True, Untrue, or (Mis)represented? — Section 410(1)(a) of the NSW *Crimes Act*

PENELOPE PETHER*

> *"I began then to understand how words say things that aren't in them. Words reach for meanings that are already inside the hearer."*
>
> E S Goldman, "Earthly Justice"

JAH v The Queen[1] is a case which deals with the exclusion — both mandatory and discretionary — of confessional evidence in criminal trials. The appeal covers a wide range of the grounds for excluding such evidence — including the general issue of voluntariness and the specific *Bunning v Cross*[2] discretion to exclude unlawfully obtained confessional evidence, as well as the operation of s410(1)(a). The case also addresses the role of a Court of Criminal Appeal in reviewing findings of fact at trial.

This article deals solely with the dispute over the interpretation of s410(1)(a), a question which has exposed a significant analytical division amongst members of the NSW appellate court, first aired in *R v Connors*[3] The consideration by the High Court of this question and its subsequent ruling have important implications for legal hermeneutics which potentially extend far beyond the operation of s410(1)(a). The case opens up the possibility of a welcome and overdue increase in the sophistication with which Australian Courts address important questions of legal interpretation, a shift from a simplistic legalism to an acknowledgment of the importance of context, and an engagement with current thought in non-legal disciplines.

1. *The Issue*

Section 410(1)(a) provides

> No confession ... shall be received in evidence against an accused person if it has been induced:
>
> (a) by any untrue representation made to him by ... some person in authority ....

Section 410(2) provides

> Every confession ... made after any such representation ... shall be deemed to have been induced thereby, unless the contrary be shown.

Badgery-Parker J's decision in *JAH* (with which McInerney J agreed) followed the judgment of the majority of the Court of Criminal Appeal in *R v Connors* in finding that to come within the meaning of the section an untrue representation must be a wilfully untrue representation, made with the object of procuring a confession.[4] The majority judgment went on to hold that an ob-

* Lecturer in Law, University of Wollongong.

1 Unreported; NSW Court of Criminal Appeal; 17 December, 1992.

2 (1987) 141 CLR 54.

3 (1990) 20 NSWLR 438 (NSW Court of Criminal Appeal, decision of Gleeson CJ and Sharpe J; Priestley JA dissenting).

4 Typescript at 2.

jectively true statement cannot amount to an untrue representation for the purposes of s410(1)(a) unless there is a failure to reveal the whole truth,[5] or something in "the manner in which [the words] are spoken and in the light of any accompanying gesture or action or activity on the part of the speaker" which converts the objectively true words into a misrepresentation.[6] The majority explicitly rejected the view that the meaning of a representation depends on the understanding of the person to whom it is made.[7] For the majority, then, the context in which meaning is generated depends solely on the objective meaning of words and other conceptually concrete things such as the absence of other words necessary to render the complete truth, certain manners of speech, gestures, actions, activities.

Priestley JA — who in *Connors* had held that untruth in s410(1)(a) was not restricted to wilful untruths or untruths used with a view to extorting a confession,[8] objective untruth being the relevant test — held in this case that the "objectively true" words which were the subject of the dispute in this case "did not state the complete truth; in the circumstances they suggested that the fact stated was more dangerous to the appellant than in fact it was."[9] The most significant difference between the judgment of Priestley JA and that of the majority judges does not, however, lie in their differing interpretations of what was said by the police in this case, and thus whether the representation was true or untrue. It lies in his specifically contextual conception of the generation of meaning, of representation properly so called. He wrote:

> If the word representation were confined to representations made in words, the meaning of which had to be considered divorced from the context in which they were said, then it might be difficult to disagree ... that s410 had no application to the appellant's confession. But a representation can be made by a gesture, a wink, a shrug, a nod, lifting of the shoulders or indeed the lowering of the head. More frequently, a representation may be made by any of those things together with words being spoken; and the meaning of the words will depend on their context. Whether a representation is communicated by one person to another will depend upon the totality of what happens between the persons at the relevant time. To decide whether a representation has been communicated must involve a consideration of all the circumstances relevant to the representor and the representee leading up to the moment of alleged communication. The meaning of any words spoken in the course of such communication cannot be understood simply by regarding them abstractly as if they were something more than what was passing between representor and representee in the situation then existing between them. That situation must be taken into account in understanding meaning.[10]

---

5 Id at 3.
6 Id at 5.
7 Id at 5.
8 *Connors*, above n 3 at 483.
9 Typescript at 10.
10 Id at 11.

2. *The Context*

A. Facts

The appellant, JAH, was convicted on 14 August 1991 of four offences arising out of an attack on a fifteen month old girl, her mother and brother at a Windang caravan park on the night of 23-24 December, 1989. The offences were kidnapping, sexual intercourse with a child under the age of ten, inflicting actual bodily harm with intent to have sexual intercourse, and assault occasioning actual bodily harm. At the time of the offences JAH was eighteen years old, and had been unemployed since leaving school at the age of fourteen, at which age he was half way through year seven. He claimed to be unable to read back a 17-18 January 1990 record of interview with investigating police — one of two in which he participated — and one of the interviewing police read it back to him before he signed it. He claimed, too, in evidence on the voir dire at trial that he did not read the other (3 January) record of interview, but the trial judge, Newman J, rejected this evidence.

On the night of the offences JAH had injected himself with amphetamines; during his subsequent incarceration at Warilla Police Station (between 3 and 18 January) he was taken at least once to Shellharbour Hospital for treatment of withdrawal symptoms and chicken pox, so it appears that the instance of drug use on 23 December 1989 was not isolated. He claimed in the 17 January interview to be hearing voices in his head immediately before and during the attack; he also claimed that he did at least some of what he did on that night because he wanted to be like Freddy Kruger (a character from the *Nightmare on Elm Street* horror movie series). At the time JAH was first questioned and de facto taken into custody[11] by police in relation to the offences JAH was in breach of bail conditions — arising out of an assault on his mother — which had required him to attend a rehabilitation centre.

JAH was discovered by police in Kings Cross on 3 January 1990 and accompanied them to Warilla Police station for questioning; he was subsequently arrested and charged with breach of bail conditions relating to the assault on his mother. On 4 January he was taken to Wollongong Local Court, where the magistrate remanded him in custody and directed that he be taken to Malabar. The police in fact returned him to the Warilla Cells, where he was held until charged over the Windang attacks, and taken to Court on 18 January, 1990. On 3 January he submitted to blood testing and participated in a record of interview, in which he made no admissions in relation to the Windang attacks.

> I am shortly going to ask you some further questions about the abduction and sexual assault upon a 15 month girl at Oaklands Caravan Park about 2 am on the night of 24th of December 1989 and about the assault upon the child's mother and brother. Do you remember being spoken to about this before?

JAH replied, "Yes", and the police officer then said

> I will tell you now that specimens taken from that little girl have been analysed and compared with a blood sample that you gave. These tests have

---

11 Whether his initially accompanying the police was voluntary or not is disputed, and the exact point at which he was arrested is unclear.

> found that you are of the same blood group as that of the offender. Do you understand that?

JAH lowered his head and said "Yes". The Police Officer then said

> I want you to think about this matter and I will be back shortly to talk to you.[12]

Shortly afterwards JAH confessed to the Windang attacks and signed a record of interview to this effect. The principal s410(1)(a) dispute in the case relates to the representation made by the investigating officer in this conversation. The statement that tests had found JAH was of the same blood group as the offender was true — but it was not added, as is the fact, that the same blood group is shared by approximately 37 per cent of the population. In the event, the results of the blood testing were not admissible in evidence at JAH's trial, because the analyst could not photographically reproduce the results of his analysis as is required for such evidence to be admitted in court.

There was disputed evidence at trial about alleged police misconduct in relation to JAH's arrest and questioning, including threats and physical mistreatment. The trial judge disbelieved JAH's evidence in relation to these matters and preferred that of the police.

B. Law

Like *JAH v The Queen*, the two most significant decisions on s410(1)(a) — *R v Davidson*[13] and *R v Connors* — involved sexual offences against girls. These two earlier cases, like that of *JAH*, also involved confessions which were apparently believed by the presiding court to be true.[14] Priestley JA's dissenting judgment in *Connors* does not share this tendency.[15]

The significance of these two judgments is that they produce an interpretation of the legislative provision which make the provision difficult to operate, and would, on the basis of *Davidson* and *Connors* mean that the clearest evidence of wrongdoing by police (surely the usual "person[s] in authority" in the case of confessional evidence) would be required before the exclusion would operate. This is so in spite of the modification in sub-section 2 of the provision which allows the prosecution to prove that the untrue representation did not in fact induce the confession. In *Davidson*, the statement in question was that two people had seen Davidson, a schoolmaster, have unlawful sexual intercourse with an under-age pupil, when in fact only one witness had done so. In the case of *Connors*, a police officer admitted in evidence that the ("factually incorrect"[16]) statement that the fifteen-year-old victim of a sexual offence "can positively identify her attacker" was something that "just flowed out," and agreed under cross-examination that he knew at the time he made it that he could not substantiate it.[17]

The prevailing judicial interpretation of s410(1)(a), then, has emerged in

---

12 Typescript at 7.

13 (1895) 16 LR (NSW) 149. The case dealt with an earlier version of the current s410(1)(a).

14 See Windeyer J, with whom Manning and Cohen JJ concurred, in *Davidson*, id at 153, and Gleeson CJ in *Connors*, above n3 at 449.

15 Id at 451, 452, 453-4, 487.

16 Id per Gleeson CJ at 445.

17 Id at 454.

cases where a concern that the provision might exclude true confessions has produced a reading of the provision which can at best be described as tortuous. The Full Court in *Davidson*, for example, made the remarkable assertion that "the very expression '*untrue representation*' conveys to the mind the idea that the representation is wilfully untrue."[18]

And Gleeson CJ in *Connors* has expressed this view of s410(1)(a):

> A possible view of the facts is that the appellant attached so little importance to the representation that he cannot even remember it being made. Another possible view is that the proposition that he was induced to make the statement by a belief that the victim's ability to identify her assailant made it useless for him to deny his guilt has such obvious implications as to his own position that he was unwilling to embrace it in evidence. The latter is more likely to be the case. That seems to produce the result that the appellant can rely on s410(2), although *the nature of the result is such that it may explain why s410, especially if it means what the appellant says it means, has not commended itself to other jurisdictions.*[19] (emphasis added)

He has also described the police officer's statement in that case as an "innocent but incorrect assertion".[20] With the benefit of hindsight these remarks now stand at odds with the recent tendency of the High Court in cases like *McKinney v R*[21] and *Foster v R*[22] effectively to increase the standard of propriety required of police officers in obtaining confessional evidence.

To come within the provision an untrue representation has to be both wilfully untrue (and *Connors* suggests that the threshold for wilfulness is high) and made with the object of procuring a confession — this last despite the capacity under s410(2) to show that the deeming provision does not operate. There is a curious echo here of the increasingly problematic[23] post-*Morgan* [24] situation in rape law which feminist analyses argue allows an accused a subjective belief in an alleged victim's consent because of embedded historical assumptions about women's inherent untruthfulness and unreliability.[25] The leading cases on s410(1)(a) similarly suspect the truthfulness of men who allegedly commit sex crimes against girls (where consent is not an issue). These cases require evidence of a very high (subjective) knowledge of wrongdoing by police or other persons in authority before confessions by such men will be excluded. The point here is perhaps that the law's "hidden gender" and paternalistic/patriarchal assumptions in relation to sexual offences are producing

---

18 Above n13 at 154.

19 Above n3 at 449. The dissenting judgment of Priestley JA gives a particularly detailed account of the legislative history of the provision.

20 Id at 447.

21 (1991) 171 CLR 468; 98 ALR 577.

22 (1993) 113 ALR 1; 67 ALJR 550.

23 In the light of recent amendents to rape law in Canada and Victoria.

24 *DPP v Morgan* (1976) AC 182.

25 Some of the most useful (interdisciplinary) work on this question is by Joelle Chenoweth and Julia Quilter. See Chenoweth, J, "The Times are Changing Back" (1993) 4(1) *Polemic* 12 and "Rape, and Nothing Else: Sex, Violence and Law Reform in New South Wales" (1993) 6(2) *Antithesis* 27; Quilter, J, "Ethical Relations, Integrity and the Law: A Study on Sexual Assault", unpublished typescript on file with the author. See also Graycar, R and Morgan, J, *The Hidden Gender of Law* (1990) n105 at 339, and Estrich, S, "Rape" in Smith, P (ed), *Feminist Jurisprudence* (1993) at 177-9.

such anomalies that the Canadian and Victorian developments should recommend themselves to the NSW legislature.[26]

Troubling, too, is the confusion of judicial reasoning about the generation of meaning in these cases, which manifests itself most starkly in both trial and appeal courts in *JAH v The Queen,* and which produces a dominant thesis about representation within the meaning of the section which is not only out of step with current Australian legal developments in a range of statute and common law regimes, and with current interpretation legislation both state and federal, but which is also completely at odds with even conservative interpretive approaches to the generation of meaning in the fields of English and Language Studies.

3. *JAH v The Queen*

The division of opinion in the NSW Court of Criminal Appeal in *JAH* echoes the different views expressed in *Connors* over whether the intention of the representor or the comprehension of the representee should govern the interpretation of the representation for the purposes of s410(1)(a). There Gleeson CJ implicitly treated as equivalent the statement of the representor and the representation made to the representee.[27] He talks about context,[28] but seems to use the word in a limited sense ("in the course of asking the appellant whether he would consent to go in a line-up"[29]) which relates to the probability of certain kinds of questions being asked in order to elicit certain kinds of answers. Context here implies a certain kind of worldly commonsense. Priestley JA's judgment, on the other hand, in its painstaking historical account of the section's enactment and reception, frequently lays stress on the meaning conveyed by the representation to the representee,[30] as is consistent with its emphasis on voluntariness of confessions.

In his ruling on the voir dire at JAH's trial, Newman J also implicitly equated the statement made by the investigating police officer with the representation made to JAH[31] and seemed to suggest that for a representation to involve more than a simple statement would require abnormal circumstances.[32] We see the same elision in Badgery-Parker J's judgment[33], and then an acceptance that in certain exceptional cases a (true) statement can be converted into a (mis)representation.[34] He also concedes that the statement in question "did not however state the complete truth"[35] while indicating that the circum-

---

26 These changes have gone a significant way to remove the capacity of accused persons to rely on the "subjective belief in consent". The Canadian developments have been described as the "no means no" legislation.

27 Above n3 at 441.

28 Ibid.

29 Ibid.

30 Id at 459, 465, 468, 472, 482.

31 Transcript at 13, 15.

32 "In other words, the photographic reproduction of any evidence of the test not being confirmed did not amount to a representation [which would transform the detective's statement about the blood analysis into a misrepresentation] ...." id at 15.

33 Typescript at 5.

34 Ibid.

35 Id at 3.

stances were not sufficiently exceptional to make the representation untrue — the example he gives is of additional undisclosed information which negatived the truth of the statement. He canvasses the possibility that JAH may have understood what was said "to be a representation that the police were in possession of damning evidence against him" but dismisses the relevance of this:

> But the question, with respect, that is posed by s410(1)(a) is not a question as to what the accused person may have understood the words to mean; the question is what did the words mean .... It may well be the case that, burdened as he was with guilty knowledge, the accused read into the words more than was there to be read; but that circumstance cannot in my view have the consequence that a statement objectively true has to be, for the purpose of s410, regarded as untrue.[36]

He goes on to give examples in support of this, all of which differ in a material way from the circumstances under consideration in *JAH*, in that they each involve matters within the more or less unspecialised knowledge and understanding of most members of the community which he and the writer and many readers may share — the colour of hair, the model and colour of a motor vehicle, the brand of a jogging shoe. In this case the statement related to forensic evidence, the accused was young and at the very least substantially educationally disadvantaged, and the statement was surrounded by remarks and actions which seem to emphasise the weight of what was said. There is apparently no evidence which reveals what the statement in question conveyed, or represented, to him. With respect, the better view is there is no such thing as plain meaning; that, as Priestley JA put it:

> The meaning of any words spoken in the course of such communication cannot be understood simply by regarding them abstractly as if they were something more than what was passing between representor and representee in the situation then existing between them. That situation must be taken into account in understanding the meaning.[37]

Contextual approaches to interpretation of words and actions have long been known to the law: the law relating to provocation, to self-defence, to duress, and indeed to the subjective belief as to consent in rape cases provide just some examples, although feminist critiques of the latter and current controversies over the status of "Battered Woman Syndrome"[38] in many jurisdictions reveal that only certain kinds of contexts may currently be assumed or accepted by the law. In the field of consumer contracts, legislation like the NSW *Contracts Review Act* and the NSW *Fair Trading Act*, as well as the common law doctrines which enable the review of contracts, stress the legal relevance of contextual matters such as the comprehension and language skills of contracting parties, and inequalities of power between contracting parties. In *Connors* Gleeson CJ adverted to such developments, while saying that it would in his view be an error:

---

36 Id at 3-4.

37 Id at 11.

38 See, eg, O'Donovan, K, "Defences for Battered Women Who Kill" (1991) *J L & Soc* 219 and Waits, K, "The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions" in Smith, P (ed), *Feminist Jurisprudence* (1993) for useful accounts of these debates.

> to equate the concept of 'voluntariness' [in relation to the admissibility of confession] ... to that which operates in the law of contract and to treat confessions to crime as being, like agreements entered into following innocent misrepresentation, liable to be set aside.[39]

The law's increasing tendency to acknowledge context in interpretive practices is reflected, too, in the shift from literal to purposive approaches to statutory interpretation such as that effected by s115 of the *Statute Law Revision Act* 1981(Cth), although as Priestley JA's judgment in *Connors* demonstrates, contextual approaches to interpretation which limit themselves to the problematic question of legislative intention present practical as well as intellectual problems.

Perhaps the most telling objection to the approach to representation taken by the majority of the NSW Court of Criminal Appeal in *JAH* , though, is that it is inadequate in the light of the twentieth century understanding of the generation and interpretation of meaning, which at least since the publication of Ferdinand de Saussure's *Course in General Linguistics* in 1915 has emphasised the social construction of meaning. There is widespread acceptance that, as the legal and literary scholar Stanley Fish has written, "there is no such thing as literal meaning, if by literal meaning one means a meaning that is perspicuous no matter what the context and no matter what is in the speaker's or hearer's mind ...."[40] Even the most conservative interpreter of a seventeenth century text, for example, would wish to determine what meanings words or phrases in that text might have had at the time and in the culture in which it was generated and first received. Put shortly, "representation is always *of* something or someone, *by* something or someone, *to* someone."[41]

It may be objected that to adopt Priestley JA's formulation of representation would be to invite practical difficulties in the operation of the section. The response to such an objection may be to follow the High Court's lead in *McKinney* and *Foster*, and to let the law as to the admissibility of confessional evidence emphasise fairness in questioning of accused persons and, in particular, propriety in police procedures in the case of statements made to accused persons about forensic evidence, particularly when circumstances may be such as to suggest that the accused person's understanding of the statements may be limited.

---

39 Above n3 at 447.

40 *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989) at 4.

41 Mitchell, W J T, "Representation" in Lentricchia, F and McLaughlin T (eds), *Critical Terms for Literary Study* (1990) at 12.