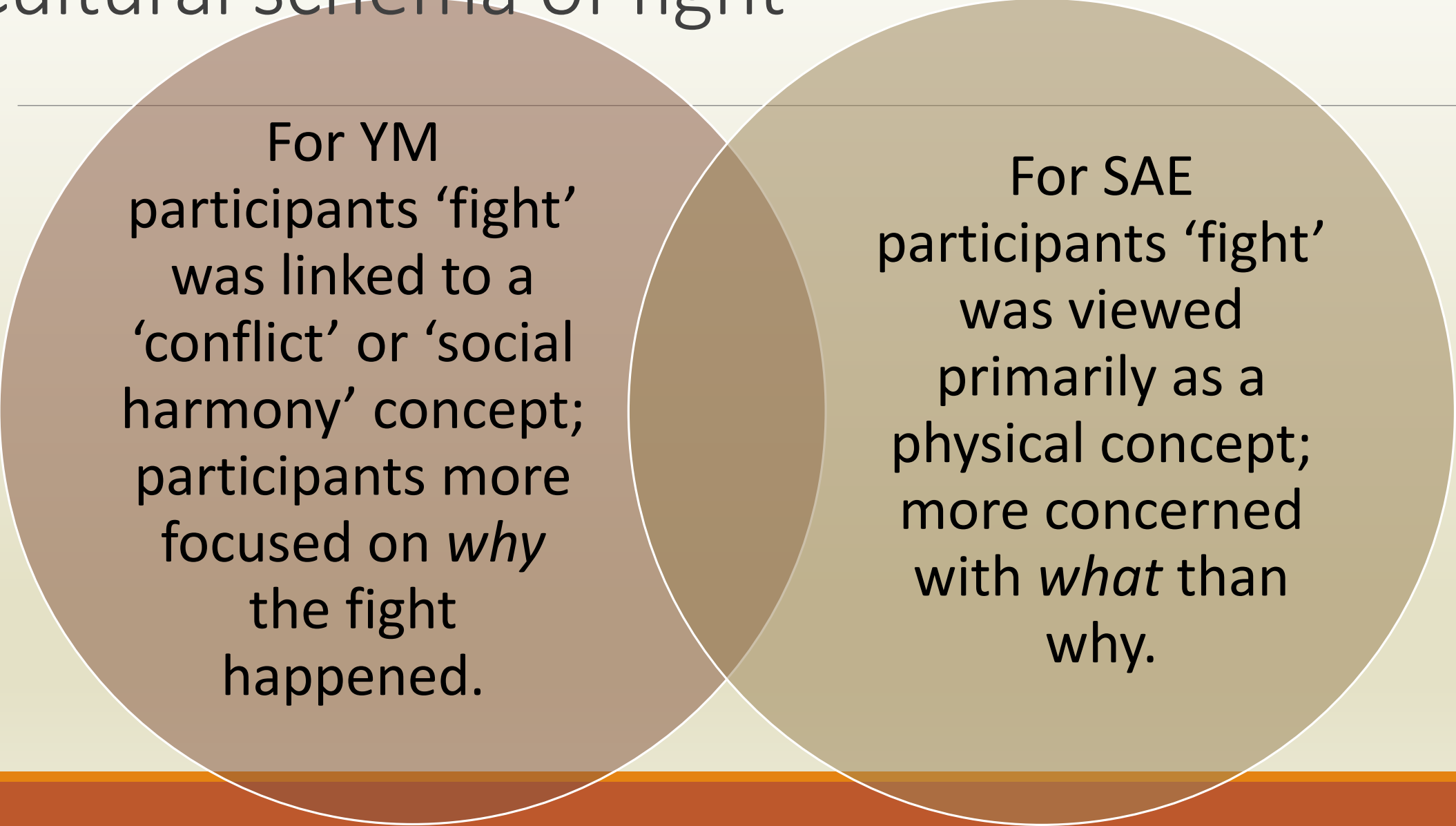
Cooke, Michael. 1995. "Aboriginal evidence in the cross-cultural courtroom."
In *Language in evidence: issues confronting aboriginal and multicultural
Australia* edited by Diana Eades. Sydney: UNSW Press, 1995, pp. 55-96; 85-87.

“Who started the fight?”

&

“Where were you when
the fight started?”

Cultural schema of fight



For YM participants 'fight' was linked to a 'conflict' or 'social harmony' concept; participants more focused on *why* the fight happened.

The diagram consists of two overlapping circles. The left circle is a darker shade of brown and contains text about YM participants. The right circle is a lighter shade of brown and contains text about SAE participants. The circles overlap in the center, and a horizontal line is positioned above the circles. The background is a light beige color with a dark orange horizontal bar at the bottom.

For SAE participants 'fight' was viewed primarily as a physical concept; more concerned with *what* than *why*.

Accurate vs true?

Inter-cultural 'miscommunication' often involves situations where;

1. There is inaccurate understanding of the meaning/purpose of a question or statement, which prompts a response that appears to be a meaningful answer, but is in fact an answer to a different question.

- The meaning of an answer can only be understood in relation to the question. Therefore, if there is a disconnect between the question and answer, the response is inaccurate (untruthful?).

2. Use of 'shared' words, with different meanings → both participants believe they understand the statement, however they each have formed a different meaning.

In other words, inter-cultural miscommunication is full of instances where a person is 'honestly untruthful' (unintentionally false), and unaware of this fact.

True but unreliable?

Q: What time did you rob the store?

A: Today is Thursday.

Q: and what were you going to do with the money you stole?

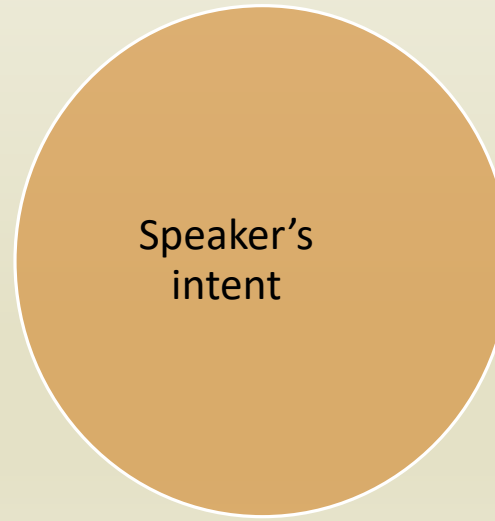
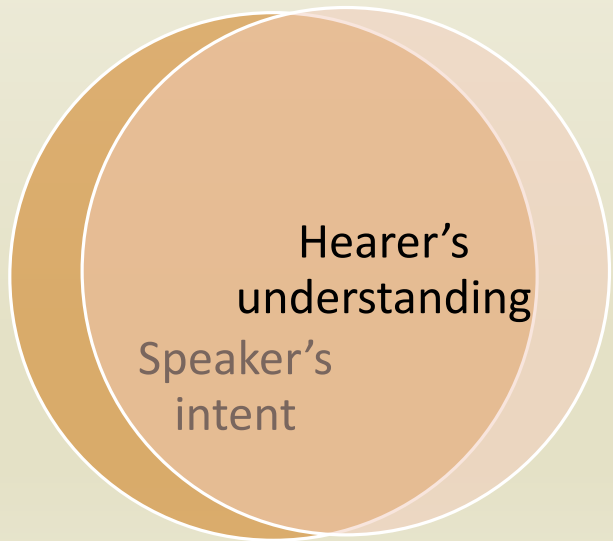
A: I own a Holden commodore.

Q: Did anyone give you permission to take that money?

A: John needs money to buy groceries.

How to measure accuracy?

The gap between the speaker's intent and the hearer's understanding.



The truth of an admission can be adversely affected, even when the accused has not made a false confession.

The Queen v BL [2015] NTSC 85

[37] Tiwi is BL's first language. His spoken English, although it may appear to be reasonable for social conversations, as was evident when speaking to BS during a break in the interview, could not be described as standard English. He speaks some English and is perhaps better described as a partial English speaker. Whatever is the appropriate expression, BL's responses in the record of interview are not those of a fluent English speaker. This is well evident from the record of interview itself, particularly the silences in response to important but seemingly simple questions, the large number of monosyllabic answers and occasional examples of obvious miscommunication.

situation to avoid miscommunication. With the second record of interview, it is clear there was significant scope for miscommunication and there are some identified examples. This reflects adversely on the reliability of the admissions made. Officer Dwyer asked a question with many assertions

[48] Although when the record of interview of 9 January was being conducted BL was not formally in custody, he was in the police station. In my opinion, given the lengthy silences, the many monosyllabic answers and some acknowledged miscommunication, this is not a record of interview that can be relied upon. An example highlighted that tends to show a lack of English proficiency is when Officer Dwyer asks “what time of day was it?” BL answers “like um Saturday or Sunday”. A proficient English speaker would not answer this way.

[51] I am not here focusing on the caution, but rather whether there was likely to be unreliability in what followed, given all of the circumstances. In my view, the failure to obtain an interpreter for the second record of interview that came about in the unusual circumstance described, diminished the reliability of the whole record of conversation. The fact that BL spoke a form of English or some English does not mean it was sufficient to complete a reliable record of interview with police.

The Queen v BM [2015] NTSC 73

[61] At a very superficial level, the accused appears to be answering and understanding some of what is said. Answers about dates, times and ages are extremely inconsistent and confused. Apart from some very basic matters and answers given in a simple way, the resulting interview as a whole is confusing. I am concerned about the reliability of many of the answers given by the accused.

[66] I appreciate the s 140 conversation is done for particular purposes in the investigation, however, the responses of the accused in that conversation are a clear indication of a problem with understanding concepts such as those contained in the caution. It is important to acknowledge the need to proceed with care is not solely about the suspect's understanding, it is about whether they can fairly explain their position. It is a fair point that Police General

[70] I accept Officers Hall and Adams genuinely thought they had good rapport.

Accuracy was important in this interview which was for serious offences. I

cannot be satisfied as to accuracy of expression or that miscommunication

did not take place. Officer Hall agreed in evidence that having another

determine this matter. Here the relevant characteristics include that the accused's first language is not English; that he speaks a non-standard form of English; that he was in custody when spoken to; and that it was not demonstrated he understood the caution or the allegations against him or their significance. The allegations against the accused were not properly explained, hence there are responses that do not accord with the questions or the relevant charges. The accused was quite young, possibly still an adolescent at 20-21 years when spoken to. He did not exhibit the maturity of an adult. The circumstances made it likely that the interview was unreliable in the sense of s 85(2) of the *Evidence (National Uniform Legislation) Act*.

narrow

broad

Whether certain
characteristics of the
accused led to a false
confession

Demonstrated
miscommunication
makes the
interaction unreliable

The purpose of s 85; reliability or truth?

“it is easy to see that s 85 is about reliability rather than the human rights concerns which lie behind s 84” (p 59)

“As we have seen, reliability is completely irrelevant under s 84, but it is the focus of s 85.” (p 61)

“...s 85 will result in the exclusion of some admissions that are in fact truthful, because the circumstances in which they were made promoted untruthfulness that did not eventuate...It is merely an initial vetting based on the circumstances that existed when the admission was made, not a confirmation of the truth of the admission, which is of course for the jury.”

Greg Taylor, "The Difference Between ss 84 and 85 of the Uniform Evidence Acts" (2019) 93 *Australian Law Journal* 53

ALRC explained (ALRC 26, para 765, p 437) that it proposed to:

... require the trial judge to be satisfied on the balance of probabilities that the admission was made in circumstances that were not likely to affect its truth adversely.

The trial judge should determine, as a preliminary issue, whether the reliability of the admission may have been impaired by the way it was obtained. The judge should consider all the circumstances, including the characteristics of the person making the admission. In making this decision he should take into account a number of factors –

In the NSW Court of Criminal Appeal decision of *R v Rooke* (unreported, NSW CCA, Newman, Levine, Barr JJ, 2 September 1997), Barr J stated (pp 14–15):

intended to require courts to inquire, where appropriate, into the process by which official questioning produces evidence tendered at trial. If the circumstances of the official questioning are such as to produce untruthful or unreliable evidence of admissions – adversely to affect their truth – the evidence is inadmissible. But the

This analysis does not resolve the question of whether the test under s 85(2) is subjective or objective. There is authority which supports an objective approach.⁸²¹ However, the trend of authority involves a subjective analysis, in the sense of a focus on the impact of the circumstances in which the admission was made on the actual reliability of the admission.⁸²² As a result, the actual contents

(at [EA.85.60]), and similar observations made in the Explanatory Memorandum to the Commonwealth amending Act, also appear to support a subjective analysis. The observation that the provision is “intended to ensure that the prosecution can demonstrate reliability in cases where the truth of an admission may be in doubt due to the circumstances in which it was made” seems more consistent with a subjective than an objective analysis.

of which the police were unaware.⁸²⁹ Higgins J in the ACT Supreme Court observed:⁸³⁰

[I]t is obvious from the terms of s 85(2) that the “circumstances” are not confined to those known to the interrogator. Nor are they confined to any objective tendency in the questions or the manner in which they had been put to produce an unreliable or untruthful answer.

NORTHERN TERRITORY OF AUSTRALIA

EVIDENCE (NATIONAL UNIFORM LEGISLATION) ACT 2011

85 Criminal proceedings – reliability of admissions by defendants

(2) Evidence of the admission is not admissible unless the circumstances in which the admission was made were such as to make it unlikely that the truth of the admission was adversely affected.

Finally, reference should be made to the summary of the law given by Murray CJ in *Ragless v Prospect District Council* [1922] SASR 299 at 311:

I think the rules [as to the use of headings] may be stated thus:

1. If the language of the sections is clear, and is actually inconsistent with the headings, the headings must give way.
2. If the language of the sections is clear, but, although more general, is not inconsistent with the headings, the sections must be read subject to the headings.
3. If the language of the sections is doubtful or ambiguous, the meaning which is consistent with the headings must be adopted.

INTERPRETATION ACT 1978 (NT)

55 Material that is, and is not, part of an Act

- (1) A heading to a Chapter, Part, Division or Subdivision of an Act is part of the Act.
- (2) A heading to a section of an Act is part of the Act if:
 - (a) the Act is enacted after 1 July 2006; or
 - (b) the heading is amended or inserted after 1 July 2006.

In the NT, where at least 50% of suspects speak English as an additional language, Courts should continue the legacy of Anunga by being on the forefront of developing case law that promotes rigorous linguistic understanding and analysis.

S 85(2) naturally lends itself to linguistic understanding and analysis, however some of the caselaw has preferenced a narrow interpretation of the section, which is not conducive to good linguistic approaches.