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A SUGGESTED APPROACH TO INTERPRETATION OF SECTION 30 OF THE EVIDENCE ACT 2006

LLM (HONS) RESEARCH PAPER
ADVANCED BILL OF RIGHTS (LAWS 523)

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CONTENTS

In 2002 *R v Shaheed* replaced the prima facie exclusion rule for improperly obtained evidence with a balancing exercise to determine whether the exclusion of evidence is a proportionate response to the breach in question. Academic commentators criticised the new test for both the mechanics of its operation and the way particular factors were dealt with, resulting in a bias towards admissibility. In response to the perceived uncertainty of the test, the Court of Appeal in *R v Williams* attempted a comprehensive explanation of its operation. However, few changes were made to the substantive treatment of particular factors, perpetuating the test's failure to adequately vindicate important rights. Soon after the judgment in *Williams*, the test was replaced by a statutory version in s 30 of the Evidence Act 2006.

This essay evaluates the application of the *Shaheed* test in cases both before and after *Williams*, and examines the extent to which academic commentators' concerns are borne out in practice. While *Williams* has largely alleviated the problems of inconsistency, the bias towards admissibility persists. It is argued that the recent enactment of s 30 provides an ideal opportunity for the courts to reconsider the balancing process by adopting an interpretative approach to certain factors that aims to correct this imbalance. Rights could be adequately vindicated within the framework of the s 30 balancing test by recognising the importance of the existence of a breach in every case, acknowledging that the seriousness of the offence and the centrality of evidence to the prosecution's case are both factors that simultaneously support both admission and exclusion, and adopting a narrow interpretation of the alternative remedies statutory factor.

Word Length

The text of this paper (excluding abstract, table of contents, footnotes, bibliography and appendices) comprises approximately 15, 484 words.

I INTRODUCTION

In 2002 *R v Shaheed* replaced the prima facie exclusion rule for improperly obtained evidence with a balancing exercise to determine whether the exclusion of evidence is a proportionate response to the breach.[1] Scott Optican and Peter Sankoff immediately criticised the new test for both its uncertainty and systemic bias towards admissibility.[2] While careful at the time to characterise their assessment as preliminary, in a later comprehensive survey of the intermediary case law applying *Shaheed*, Optican concluded that his and Sankoff's earlier critique had been confirmed in practice.[3]

In response to the perceived uncertainty of the *Shaheed* test, the Court of Appeal in *R v Williams* attempted a comprehensive explanation of its operation, with the stated goal of "lay[ing] down a structured approach … that should lead to more consistent results."[4] In doing so, *Williams* took valuable steps towards addressing the need for an "identifiable structure for the *Shaheed* calculus."[5] However, the judgment's contribution to the certainty of the test was undermined in places by guidance that was phrased either too generally or too specifically to be of material assistance to lower courts. A more problematic aspect of *Williams* is that it made no attempt to address the *Shaheed* structure's unacceptable bias towards admissibility, at the expense of adequate vindication of important rights.

Soon after the judgment in *Williams* the modified test was replaced by the statutory test for admissibility of improperly obtained evidence in s 30 of the Evidence Act 2006, which is modelled closely on the *Shaheed* framework.[6] Its introduction provides an ideal opportunity for the courts to reinterpret the way the balancing exercise is being carried out in order to address its internal bias. I

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[1] *R v Shaheed* [2002] 2 NZLR 377.
[2] Scott L Optican and Peter J Sankoff *The New Exclusionary Rule: A Preliminary Assessment of* R v Shaheed [2003] NZ Law Review 1.
[3] Scott L Optican *The New Exclusionary Rule: Interpretation and Application of* R v Shaheed [2004] NZ Law Review 451, 528.
[4] *R v Williams and Ors* [2007] NZCA 52, para 147, Glazebrook J and William Young P.
[5] Optican and Sankoff, above n 2, 28.
[6] The Evidence Act 2006 came into force on 1 August 2007.

will argue that the vindication of rights can be adequately ensured within the framework of the s 30 balancing exercise by recognising the importance of the existence of a breach in every case, acknowledging that the seriousness of the offence and the centrality of evidence to the prosecution's case are both factors that simultaneously support both admission and exclusion, and confining the application of the alternative remedies statutory factor to cases where imprisonment is unlikely.

II SHAHEED

A *Establishment of the balancing test*

1 *The situation before* Shaheed: *the prima facie exclusion rule*

Prior to the judgment in *Shaheed* in March 2002, New Zealand had a prima facie rule of exclusion for evidence obtained in breach of the Bill of Rights. The rule created a rebuttable presumption of inadmissibility, which could be overridden if a Judge was satisfied that that was the "fair and right" course.[7] Established categories of exceptions to the prima facie rule included insufficient causal connection, inevitable discovery, lack of standing, and situations where no official conduct was involved.[8]

After the *Shaheed* test was introduced, many of the criticisms directed towards it were based on old justifications for the prima facie rule. A common theme is that any alternative would not adequately implement New Zealand's "rights centred" approach to admissibility.[9] The introduction of the balancing test was opposed on the grounds that the consideration of "the seriousness of the offence, the importance (to a conviction) of the evidence, the availability of other investigatory techniques, the reliability of the evidence" and police good faith was inappropriate because these factors "provide no sufficient answer to

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[7] *R v Butcher* [1992] 2 NZLR 257 (CA) 266; *R v Kirifi* [1992] 2 NZLR 8 (CA) 8.
[8] Optican and Sankoff, above n 2, 3-4; see also *R v Goodwin* [1993] 2 NZLR 153 (CA) 171, per Cooke P.
[9] *R v Goodwin, above n 8*, 193, per Richardson J; see also David M Paciocco "Remedies for Violations of the New Zealand Bill of Rights Act 1990" in Rishworth and Paciocco *Essays on the New Zealand Bill of Rights Act 1990* (Legal Research Foundation, Publication No 32, 1992).

the accused's cry for vindication of rights."[10] In her dissenting judgment in *Shaheed*, Elias J rejected the idea that the rule should be replaced partly because it was there to implement the appropriate balance already struck in the Bill of Rights between "minimum standards of criminal process and the public interest in the detection and prosecution of crime. Once a breach is established a wider balancing of interests is not appropriate".[11] It has also been argued that a presumption of exclusion is necessary to provide certainty, because the "comparatively lucid" rule "gave clear guidance to the police,"[12] thus assisting "all sides in understanding what must occur for exclusion to take place."[13] Under the prima facie exclusion rule New Zealand's law was closer to that in the United States of America, which has an exclusionary rule for evidence obtained in breach of the Fourth Amendment of the Constitution on the basis that it is necessary in order to deter future police transgressions.[14]

The idea of replacing the prima facie rule with a balancing test for exclusion grew out of discontent with the way that the exclusionary rule was operating in practice as an "almost automatic" rule of exclusion.[15] Ultimately it was argued for the Crown in *Shaheed* that courts had adopted an overly strict approach to the interpretation of the urgency and inconsequentiality exceptions, and that waiver and inevitable discovery ought not to be conceived of as exceptions at all.[16] In *R v Te Kira* Thomas J suggested that the prima facie rule carried with it "a number of real disadvantages", including the risk of setting guilty criminals free, the necessary undervaluing of the rights of victims "who can be said to have an interest greater than the community at large in…successful prosecution", forcing judges to "adopt a disciplinary role alien to the judicial function", and the fact that it can lead to "strained findings of fact, or law, in order to avoid the suppression of probative and relevant evidence."[17]

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[10] Richard Mahoney "Vindicating Rights: Excluding Evidence Obtained in Violation of the Bill of Rights" in Grant Huscroft and Paul Rishworth *Rights and Freedoms: the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brookers, Wellington, 1995), 453.
[11] *R v Shaheed*, above n 1, para 386, Elias J.
[12] Ibid, para 385, Elias J.
[13] Optican and Sankoff, above n 2, 27.
[14] *R v Shaheed*, above n 1, para 74 Blanchard, Richardson and Tipping JJ.
[15] Ibid, para 53.
[16] Ibid.
[17] *R v Te Kira* [1993] 3 NZLR 257, 286, Thomas J.

In law and economics terms, Walker argued that the exclusionary rule involved a net social cost, because exclusion of evidence means that either allocation of more resources is necessary to secure more evidence or the chance of conviction is decreased.[18] However, it should be noted that this argument rests on the assumption that a reduced conviction rate is a "dead weight loss" to society, and does not acknowledge society's contrary interest in having enforcement officers comply with the law. Finally, it is argued that the truth-seeking function of the criminal justice system is undermined by an exclusionary rule which sometimes necessitates ignoring reliable evidence.[19] These were the types of concerns that ultimately induced the majority in *Shaheed* to replace the prima facie exclusionary rule with the new balancing test. The adoption of the balancing test brings New Zealand law closer in line with the Canadian position, where admissibility of improperly obtained evidence is determined by a balancing exercise covering similar factors to those relevant under *Shaheed*.[20] However, the Canadian test is coloured by the wording of the remedies clause in the Canadian Charter of Rights and Freedoms of which New Zealand has no equivalent, which directs that evidence will be excluded if its admission would "bring the administration of justice into disrepute."[21]

2 *Summary of the new test*

I will begin by summarising the initial formulation of the balancing exercise as recorded by Blanchard J in *Shaheed*.[22] Under the balancing exercise, a judge asked to exclude evidence obtained by a breach of the Bill of Rights must decide whether exclusion is a proportionate response to the breach.[23] Blanchard J was careful to note that the list of factors given was not intended to

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[18] Walker "Wilkes and Liberty: A Critique of the Prima Facie Exclusion Rule" (1996) 17 NZULR 69, 82.
[19] Ibid, 81.
[20] Optican and Sankoff, above n 2, 19.
[21] Canadian Charter of Rights and Freedoms, 1982, s 24(2), Part 1 of the Constitution Act 1982 (Canada Act 1992 (UK), sch B).
[22] *R v Shaheed*, above n 1. Richardson and Tipping JJ joined in Blanchard J's judgment, Gault and Anderson JJ delivered concurring judgments, McGrath J partially concurred, and Elias CJ dissented.
[23] Ibid, para 156.

be exhaustive.[24] In addition, it was explained that "[t]o isolate a particular factor would be to misunderstand the discussion and would lead to possible distortion of the process".[25]

This clarification was followed by a paragraph indicating that where the interference with a right is trivial, an insufficient causal connection existed between the breach and the discovery of the evidence, the evidence would inevitably have been legitimately discovered, or there had been a fully informed waiver of the relevant right the balancing exercise is unnecessary.[26] These 'knockout blows' reflected the established categories of exceptions that had developed under the old prima facie rule of exclusion. Under the prima facie rule, the triviality and insufficient causal connection points were encompassed within the inconsequentiality exception.[27]

In terms of factors to be considered under the balancing test, we are told that that the "starting point should always be the nature of the right and the breach."[28] Where rights are fundamental in nature and intrusions are serious, this will count heavily against admissibility. If the search was conducted in urgent or dangerous circumstances, the presence of these factors can operate to make the intrusion less serious than it would at first appear.[29]

Where police misconduct is characterised as deliberate, reckless or grossly careless, "[e]xclusion will often be the only appropriate response".[30] The majority declined to accept the view of the Irish Supreme Court that the violator's awareness of the violation is irrelevant, because "[a]n action not known to be a breach of rights does not merit the same degree of condemnation as one which is known to be so".[31] Blanchard J clarified that good faith on the

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[24] Ibid, para 145.
[25] Ibid.
[26] Ibid, para 146.
[27] *R v Te Kira,* above n 17, 261, per Cooke P. For a discussion of the importance of a causal connection between the breach and the evidence obtained, see *Ministry of Transport v Noort* [1992] 3 NZLR 260, 274 per Cooke P.
[28] *R v Shaheed*, above n 1, para 147 Blanchard, Richardson and Tipping JJ.
[29] Ibid.
[30] Ibid, para 148.
[31] Ibid.

part of the police is to be treated as a neutral factor, because police courtesy is expected where the preferred approach is "rights centred".[32]

The next factor considered by the Blanchard J was the availability of alternative, lawful investigative techniques. Where the police were aware of the existence of such techniques and persisted in an illegal course of conduct, this would suggest that exclusion is appropriate.[33] This is consistent with the judicial approach taken to alternative techniques under the old exclusionary rule.[34] Their analysis of this factor is consistent with, but does not make reference to, earlier dicta to the effect that where "a search warrant is readily obtainable [but not obtained] that must tell strongly against an unauthorised search."[35]

Blanchard J then considered the nature and quality of the challenged evidence.[36] He opined that improperly obtained evidence of doubtful reliability is to be given "little or no weight", suggesting that the reliability of evidence is likely to be a nearly conclusive factor.[37] Reliability concerns are most likely to be present in situations where improperly obtained evidence is confessional in nature, whereas for real evidence "the probative value of that discovery may be a weighty factor."[38] The Court disagreed with the Supreme Court of Canada's opinion that the use of real evidence of undoubted reliability could make a trial unfair, preferring to regard the fairness of a trial as only compromised where the verdict may be unsafe.[39]

Another factor that would weigh in favour of admission is the centrality of the evidence to the prosecution's case, in the sense that the case is unlikely to succeed if the evidence cannot be adduced. This factor is consistently coupled with the reliability of the evidence in the judgment. They refer to evidence as "probative and crucial", "not only reliable but also crucial", and imply that the

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[32] Ibid, para 149.
[33] Ibid, para 150.
[34] See *R v Jefferies* [1994] 1 NZLR 290, 305, per Richardson J.
[35] *R v Grayson & Taylor* [1997] 1 NZLR 399, 408.
[36] *R v Shaheed*, above n 1, para 151 Blanchard, Richardson and Tipping JJ.
[37] Ibid.
[38] Ibid.
[39] Ibid.

centrality factor will only be a valid consideration where "the admission ...will not lead to an unfair trial".[40] Evidence that is reliable and central could potentially outweigh even a serious breach when coupled with the other major factor in favour of admission, serious offending. [41]

The majority then turned to consider whether a breach that led to the discovery of vital and reliable evidence could ever be adequately vindicated by remedies other than exclusion, and if so, whether that consideration could ever properly inform the balancing exercise.[42] They decided that a declaration of the breach or disciplinary proceedings against the perpetrator could never effectively redress a breached right in this context.[43] This statement is consistent with the approach taken to the issue of adequacy of alternative remedies in earlier case law.[44] The judgment in *Shaheed* implied that an award of *Baigent* damages or a reduction in a sentence of imprisonment in compensation for use of improperly obtained evidence at trial may be interpreted as condoning police breaches of rules, and bring the administration of justice into disrepute.[45] In that case, the public perception that police breaches of rights are condoned would be a negative side effect that would outweigh any benefit gained by the conviction of serious offenders.[46] For these reasons, the majority decided that where a conviction is likely to lead to a sentence of imprisonment, the availability of alternative remedies should not be considered under the balancing exercise.[47] They remained silent as to the proper approach in a situation where a conviction is unlikely to lead to imprisonment. The majority's conclusion on alternative remedies was explicitly endorsed by Gault J, who added that any assessment of alternative remedies would require making assumptions about the significance of evidence and the outcome of a trial which cannot realistically be evaluated "at the time of determining admissibility of evidence".[48]

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[40] Ibid, para 152.
[41] Ibid.
[42] Ibid, para 153.
[43] Ibid.
[44] *R v Te Kira*, above n 17, 276, per Richardson J.
[45] *R v Shaheed*, above n 1, para 154 Blanchard, Richardson and Tipping JJ.
[46] Ibid.
[47] Ibid, para 155.
[48] Ibid, para 173 Gault J.

In summary, the factors from *Shaheed* to be taken into account in the balancing exercise are nature of the right and the breach, police conduct, alternative investigative techniques, the reliability and centrality of evidence discovered and the seriousness of the offence in question. As these factors are weighed, "appropriate and significant weight" must be given to the existence of the breach and the need to maintain an effective and credible system of justice.[49] Blanchard J concluded this section of his judgment by commenting that while the new approach should lead to "a greater exercise of judgment", overall the results should largely be the same as under the earlier rule,[50] a sentiment mirrored in the judgment of Anderson J.[51]

3 *Early academic commentary*

The judgment in *Shaheed* generated a wealth of academic comment, both positive and negative. A particularly worthy critical account of the new test is found in Optican and Sankoff's preliminary assessment.[52] After the qualification that any analysis must necessarily be tentative until the effect of the new rule is explored in practice, the authors went on to make various criticisms of the new test. [53] Firstly, they attributed the absence of discussion in *Shaheed* of justifications for the abandonment of the prima facie rule to a thinly veiled judicial preference for "an exclusionary rule based on 'crime control' values rather than those of 'due process' and the protection of rights."[54] Secondly, it was argued that the new test was "horribly uncertain and capable of infinite manipulation and abuse", as it promulgates a non-exhaustive list of relevant factors and insufficient guidance as to the relationship between them.[55] Under this head the validity of some factors favouring admissibility were challenged because of the "pernicious 'ends-means' reasoning"[56] that they represent. That article was followed a year later by another article by Optican

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[49] Ibid, para 156.
[50] Ibid.
[51] Ibid, para 202 Anderson J.
[52] Optican and Sankoff, above n 2.
[53] Ibid, 2.
[54] Ibid, 18 - 19.
[55] Ibid, 27.
[56] Ibid, 24.

which omitted the earlier criticisms of the decision to adopt a balancing exercise per se, but concluded that his and Sankoff's earlier criticisms had been effectively borne out in practice.[57]

By contrast, a worthy example of early academic commentary advocating the new test is an article by Simon Mount.[58] Like Optican and Sankoff, Mount emphasised the necessarily preliminary nature of his evaluation, but argued that *Shaheed* represented a positive development unlikely to result in the erosion of defendants' rights in practice.[59] Mount believed that the concerns of uncertainty following *Shaheed* were exaggerated, because a period of "initial uncertainty" would be likely to be followed by the development of a body of precedent from which "relatively certain predictions" could be drawn.[60] Also he argued that there was nothing inherent in the nature of a balancing test that would undermine rights, and that the test as formulated in *Shaheed* was in terms so neutral that it was equally capable of being used to admit more evidence, preserve the status quo, or exclude evidence more readily than before.[61]

While Mount's optimistic view of the potential effects of *Shaheed* was a valid preliminary thesis, with the benefit of hindsight it can be shown that the practical effects of *Shaheed* have more closely resembled Optican's bleaker prediction. For this reason, this essay adopts some of Optican's concerns as a framework for evaluating the subsequent case law.

A Criticisms of the mechanics of the Shaheed *test*

In 2003, Optican and Sankoff observed that "full evaluation of the new exclusionary rule will not be possible until a critical mass of judgments applies *Shaheed* to diverse types of criminal case".[62] By the time of the publication of Optican's second article he noted that "while the case law may still be in its

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[57] Optican, above n 3, 528.
[58] Simon Mount R v Shaheed*: the Prima Facie Exclusion Rule Re-examined* [2003] 1 NZLR 45.
[59] Ibid, 46.
[60] Ibid, 69.
[61] Ibid, 67.
[62] Optican and Sankoff, above n 2, 2.

infancy,"[63] it was nevertheless possible to "evaluate the actual operation of *Shaheed* as illustrated in decided cases."[64] After analysing the five dozen High Court and Court of Appeal cases that had applied the new test he concluded that his and Sankoff's earlier criticisms remained pertinent.[65] It is now almost three years since Optican's second assessment. During that time, the case law which was then described as in its "infancy" has more than doubled,[66] providing a much greater "critical mass of cases" with which to analyse the effectiveness of the *Shaheed* test.[67] The following section will examine the validity of Optican's criticisms relating to uncertainty and assess the extent to which they are have been confirmed or contradicted in practice by decisions between the conclusion of his study and the Court of Appeal's decision in *Williams*.

For consistency, Optican's parameter of confining the survey to cases decided at the High Court and Court of Appeal level is adopted. In addition, my sample is limited to cases which either actually apply *Shaheed* or include an obiter dicta discussion of the application of *Shaheed* test that amounts to more than a perfunctory or conclusive statement about the likely result. Relevant cases have been occurring at roughly the same rate. Optican's study, which spanned a little over two years, covered over five dozen cases,[68] and the 68 relevant decisions between the conclusion of his study and the Court of Appeal's decision in *Williams* contained 76 applications of *Shaheed* to various sets of facts.[69]

1 Lack of use of precedent

Optican's first criticism is that in almost all of the decisions, "no other *Shaheed* judgment is cited as precedent for the instant result",[70] depriving the

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[63] Optican, above n 3, 457.
[64] Ibid, 456.
[65] Ibid, 528.
[66] Ibid, 457.
[67] Optican and Sankoff, above n 2, 2.
[68] Optican, above n 3, 456.
[69] In some cases the *Shaheed* test was applied to more than one set of facts within a single judgment.
[70] Optican, above n 3, 457.

applications of the necessary "principled coherency".[71] The validity of this criticism may be challenged on the grounds that any form of reasoning by precedent is contrary to the very nature of a balancing test. However, an increased willingness to consider precedent could promote consistency, provided that the exercise is conducted with some degree of flexibility.

While Optican found that in "almost every" case no other *Shaheed* judgment was cited, in my sample 13 cases made reference to other *Shaheed* cases. One case involving an unreasonable search of a motor vehicle argues entirely by analogy with the earlier case of *R v Maihi*,[72] by summarising the application of the test in that case, comparing the facts to the ones under consideration, and concluding accordingly.[73] While the cases which cite *Shaheed* precedent represent only approximately one sixth of my sample, which may be a lower proportion than is desirable, the figure is an improvement on the situation as reported by Optican in 2004. This is perhaps an unsurprising development, because as the body of *Shaheed* precedent accumulates over time there will be more chance of a precedent existing bearing a factual similarity to a case at hand. This suggests that Optican's first concern has been partially alleviated since his article, a trend which may continue in the future as more cases are decided.

2 Inadequate balancing

Secondly Optican points to the use of inadequate balancing, as illustrated by cases which demonstrate "perfunctory or conclusive reasoning", "mysteriously selective application", or "focus[ing] on one or more relevant considerations to the exclusion of others relevant to the case."[74] With respect to the last example, Optican argues that courts are obliged to account for all pertinent considerations in the balancing exercise, therefore while judges are

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[71] Ibid.
[72] *R v Maihi* (2002) 19 CRNZ 453.
[73] *R v Torvald* (25 August 2006) HC AK CRI 2005-092-014606, para 31-38; see also *R v Anderson* (23 February 2005) CA 388/04, para 41-43.
[74] Optican, above n 3, 461.

free to prioritise some factors over others they must nevertheless explain why omission of ostensibly relevant factors is appropriate.[75]

A large number of cases in my sample had the characteristics complained of by Optican of being either "mysteriously selective" or elevating one or more factors to determinative importance while making no reference to other, potentially relevant factors. For example, in *Plumb v Police* the doubtful reliability of the evidence was treated as a determinative factor.[76] While the treatment of doubtful reliability as a knockout blow has been advocated by academic commentators,[77] under *Shaheed* it was only to be taken into account as one, albeit heavily weighted, factor.[78] It is arguable that the treatment of bad faith as a determinative factor was mandated by the wording of *Shaheed*, which stated that if police behaved in a grossly careless manner or worse "exclusion will often be the only appropriate response",[79] which could explain the two cases that treated it as such.[80] However, the opposite is true where the *absence* of bad faith is elevated to conclusive status, since this factor was explicitly stated to be neutral.[81] This was effectively the position in *R v Owen*, where the only factor mentioned in the balancing exercise was that the officer executing a warrant would have been clearly justified in thinking that it contained adequate grounds.[82] There were also examples of cases which considered only two factors[83] or cases which considered more than two factors but nevertheless neglected to analyse factors relevant to the case.[84]

However, when considering the validity of Optican's inadequate balancing complaint it should be kept in mind that lapses in adequate balancing

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[75] Ibid, 462.
[76] *Plumb v Police* (19 September 2006) HC AK CRI 2005-404-95, para 32.
[77] Optican, above n 3, 500.
[78] *R v Shaheed*, above n 1, para 151 Blanchard, Richardson and Tipping JJ.
[79] Ibid, para 148.
[80] *R v Williams (No 8)* (6 September 2005) HC AK CRI 2004-404-003697, para 97; *Traber v Police* (1 December 2004) HC MAS CRI 2004-435-20, para 43.
[81] *R v Shaheed*, above n 1, para 146 Blanchard, Richardson and Tipping JJ.
[82] *R v Owen* (25 July 2006) CA 213/06, para 18.
[83] See *R v M* (6 December 2005) HC NEL CRI 2005-042-001981, para 24; *Collins v Police* (8 November 2006) HC AK CRI 2006-404-000152, para 49; *R v Cummings* (23 March 2006) HC CHCH CRI 2005-009-009014, para 21.
[84] See *R v Siauane* (25 October 2006) HC AK CRI 2006-092-004989, para 50; *R v Rogers* [2006] 2 NZLR 156 (CA), para 71-73; *R v Savelio* (5 August 2005) CA 234/96, para 52.

are necessarily more forgivable in cases where the *Shaheed* application is obiter or the evidence is ultimately excluded. Of my examples above, the only cases that do not fall into either category are *R v Owen* and *R v M*. The fact that most examples of inadequate balancing come from cases that ultimately excluded evidence suggests that the inadequate balancing concern may be overstated.

To Optican's concerns under the heading of inadequate balancing my sample would suggest that another could be added, that is, reasoning that is illogically ordered to the point that double counting of particular elements becomes an issue. In a few cases, the reasoning leaps from factor to factor and returns to ones already dealt with. For example, the balancing section of *Hunter v Police* both begins and ends with an analysis of the seriousness of the offence.[85] Also, in *R v Kata* reliability was treated the same way when the Court considered whether or not an interviewee had been subject to undue cross-examination when offering a voluntary statement under Rule 7 of the Judges' Rules.[86] Asher J applied the *Shaheed* test separately to an offensive part of the interview and the balance of the evidence. In considering the offensive part, he stated that the manner of questioning had become so overbearing that the reliability of the statement was in doubt.[87] However, later in the same balance he said that the evidence was of "reasonable quality."[88] The structure of the reasoning invites concern that the nature and quality of evidence was considered more than once in a contradictory matter. Whether or not that was in fact the case is not clear, but it would be preferable for courts to contain all their reasoning for each factor in one place for maximum transparency.

3 *Consideration of inappropriate factors*

Next Optican notes the consideration of inappropriate factors in the balancing exercise. Several examples are found, including the accused's belief

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[85] *Hunter v Police* [2005] DCR 936, paras 45 and 53; see also *R v Williams (Michael)* (21 December 2005) HC HAM CRI 2005-019-001588, paras 61-64.
[86] *R v Kata* (1 November 2005) HC AK CRI 2004-092-013265.
[87] Ibid, para 93.
[88] Ibid, para 94.

in the propriety of the search,[89] the fact that the jury had already heard the evidence,[90] and factors that are relevant to the lawfulness and reasonableness of a search itself.[91] He acknowledged that the consideration of such factors could be mandated by the explicit statement in *Shaheed* that the factors provided are not an exhaustive list,[92] but argued that a "blank cheque" for courts to consider factors "essentially unrelated to the factors set out in *Shaheed*" was not intended.[93] As the examples below illustrate, my sample indicates that courts are still inclined to take irrelevant factors into consideration.

(a) Good faith

Shaheed reaffirmed the "often overlooked expectation" that politeness and courtesy on the part of the police are expected at all times,[94] therefore the fact that a right is breached in good faith should not be treated as anything other than a neutral factor.[95] Some of the cases applying the test explicitly acknowledge the neutral status of good faith.[96] However, many cases note the absence of police misconduct but are silent as to whether it is appreciated that that factor is neutral, or whether they are giving it some weight in the analysis.[97] More worrying are cases that explicitly treat good faith as a factor carrying some weight. A typical example is *R v Tweeddale*, where the fact that police were acting in good faith is included in a bulleted list of factors that the Court regarded as determinative.[98] Even more explicit is the lower court judgment in *R v Sua* which, after finding that there was no bad faith,[99] stated that "[if] the focus of the balancing exercise was solely on the actions and the bona fides of

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[89] Optican, above n 3, 460; see also *R v Lapham* (2003) 20 CRNZ 286 (CA).
[90] Ibid, 463-6; see also *R v Allison* (9 April 2003) HC AK T 002481.
[91] Optican, ibid, 467; see also *R v Rollinson* (23 March 2003) CA 434/02.
[92] *R v Shaheed*, above n 1, para 145 Blanchard, Richardson and Tipping JJ.
[93] Optican, above n 3, 468.
[94] *R v Michalaros* (4 August 2005) HC HAM CRI 2005-019-000304, para 55.
[95] *R v Shaheed*, above n 1, para 149.
[96] *R v Rangihuna* (28 September 2006) HC CHCH CRI 2005-009-000005, para 48; *R v Yorston* (7 March 2006) HC AK CRI 2005-004-018740, para 42; *R v Mitchell* (31 August 2005) CA 160/05, para 53.
[97] For example *R v Siauane*, above n 84, para 49; *R v Savelio*, above n 84, para 52; *R v McFall* [2005] BCL 631, para 34; *R v Barnett* (9 December 2004) HC WN CRI 2004-085-002076, para 26.
[98] *R v Tweeddale* (7 September 2006) CA 38-06, para 32; see also *R v Iwihora* (29 November 2006) HC AK CRI 2006-055-000403, paras 20 and 23.
[99] *R v Sua* (20 September 2005) HC AK CRI 2004-090-010665, para 31.

the police, the evidence here would be admitted. However, that…is but one factor."[100] Perhaps the most problematic example was *R v Owen* where, as has been shown, the absence of good faith was elevated to determinative status.[101] In *R v Torvald*[102] Venning J cited *R v Maihi* for the proposition that good faith "tells not so much in favour of admissibility, rather it is the absence of a factor which would have pointed strongly in favour of exclusion."[103] This kind of reasoning perpetuates confusion because it would be impossible to take into account the absence of a factor which would have pointed strongly in favour of exclusion in any real way without giving good faith some positive weight in the balancing exercise.

(b) 'Knockout blows'

At the inception of the *Shaheed* test, certain factors were singled out as 'knockout blows'.[104] Their presence would result in automatic exclusion of disputed evidence, rendering the application of *Shaheed* unnecessary. Initially these were where the intrusion was trivial, there was an attenuated causal link between the breach and the discovery of the evidence, the evidence would inevitably have been discovered, or the right had been waived.[105] However, despite this guidance the treatment of both the causation point and the inevitable discovery point has been ambivalent in practice.

While some cases involving an attenuated causal link took their analysis no further than a finding of insufficient causation,[106] others treated the strength of the causative link as a factor in the balancing exercise.[107] In *R v Siauane*, the High Court decided that had the innocent misrepresentation that formed the

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[100] Ibid, para 32.
[101] *R v Owen*, above n 82, para 18.
[102] *R v Torvald*, above n 73, para 30.
[103] *R v Maihi*, above n 72, para 34. This statement may have descended from *Shaheed* itself, where Blanchard J said that in a good faith situation "[t]he best that can be said is that there is an absence of bad faith: *R v Shaheed*, above n 1, para 149.
[104] *R v Shaheed*, ibid, para 146 Blanchard, Richardson and Tipping JJ.
[105] Ibid, para 146.
[106] For example *R v Clark* (12 June 2006) CA 479/05, para 24; *S v Police* [2006] NZFLR 961, para 67.
[107] See for example *R v Mitchell*, above n 96, para 36; *R v Mitchell* (10 May 2005) HC AK CRI 2004-044-006481, para 44.

breach in question not occurred, the interviewee's answer would have been the same.[108] This consideration was then balanced alongside the quality and centrality of the evidence in order to find that the evidence was admissible. Similarly in *Hunter v Police* a finding of insufficient connection was balanced alongside most other *Shaheed* factors to contribute to a finding of admissibility.[109]

A similarly ambivalent stance is apparent towards the treatment of inevitable discovery as a knockout blow. One case cites the earlier authority of *R v Doyle* for the proposition that inevitable discovery was to be treated as a factor in the *Shaheed* analysis rather than as a knockout.[110] Tacit acceptance of this proposition may underlie the treatment of inevitable discovery as merely one factor in the balance in *R v Thomas*,[111] *R v Castle*,[112] and the minority judgment in *R v Hata*.[113] At both the High Court and Court of Appeal levels in *R v Iwihora*, inevitable discovery was treated as negating the need to have recourse to the alternative lawful investigative techniques.[114] In contrast to this line of authority, in *R v Ngan* Miller J maintained the original *Shaheed* position by treating inevitable discovery as a knockout blow rendering the application of the balancing exercise unnecessary.[115]

(c) Matters going to lawfulness and reasonableness

Optican characterised the consideration of points going to the legality and reasonableness of official acts as inappropriate, using the example of *Rollinson*, where "most of the 'factors' said to favour exclusion in the judgment have little or nothing to do with those set out in *Shaheed*" and "relate essentially to the lawfulness and reasonableness of the search itself."[116] The practice of considering these issues has continued beyond the publication of Optican's

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[108] *R v Siauane*, above n 84, para 50.
[109] *Hunter v Police*, above n 85, para 50.
[110] *R v Goodin* (9 February 2005) HC AK CRI 2004-055-001440, para 67.
[111] *R v Thomas* (7 July 2005) CA 173/05, para 9.
[112] *R v Castle* [2005] DCR 517, para 30.
[113] *R v Hata* (21 August 2006) CA 441/05, para 57, per Baragwanath J.
[114] *R v Iwihora* (5 February 2007) CA 463/06, para 21; *R v Iwihora* (HC), above n 98, para 21.
[115] *R v Ngan* (27 June 2005) HC WN CRI 2004-054-001295, para 21.
[116] Optican, above n 3, 467.

article.[117] However, in my opinion factors relevant to the lawfulness and reasonableness of the search can be legitimately taken into account under the nature of the breach aspect of the balancing exercise.[118] It is clear from the analysis in *Shaheed* of this factor that some consideration of the extent of the illegality is involved.[119] In many cases, this inquiry would encompass considerations of legality and reasonableness. Consistently with Optican's assessment of *Rollinson*, their consideration only becomes problematic where they are taken into account at the expense of other relevant factors. *Sua* and *Pierce* are less objectionable in this respect because the factors going to the reasonableness of police actions, while remaining dominant considerations, were cursorily balanced against other *Shaheed* factors. Optican's objection to the reasoning in *Rollinson* is better conceived of as an inadequate balancing concern, rather than a question of considering inappropriate factors.

(d) Other inappropriate factors

Other examples of consideration of inappropriate factors occur in my sample. In one case, the Court held that an accused's prior familiarity with the justice system could be taken into account to mitigate the seriousness of a breach,[120] without apparent appreciation of the double jeopardy implications of such a stance. Similarly, in *R v Umuhiri* it was held that a decision to conduct a warrantless search could be partly validated by the fact that the conflict between the accused's gang and another one had caused loss of life before.[121] This problematically involves the assumption that Umuhiri's right to be free from unreasonable search and seizure is somehow undermined by the past actions of people with whom he associates.

However, it is important to give effect to the acknowledgement in *Shaheed* that the listed factors are not intended to be exhaustive.[122] The cases

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[117] *R v Rangihuna* (14 December 2006) CA 365-06, para 46(a); *R v Sua*, above n 99, para 28; *R v Pierce* (21 June 2005) HC AK CRI 2004-004-024268, para 45.
[118] See *R v Reese* (2 March 2007) HC CHCH CRI 2005-009-010184, para 95.
[119] *R v Shaheed*, above n 1, para 147.
[120] *R v Clayton & Ors (No 1)* (21 November 2006) HC WN CRI 2005-078-001785, para 33.
[121] *R v Umuhiri* (29 October 2004) HC ROT CRI 2004-463-000064, para 11.
[122] *R v Shaheed*, above n 1, para 145 Blanchard, Richardson and Tipping JJ.

applying *Shaheed* do present some legitimate additional factors for inclusion in the balance where relevant. Some cases incorporate the particular vulnerabilities of the accused into the balance, such as the accused's difficult family background in *R v Rogers*.[123] While this factor may seem commonplace and unworthy of inclusion in the balancing test, in that case it warranted consideration as it had a direct bearing on the breach, which involved inducing the accused to agree to a reconstruction of the murder he was charged with by telling him it would be an opportunity to see his estranged family. Other specific vulnerabilities regarding language and comprehension abilities were considered in *R v Barreiro-Teixeira*[124] and *R v Kata*[125] respectively, although they did not contribute to the balancing exercise. Another example of a relevant factor not articulated in *Shaheed* is seen in the minority judgment in *R v Hata*, where the wellbeing of maltreated horses that were unreasonably seized was held to be relevant.[126] The inclusion of this factor was appropriate as it raised a relevant concern that could not be accommodated within the regular *Shaheed* factors, which do not envisage the unusual situation where living things are seized.

4 *Questionable interpretation of* Shaheed *factors*

Optican's final criticism regarding the certainty of the test concerns the "questionable interpretation of the meaning and explication of the *Shaheed* factors themselves."[127] His first concern under this head relates to some apparent confusion over exactly what constitutes a serious charge, and whether the appropriate standard is the nature of the offence itself or the consequences in a given case.[128] This criticism is borne out by my later sample. While the majority of judgments assess seriousness by the latter criteria, an approach that has since been endorsed in *Williams*,[129] in *R v Castle*[130] and the majority

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[123] *R v Rogers*, above n 84, para 71.
[124] *R v Barreiro-Teixeira* (4 April 2006) HC AK CRI 2005-092-004272, para 27.
[125] *R v Kata*, above n 86.
[126] *R v Hata*, above n 113, paras 39 and 56, per Chambers and Venning JJ.
[127] Optican, above n 3, 467.
[128] Ibid, 469; Optican's discussion relates to *R v I* (2002) CRNZ 413 and *Police v Wallis* (22 May 2002) HC DUN AP 30/01.
[129] *R v Williams,* above n 4, para 134, Glazebrook J and William Young P.
[130] *R v Castle*, above n 112, para 30.

judgment in *R v Hata*[131] only the maximum penalty available for the offence in question was cited as evidence of serious offending. A preferable approach is seen in *R v Firman*, where it was acknowledged that where possession of methamphetamine is the charge, the quantity of methamphetamine found in a given case is relevant, and it was the large volume found in the car that Mr Firman was driving that made the public interest in securing convictions an important factor.[132] Similarly in *Hunter v Police*, a case involving a charge of driving with excess blood alcohol content, it was the fact that Mr Hunter's blood contained over twice the legal limit and that public safety was at stake that aggravated the seriousness of an otherwise more minor offence.[133] The offence was described as "a bad case of its type in an area of real concern."[134]

Optican's next concern relates to the arguing technique of evaluating against extreme examples.[135] By this he means an interpretive strategy whereby a judge diminishes the significance of the facts of the case in front of them by contrasting them with an "even more egregious hypothetical case".[136] One example given is *R v Haapu* where the seriousness of *Haapu*'s burglary crime was minimised by reference to murder.[137] His second example is *R v Vercoe*, where Baragwanath J contrasted a violation of s 22 of the Bill of Rights with the "paradigm case in which the police arrive on a man's doorstep, take him into custody and interrogate him at the police station."[138] My sample included more examples of cases using the reasoning technique of evaluating against hypothetical extreme examples.[139] However, while Optican disapproved of this arguing technique as "a process of questionable comparison", I do not think that this kind of reasoning under *Shaheed* is per se objectionable.[140] For example, where judges are required to locate offending on a scale of seriousness I can

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[131] *R v Hata*, above n 113, para 31, per Chambers and Venning JJ.
[132] *R v Firman* (16 December 2004) CA 351/04., para 29; see also *Graham v Blenheim District Court* (10 October 2006) HC BLE CIV 2006-406-000119.
[133] *Hunter v Police*, above n 85, para 53.
[134] Ibid.
[135] Optican, above n 3, 470-1.
[136] Ibid, 471.
[137] *R v Haapu* [2002] 19 CRNZ 616 (CA).
[138] *R v Vercoe* (6 September 2002) HC ROT T 01/3866.
[139] See *R v Collings* [2005] DCR 714, para 102; *R v Reese,* above n 118, para 69; *R v Beattie & Ors* (31 May 20050) HC AK CRI 2003-004-025599, para 235.
[140] Optican, above n 3, 471.

appreciate the temptation of using this kind of logic to articulate that the offence falls somewhere in the mid-ranges of the scale. Unless this argumentation method is employed to conceal a factually insupportable conclusion, it is unfair to criticise a judge for resorting to this type of reasoning to explain their characterisation of a particular fact.

Optican's final criticism relating to the questionable interpretation of factors points to difficulties with the characterisation of police behaviour, an area susceptible to legitimate judicial disagreement.[141] Examples showing the scope for legitimate disagreement can be found within my sample with respect to other *Shaheed* factors. For example, *R v Fowler* contained the surprising conclusion that an insignificant invasion of privacy was involved in a search of a wallet,[142] and in *Rangihuna* the same was said of a search into drawers and cupboards, despite the fact that these areas are typically thought of as private.[143] In *R v Hata*, the majority and minority judgments expressed different opinions of the urgency involved in a situation of seizing horses from an environment of maltreatment. The majority held that "[w]hile Mr Wilson was concerned for the horses it cannot be said to have been a situation of urgency."[144] Baragwanath J in dissent challenged this characterisation, choosing to "respectfully disagree with the majority that [Mr Wilson's] delay in acting signified lack of urgency."[145] These examples show that the scope for legitimate judicial disagreement about the interpretation of *Shaheed* factors continues to undermine the consistent application of the balancing exercise.

5 *Summary*

In conclusion, many of the concerns raised by Optican about the application of the *Shaheed* test are confirmed by cases decided between his article and the judgment in *Williams*. I have noted that the habit of judges not to

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[141] Optican, ibid, 471-4.
[142] *R v Fowler* (5 February 2007) CA 418/06, para 17; contrast *R v Yeh & Ors* (31 August 2007) HC AK CRI 2206-004-22722, para 90.
[143] *R v Rangihuna*, above n 96, para 41; endorsed in *R v Rangihuna* (CA), above n 117, para 46(e).
[144] *R v Hata*, above n 113, para 27 and 30, per Chambers and Venning JJ.
[145] *R v Hata*, ibid, para 38, per Baragwanath J.

cite other *Shaheed* applications may be changing gradually, and have challenged Optican's criticism of the taking into account of matters going to lawfulness and reasonableness and the technique of arguing against extreme examples. However, even when relatively minor points are taken out of consideration, Optican's criticisms relating to the inadequate balancing of factors, the consideration of inappropriate factors, and the questionable interpretation of factors have been vindicated by the subsequent case law.

B Criticisms of substantive treatment of factors

1 Existence of a breach, nature of the right and nature of the breach

These three separate inquiries replace the presumption of exclusion that existed before *Shaheed*, and are the main vehicle for vindicating the accused's rights under the new test. In *Shaheed*, Blanchard J treated the existence of a breach as an umbrella concept that was to be "give[n] appropriate and significant weight" as the test was conducted, along with the need to ensure the credibility of the justice system.[146] This nature of the right and the nature of the breach were described as the "starting point" of the exercise.[147] Under this inquiry, the nature of the right deals with the extent to which the right is considered fundamental, and the nature of the breach covered issues such as the extent of the illegality, the seriousness of the intrusion, and any mitigating factors such as urgency or public danger.[148]

Despite the fundamental significance of these concerns, both the fact of the breach and the nature of the right are commonly disregarded in practice. Most cases applying the *Shaheed* test do not explicitly mention the fact of a breach, an approach which is tacitly mandated by the decision in *Shaheed* to include this point only in a concluding paragraph after the mechanics of the test had been explained. By contrast, in a minority of cases courts have been aware of the need to give significant weight to the existence of a breach. For example,

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[146] *R v Shaheed*, above n 1, para 156 Blanchard, Richardson and Tipping JJ.
[147] Ibid, para 147.
[148] Ibid.

in *R v Collings* Winkelmann J held that the fact of a breach had to be given great weight,[149] and in *R v Firman* the Court noted that they must bear in mind that the exercise was to be conducted against the background of a breach.[150] In *R v Rangihuna* it was held that in the absence of any factors pointing strongly towards admissibility, courts should defer to the fact that a right has been breached.[151]

Despite the fact that *Shaheed* described the nature of the right as one half of the starting point of any balancing exercise, it is often disregarded in cases dealing with rights other than the right to be free from unreasonable search and seizure. In most s 21 cases, the nature of the right is dealt with by considering the strength of the privacy interest in a given case, for example by stating the that expectation of privacy in a residence is paramount, and superior to that in a motor vehicle.[152] A few cases attempt to characterise rights other than s 21. The right to have a lawyer present in s 23(1)(b) of the Bill of Rights has been variously described as "important"[153] and "fundamental".[154] In *R v Clayton* the fundamentality of Rule 2 of the Judges' Rules was considered to have a bearing on the outcome of the balancing exercise,[155] conversely in *R v Kata* the fact that Rule 7 is not technically a 'right' was given some weight.[156] However, the most common practice is to either pay lip service to the "nature of the right and the breach" as the starting point, before turning to an application that ignores the nature of the right component,[157] or omit to mention the nature of the right completely.[158]

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[149] *R v Collings*, above n 139, para 53.
[150] *R v Firman*, above n 132, para 50. See also *R v Tanner* (9 May 2006) CA 5/06, para 20; *R v Sua*, above n 99, para 30; *R v Michalaros*, above n 94, para 54; *R v McFall*, above n 97, para 35; *R v Hooper* (24 March 2005) HC GIS CRI 2003-016-006805, para 45; *R v Anderson*, above n 73, para 43; *R v Barnett*, above n 97, para 26.
[151] *R v Rangihuna* (CA), above n 117, para 55.
[152] See for example *R v Gray* (8 March 2007) HC AK CRI 2006-044-001207, para 30; *R v Reese*, above n 118, para 69; *R v Rangihuna* (HC) above n 96, para 48; *R v Taylor* (3 May 2006) CA 384/05, para 37.
[153] *R v Barreiro-Teixeira*, above n 124, para 52; *R v Hooper*, above n 150, para 35.
[154] *Hunter v Police*, above n 85 para 46.
[155] *R v Clayton*, above n 120, paras 33 and 42.
[156] *R v Kata*, above n 86, paras 94 and 102.
[157] For example, see *R v Iwihora* (HC), above n 98, para 18; *R v Taylor*, above n 152, para 37; *R v Paku* (30 May 2006) HC HAM CRI 2005-019-006408, para 34; *R v Cummings*, above n 83, para 21; *R v Collings*, above n 139, para 100.
[158] For example, see *R v S* (5 May 2006) HC AK CRI 2004-090-005245; *R v Taylor*, above n 152, *R v Noble* [2006] 3 NZLR 551 (HC), *R v Barreiro-Teixeira*, above n 124.

Of these three considerations, only the nature of the breach is being balanced with any regularity. Thus, the nature of the breach inquiry is in many cases the sole vehicle for vindicating an accused's rights. In this way, the operation of the *Shaheed* test amounts to relegation of the freedoms affirmed to be "matters to be given some weight in the exercise of judicial discretion", a situation described in *R v Te Kira* as "inconsistent with the concept of a Bill of Rights."[159] In order to remedy this situation, the fact of the breach ought to be considered as the startpoint to the exercise, while the nature of the breach remains to be considered within the body of the balancing test. The tendency to overlook the nature of the right concept may be understandable, given that all the criminal process rights which are likely to be at issue in an exclusion of improperly obtained evidence situation are probably considered to be similarly fundamental. For this reason, in cases other than search and seizure cases the nature of the right would be given a similar weight every time, and it would be unnecessary to pit one against another. It is clear that in these cases, the nature of the right issue has little to contribute to the balancing exercise.

2 Seriousness of the offence

Prior to *Shaheed*, one of the grounds on which the introduction of a balancing test was opposed was that the consideration of "the seriousness of the offence," amongst other factors, was inappropriate because it could "provide no sufficient answer to the accused's cry for vindication of rights."[160] In *R v Goodwin*, when the Solicitor-General argued that the seriousness of offending should be considered relevant to the admissibility of improperly obtained evidence, he tempered his submission with an acknowledgement that "the importance to the accused of the rights violated would have to be weighed as well."[161] While refraining from providing a definite answer to this argument, Cooke P mentioned that it strayed into "difficult territory", and that it "might seem odd that an alleged drunken driver should have stronger Bill of Rights Act

[159] *R v Te Kira*, above n 17, 262, per Cooke P.
[160] Mahoney, above n 10, 453.
[161] *R v Goodwin*, above n 8, 171.

protection than an alleged murderer."[162] The caution with which this consideration was treated in *Goodwin* was not reflected in *Shaheed*, which considered the seriousness of the offence only on the public interest side of the scale.[163] This treatment created an inappropriate bias within the test towards admissibility by failing to adequately acknowledge that it is "*precisely* in serious circumstances … that a court should be most solicitous about ensuring that the Bill of Rights is followed."[164] This bias needs to be addressed by the acknowledgement that where improperly obtained evidence relates to serious offending, this factor necessarily simultaneously supports both admissibility and exclusion. This was acknowledged in *R v Samuelu*, where Frater J commented that while " the public has an enhanced interest in the successful prosecution of serious crimes … those accused of such crimes have a greater need to ensure that they are afforded their fundamental rights."[165] In holding that the seriousness of the offending was insufficient to counterbalance the breach, he acknowledged that "[t]he public has a sense of fair play" and "do not want a conviction at any price."[166] I do not suggest that in circumstances of serious offending the public interest in convicting criminals will not outweigh the accused's increased interest in Bill of Rights procedural safeguards. However, the Court should have recognised that the weight to be given to the seriousness of the offence must necessarily be limited because of the internal compromise inherent within that factor.

3 Centrality of the evidence to the prosecution's case

The *Shaheed* treatment of the centrality of the evidence as pointing only towards admissibility gives rise to similar concerns. The courts have an enhanced responsibility to meaningfully enforce an accused's rights when considering the admissibility of evidence that is crucial to a prosecution, given that their liberty may be at stake.[167] As with the seriousness of offending, the

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[162] Ibid.
[163] *R v Shaheed*, above n 1, para 152 Blanchard, Richardson and Tipping JJ.
[164] Optican and Sankoff, above n 2, 24.
[165] *R v Samuelu* [2005] BCL 630 (HC), para 134.
[166] Ibid, para 135.
[167] Optican and Sankoff, above n 2, 24.

Court should have specified that this factor must be treated with caution as it necessarily simultaneously supports both exclusion and admission.

4 Reliability

It is appropriate at this point to discount some concerns presented in academic commentary regarding the treatment of reliability of evidence. While Blanchard J made clear that this factor was to be a particularly compelling one by stating that evidence of doubtful reliability was to be given "little or no weight",[168] Optican took the argument one step further an advocated the treatment of reliability as a knockout blow rather than merely another factor.[169] He argued that "any real doubts about the trustworthiness of a confession … should lead absolutely to the statement's exclusion".[170] Despite steadfastly advocating the removal of the reliability element from the balancing test and reinstating it in a 'gatekeeper role',[171] Optican overlooks the fact that his main objection to letting causation have such a role, that there is too much scope for judicial disagreement as to what constitutes an insufficient causal connection, has some application to the reliability point also. This is illustrated by *R v Siauane*, where Courtney J surprisingly considered that the evidence was high-quality despite the fact that it was a confessional statement made in unfair circumstances.[172] There is also the general objection that a properly informed balancing exercise requires the ability to take reliability into account. In my opinion, the treatment of reliability in *Shaheed* did not contribute to the bias within the test towards admissibility.

5 Cumulative effect

The tendency to inappropriately overlook the fact of a breach, coupled with the one-sided consideration of seriousness and centrality, contributes to the general bias within the *Shaheed* test towards admissibility. This supports

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[168] Ibid.
[169] Optican, above n 3, 500.
[170] Ibid.
[171] Ibid
[172] *R v Siauane*, above n 84, para 50.

Optican's point that *Shaheed* demonstrates a judicial policy preference for an exclusionary rule based on "crime control values" rather than rights protection and "due process",[173] to the point of falling short of the their obligation to vindicate abuses of rights. Thus, at the point that *Williams* was decided, the concerns about the mechanics of the test were coupled with concerns relating to the substantive bias towards admissibility of evidence.

III WILLIAMS

A Summary

In *Williams*, the Court referred to earlier inconsistency in the application of the *Shaheed* test and attempted to construct a systematic approach to its application to help lower courts reach consistent results.[174]

Firstly, they clarified that the starting point must be the nature of the right and the nature of the breach,[175] which reflects the starting point of the *Shaheed* inquiry.[176] Under this head it is permitted to have regard to a hierarchy of rights as recognised in international law.[177] We are told that in search and seizure cases this factor may be considered either separately or as part of the seriousness of the breach inquiry, as the seriousness of the breach limb will involve an assessment of the nature of the privacy interest breached.[178]

The seriousness of the breach inquiry is separated into consideration of the extent of the illegality[179] and the nature of the privacy interest,[180] and consideration of any aggravating and mitigating factors.[181] The considerations encompassed in the seriousness of the breach inquiry as envisaged by *Williams*

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[173] Optican and Sankoff, above n 2, 19.
[174] *R v Williams*, above n 4, para 147, Glazebrook J and William Young P.
[175] Ibid, para 106.
[176] *R v Shaheed*, above n 1, para 145 Blanchard, Richardson and Tipping JJ.
[177] *R v Williams,* above n 4, para 107, Glazebrook J and William Young P.
[178] Ibid, para 109.
[179] Ibid, para 110-112.
[180] Ibid, para 113-115.
[181] Ibid, para 116-129.

roughly correspond to those relevant to the nature of the breach under *Shaheed*.[182]

The extent of the illegality inquiry involves consideration of how far the breach fell short of what would be required for the search or seizure to be lawful.[183] As was expressed in *R v Jefferies*, "there are degrees of unlawfulness, ranging from the result of a technical or inconsequential procedural breach to a flagrant violation of a right."[184]

The nature of the privacy interest inquiry reflects the idea that different types of property can attract varying degrees of privacy interests. This idea comes from early important search and seizure cases such as *R v Jefferies* and *R v Grayson & Taylor*.[185] It also finds some oblique support in *Shaheed*, where it was said that the taking of a bodily sample is an especially serious invasion of privacy because of its intrusive nature.[186] The Court in *Williams* does not acknowledge the fact that the nature of the privacy interest component will only be applicable in cases involving the right to be free from unreasonable search and seizure.

Factors which may aggravate the seriousness of a breach include non-compliance with a statutory code, police misconduct and the unreasonable manner of a search.[187] It can be mitigated by factors such as urgency, a weak connection between the person and the searched or seized property, and attenuation of the causative link between the evidence and the breach.[188] Factors which ought to have no bearing on the seriousness of the breach are police good faith and the seriousness of the offence.[189]

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[182] *R v Shaheed*, above n 1, para 147 Blanchard, Richardson and Tipping JJ.
[183] *R v Williams*, above n 4, para 110, Glazebrook J and William Young P.
[184] *R v Jefferies*, above n 34, 315, per Hardie Boys J.
[185] *R v Grayson & Taylor*, above n 35, 407; *R v Jefferies*, ibid, 297, per Cooke P.
[186] *R v Shaheed*, above n 1 para 147 Blanchard, Richardson and Tipping JJ.
[187] *R v Williams*, above n 4, para 116-121, Glazebrook J and William Young P.
[188] Ibid, para 122-129. The treatment of urgency and non-compliance with a statutory code as mitigating factors dates back to the prima facie exclusionary rule, see for example *R v Jefferies, above n 34*, 305, per Richardson J.
[189] *R v Williams*, ibid, para 130-131.

The choice of aggravating and mitigating factors reflects fundamental changes in the *Shaheed* calculus. It can be seen that alternative lawful investigative techniques, previously a separate factor under *Shaheed*,[190] is now relevant in two ways. It can lessen the seriousness of the breach where its existence was unknown to the police,[191] whereas if the police did know or ought to have known of its existence it will become an aggravating factor. Similarly the conduct of the police, once a separate factor, is now relevant as an aggravating factor.[192] While adopting the *Shaheed* position that any police state of mind equivalent to gross carelessness or worse will aggravate the seriousness of a breach,[193] the Court in *Williams* adds a gloss that the "practical realities of policing must be borne in mind" and note that "mere sloppiness" will not attract judicial sanction.[194] Attenuation of causation and inevitable discovery, once knockout blows under *Shaheed*, are now treated as mitigating factors within the balancing exercise.[195]

Once the seriousness of the breach is assessed, it is to be balanced against the public interest factors; the seriousness of the offending and the nature and quality of the evidence.[196] In the course of justifying the inclusion of the seriousness of the offence on the public interest side, the Court in *Williams* repeats the justification from *Shaheed* that "[weight] is given to the seriousness of the crime not because the infringed right is less valuable to a person accused of serious crime but in recognition of the enhanced public interest in convicting and confining those who have committed serious crimes".[197] The nature and quality of the evidence point is to encompass probative value, relevance, and reliability.[198] Of these three, only reliability is specifically dealt with in *Shaheed*,[199] raising the question of what may be usefully added by the inclusion of the probative value and relevance points. Finally, consistently with *Shaheed*,

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[190] *R v Shaheed*, above n 1, para 150 Blanchard, Richardson and Tipping JJ.
[191] *R v Williams*, above n 4, para 110, Glazebrook J and William Young P.
[192] Ibid, para 119-121.
[193] *R v Shaheed*, above n 1, para 148 Blanchard, Richardson and Tipping JJ.
[194] *R v Williams*, above n 4, para 120, Glazebrook J and William Young P.
[195] *R v Shaheed*, above n 1, para 146 Blanchard, Richardson and Tipping JJ.
[196] *R v Williams*, above n 4, para 134-141, Glazebrook J and William Young P.
[197] Ibid, para 138.
[198] Ibid, para 140.
[199] *R v Shaheed*, above n 1, para 151 Blanchard, Richardson and Tipping JJ.

the Court holds that the centrality of the evidence is relevant to the public interest side of the equation, despite its deletion from s 30 of the Evidence Act.[200]

Once a conclusion has been reached on the seriousness of the breach and the strength of the public interest in admissibility, these two are to be balanced against each other to determine whether exclusion of the evidence is a proportionate response in a given case.

While the treatment of *Shaheed* in *Williams* goes a long way towards improving the certainty of the *Shaheed* test, it fails to seize an opportunity to address substantive bias within the test towards admissibility.

B Extent to which Williams *addresses certainty concerns*

While at the time of writing only twenty cases have conducted the balancing exercise as modified by *Williams* or as set out in s 30 of the Evidence Act 2006, their experience suggests that the mechanical issues picked up by Optican, as modified by my analysis have been largely alleviated by the *Williams* guidance. As with Optican and Sankoff's initial analysis of *Shaheed*, of course, this analysis must necessarily remain tentative until a greater body of cases applying the test with the benefit of *Williams*' guidance have been decided. In this part of the essay, I will consider the criticisms one by one and the extent to which they have been resolved.

1 Use of precedent

The sample of cases decided since *Williams* is consistent with the trend noticed above that courts are becoming increasingly willing to make use of earlier cases applying *Shaheed* to help arrive at their own conclusion. Ten of the twenty cases made use of various *Shaheed* precedent in some way. Increasingly, the cases demonstrate the ideal use of precedent in a *Shaheed* case, of

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[200] *R v Williams*, above n 4, para 141, Glazebrook J and William Young P.

comparing the facts with a similar case and deciding the weight to be attributed to the relevant factor based on the weight it was given in the earlier case. One example of such a use of precedent is *R v Hotai*, where a vehicle that was locked and parked in front of a private residence was searched.[201] This situation was distinguished from *R v Gillies*, where police entered an impounded vehicle in order to move it,[202] and *R v Iwihora*, where a disqualified driver had fled the scene leaving the driver's door open exposing drugs,[203] in order to find that *Hotai* had a greater expectation of privacy in these circumstances.[204] Surprisingly, given the guidance in *Williams* that offences were to be considered serious if the offender was likely to be sentenced to four or more years' imprisonment, only one case compared similar cases to assist with sentencing predictions.[205]

2 *Inadequate balancing*

It will be remembered that Optican's concerns about adequate balancing concerned "perfunctory or conclusive reasoning", "mysteriously selective" application, and "focus[ing] on one or more considerations to the exclusion of others relevant to the case."[206] To this I added my own concern that some judgments dealt with the same factor in more than one place, giving rise to the suspicion of double counting of particular factors.

The sample of cases since *Williams* shows that Optican's concerns of inadequate balancing have all but disappeared. It seems that courts are taking seriously the necessity to carry out the balancing exercise "conscientiously, so that … it will be clear that the right has been taken seriously".[207] Where conclusions appear to be the result of inadequate balancing, there is reason not to be overly concerned. For example, although evidence from a second search was admitted in *R v Whimp* without making any reference to factors on the

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[201] *R v Hotai* (9 March 2007) HC WN CRI 2005-091-004324, para 38.
[202] *R v Gillies* (4 April 2006) CA 470/05.
[203] *R v Iwihora* (HC), above n 98.
[204] *R v Hotai*, above n 201, para 38.
[205] *R v Yeh*, above n 142, para 92.
[206] Optican, above n 3, 461.
[207] *R v Williams*, above n 4, para 104, Glazebrook J and William Young P.

public interest side of the equation, it can be assumed that the public interests factors mentioned in regard to the initial search were considered to be applicable to both.[208] Similarly, although Courtney J in *R v Yeh* neglects to consider the extent of the illegality when deciding whether evidence obtained as a result of an unreasonable search should be admitted, this failure is forgivable in light of the ultimate conclusion in favour of exclusion.[209]

Some cases decided after *Williams* again refer to the same factor at more than one point in the analysis, giving rise to a fear of double counting. For example, in *R v Beazley & Ors (No 9)* the issue of characterising the conduct of police was considered both under the extent of the illegality and as an aggravating factor.[210] In *R v Yeh* in the context of the search of Mr Ren the perceived urgency of the situation is dealt with twice,[211] as is the availability of lawful investigative techniques in *R v Petricevich.*[212] However, again the concerns raised by these examples can be overstated, as in both *Beazley* and *Yeh* the evidence was ultimately excluded, and in *Petricevich* the analysis was obiter. Also, in these cases it is unclear whether the judges in fact inappropriately counted the relevant factors twice.

3 *Consideration of inappropriate factors*

The sample of cases decided since *Williams* contains no examples of good faith being treated as anything other than a neutral factor. There is no longer any reason to object to the inclusion in the balance of any attenuation of causation or inevitable discovery, as *Williams* makes clear that these considerations are no longer to be accorded knockout status.

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[208] *R v Whimp* (2 April 2007) CA 451/06, para 56.
[209] *R v Yeh*, above n 142, para 94.
[210] *R v Beazley & Ors (No 9)* (9 May 2007) HC AK CRI 2006-004-3200, paras 100 and 114; however they judgment could have been influenced by *Williams* itself, which mentions police conduct in both contexts.
[211] *R v Yeh*, above n 142, para 80.
[212] *R v Petricevich* (30 July 2007) CA 236/07, para 36(e) and (f).

The only example of consideration of an inappropriate factor in this sample was seen in *R v Beazley & Ors*.[213] In that case police conducted a thorough search of a family residence that involved searching "bedrooms and areas which attract a particularly high expectation of privacy, such as drawers or cupboards".[214] Despite this, it was considered relevant that the laboratory equipment and materials discovered were "in plain view in a rumpus room leading off the lounge", where privacy expectations are lower.[215] In my opinion, when assessing the nature of an infringed privacy interest the search should be considered at its most intrusive point, regardless of where the seized items were in fact found.

4 Questionable interpretation of factors

Before *Williams*, problems with the interpretation of factors manifested themselves in confusion as to whether the seriousness of the offence limb related to the maximum penalty available for the charged offence or the consequences of the particular offending in question, and in legitimate judicial disagreement as to how certain *Shaheed* factors were to be interpreted.

Williams' clarifies that the assessment of the seriousness of offending relates to the likely consequences to the particular offender.[216] While subsequent cases have continued to refer to maximum penalties, this often only occurs in the course of deciding the likely consequences in a particular case.[217] Of course, even after *Williams* the assessment of the seriousness of offending is not without controversy, as is apparent from the conflicting approaches that have been taken to the application of the *Williams* guidance. An overly rigid approach to the seriousness guidance was seen in *R v Yeh*, where Courtney J declined to treat the offending as serious in terms of *Williams* because it was "unlikely to attract a sentence of imprisonment of more that about three-and-a-

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[213] *R v Beazley & Ors*, above n 210.
[214] Ibid, para 106.
[215] Ibid, para 107.
[216] *R v Williams*, above n 4, para 135, Glazebrook J and William Young P.
[217] *R v Horsfall* (3 September 2007) HC AK CRI 2006-090-2930, para 106; *Bryham v DIA* (22 August 2007) HC WHA CRI 2007-488-39, para 30.

half years."[218] While this reasoning reflects the danger inherent in setting thresholds such as this within a balancing exercise, the majority of cases treat the guidance with an appropriate degree of flexibility.[219] In *Connelly v Police* the Hon Justice Ron Hansen rejected a submission that the *Williams* guidance was to be treated as a code, and confirmed that offending that was insufficient to meet the threshold could be aggravated by the presence of other factors, such as a threat to public safety.[220]

Following *Williams*, there are still examples of legitimate judicial disagreement as to the appropriate interpretation of particular factors. For example, in *R v Hotai* it was asserted that urgency could only operate as a mitigating factor where public safety concerns were involved.[221] By contrast, *R v Whimp* held that a risk of destruction of evidence was sufficient to let urgency operate as a mitigating factor.[222] Some middle ground between there propositions was applied in *R v Yeh*, where diminished weight was attached to the perceived urgency of the situation because no issue of safety was involved,[223] an approach most consistent with the guidance in *Williams*.[224]

5 Summary and suggested explanations

The twenty cases applying the balancing test since *Williams* suggest that it has alleviated most of the certainty concerns enumerated by Optican and adopted by me. The trend towards making more use of *Shaheed* precedent continues. Problems involving inadequate balancing only surfaced in cases where the evidence was ultimately excluded or where the balancing exercise is obiter. Only one case presents an example of the consideration of an inappropriate factor. While Optican's original concern about the interpretation of the seriousness of the offence factor has been alleviated, there is still some

[218] *R v Yeh*, above n 142, para 81.
[219] See for example *Bryham v DIA*, above n 217, para 30.
[220] *Connelly v Police* (1 May 2007) HC CHCH CRI 2006-409-230, para 8.
[221] *R v Hotai*, above n 201, para 40.
[222] *R v Whimp*, above n 208, para 54.
[223] *R v Yeh*, above n 142, para 47.
[224] *R v Williams*, above n 4, para 123, Glazebrook J and William Young P.

evidence of legitimate judicial disagreement as to the appropriate interpretation of seriousness and urgency.

This shows that the judgment in *Williams* has gone a long way towards achieving its self-proclaimed goal of "lay[ing] down a structured approach" for the *Shaheed* analysis.[225] After incorporating the *Williams* guidance, the *Shaheed* schema could no longer be legitimately described as a "meandering … 'shopping list' of potentially applicable factors."[226] In addition, rather than perpetuating a situation where courts are "absolve[d] … from having to take into account all pertinent considerations",[227] *Williams* clarifies that conclusions should be drawn for each relevant factor before an overall assessment is made.[228] While only twenty judgments have been released applying *Shaheed* since *Williams*, a comparison of these with earlier decisions shows the positive effect of the judgment in a cosmetic way, in that courts have shown a willingness to explicitly adopt and structure judgments around the guidance offered by *Williams*, and come to a conclusion by expressly balancing one side against the other. Fifteen of the twenty newer cases considered or discounted every relevant factor, whereas from my sample of the earlier cases only twelve of 70 had done so.

To the extent that some of Optican's concerns remain unaddressed by the attempt in *Williams* to coordinate the application of the test, this may be explained by the fact that much of its guidance is in terms either too general or too specific to provide meaningful assistance to lower courts. A clear example of the courts providing guidance at too general a level is its choice of adjectives to emphasise the significance of certain factors. For example, the fact that a search has been conducted in an unreasonable manner is "a stand alone and often very weighty factor."[229] Police misconduct is "a controlling factor",[230] the strength of an individual's privacy interest is "of major significance",[231] the

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[225] Ibid,, para 147.
[226] Optican and Sankoff, above n 2, 28-29.
[227] Optican, above n 3, 462.
[228] *R v Williams*, above n 4, para 132, Glazebrook J and William Young P.
[229] Ibid, para 118.
[230] Ibid, para 119.
[231] Ibid, para 124.

probative value of the evidence is "very important",[232] and the nature of the right and the seriousness of the breach is "of fundamental importance."[233] While some factors are given elevated importance in this way, the court seems reluctant to indicate any factors that are to carry comparatively less weight. The closest it comes to marking a factor in a negative way is its warning that "[i]nevitability of discovery, even as a factor in the balancing process, should be used with caution."[234] If the Court considers that these factors should be accorded varying degrees of significance, there is little to indicate which descriptive phrase they consider to be stronger than any other, although it could be argued that "fundamental importance" and "controlling" are intended to be especially meaningful. Alternatively, if these terms are meant to be synonymous, the use of a common term would be better. The choice of adjectives does little to alleviate the concern that, following *Shaheed*, courts have "no real guidance as to how the relevant factors should be organised, weighted [and] balanced against each other".[235]

Another aspect of the guidance in *Williams* that could be seen as too general to be useful is the provision of generalisations to indicate whether admissibility will be expected where a particular combination of factors is present. Firstly, we are told that:[236]

> [W]here a breach is minor, the balancing exercise would often lead to evidence being admissible where the crime is serious and the evidence is reliable, highly probative and crucial to the prosecution case.

And secondly:[237]

> [i]f the illegality or unreasonableness is serious, the nature of the privacy interest strong, and the seriousness of the breach has not been diminished by any mitigating factors…then any balancing exercise would normally lead to the exclusion of the evidence, even where the crime was serious.

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[232] Ibid, para 140.
[233] Ibid, para 148.
[234] Ibid, para 129.
[235] Optican, above n 3, 454.
[236] *R v Williams*, above n 4, para 144, Glazebrook J and William Young P.
[237] Ibid, para 145.

The value of this exercise can be measured by the extent to which these examples capture "practically recurring constellations of fact", such that they could meaningfully guide lower courts.[238] An analysis of the 99 factual situations *Shaheed* has been applied to since October 2004 suggests that the combinations of factors reflected in the generalisations are indeed ones that occur with some regularity. The combination of all of the factors mentioned in the first generalisation has arisen twelve times, assuming that reliability and a high probative value can be equated for these purposes.[239] The combination of all of the factors in the second generalisation has occurred six times.[240] Of these, two specifically quoted the second generalisation as support for a finding of inadmissibility.[241] However, the fact that in all of the cases mentioned the appropriate result in terms of the *Williams* generalisations was reached, whether or not they were decided before *Williams*, suggests that these generalisations may be superfluous. It is possible that by choosing to limit this exercise to "cases at each end of the scale of seriousness",[242] the Court has confined itself to making commonsense statements too obvious to provide meaningful guidance to a lower court judge.

Also, the Court's suggested systematic formula to help lower courts evaluate the seriousness of a breach is too simplistic and underdeveloped to offer real assistance. They recommend ranking the extent of illegality of a breach on a six-point scale ranging from extremely serious to minor, and adjusting the position on the scale based on the presence or absence of various

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[238] Optican, above n 3, 533.

[239] See *R v Tanner*, above n 150; *R v Cummings*, above n 83; *R v Williams (Michael),* above n 85; *R v Kata*, above n 86; *R v Michalaros*, above n 94; *R v Javid* (11 June 2007) CA 319/06; *R v Southgate & Anor* (14 May 2007) HC HAM CRI 2006-019-002189; *R v Stevenson* (4 April 2007) HC WN CRI 2004-019-006376; and *R v Hansen* (3 April 2007) HC WANG CRI 2006-083-1727; *Bryham v DIA*, above n 217; *R v Petricevich*, above n 212; *Connelly v Police*, above n 220.

[240] See *R v Noble*, above n 158; *Campbell v Police* (7 June 2007) HC ROT CRI 2006-463-87; *R v Beazley & Ors*, above n 210; *R v McMahon* (16 March 2007) CA 291/06; *R v Chadd* (4 September 2006) CA 114/06 although it should be noted that as this was not a search and seizure case the strong privacy interest aspect was not applicable; *R v Yeh*, above n 142, with respect to the search of Apartment 8.

[241] *R v Beazley & Ors*, ibid, para 114; *R v Yeh*, ibid, para 93.

[242] *R v Williams,* above n 4, para 142, Glazebrook J and William Young P.

other factors.[243] While a hypothetical scenario is used to demonstrate the type of factors that could reduce the illegality,[244] no fully worked-out example is provided to explain how it ought to be applied in any given case, and it could lead to a tick-the-box approach where mitigating or aggravating factors are not balanced against each other, as each may come to represent exactly one unit on the scale. This outcome would be incompatible with the very nature of a balancing test.

While some parts of the judgment are in terms too general to be of assistance to lower courts applying the *Shaheed* test, occasionally guidance is provided in problematic detail. One example is the seemingly arbitrary statement that an offence will be considered serious if the offender is likely to be sentenced to four or more years' imprisonment, or less if public safety is at stake.[245] The idea of setting a threshold for serious offending may be considered incompatible with the very nature of a balancing test, although it will not necessarily cause problems provided that it is treated by courts as a presumption rather than a rigid classification. However, even when it is accepted that it is necessary to impose a threshold to ensure consistency between decision-makers, the problem in *Williams* is that the choice of the sentencing starting point seems arbitrary because it is unsupported by reasoning. In addition, difficulties could arise from the decision to consider the likely sentence of a particular offender rather than the maximum penalty available for the charged offence, as this involves an assessment that judges will be ill-equipped to make at the pre-trial stage.

A second example of problematically specific guidance concerns the Court's hierarchy of privacy interests in various areas of property, to the level of specificity of distinguishing between a front garden and other parts of a garden, or between different drawers and cupboards within a house.[246] This passage is reminiscent of one in *R v Bradley* where the Court found that a householder has a greater privacy interest in a chest of drawers than under a flap of linoleum

[243] Ibid, para 133.
[244] Ibid.
[245] Ibid, para 135.
[246] Ibid, para 113.

under a bath.[247] The New Zealand Law Commission's criticism of that statement, that "the practicalities of police operations are impeded by dependence on such niceties",[248] applies equally to the Court's dicta in *Williams*. It is easy to conceive of situations where the classification is inappropriate, such as where a front garden is surrounded by a high fence. While it is not suggested that this type of analysis is always unhelpful, description of the gradation in such detail imports a risk that lower courts may feel compelled to use these comments to apply the test in too rigid a manner, despite the acknowledgement in the judgment of the need for flexibility.[249]

A final example is the statement that "a mid-range illegality relating to search of the person or a residential property is likely to be regarded more seriously than a more serious breach relating to open farmland."[250] This seems to assert that the nature of the privacy interest is a more compelling factor than the extent of the illegality. As a statement that makes one factor subordinate to another in general terms, this is an unusually instructive aspect of the judgment. While this type of statement is encouraged, its potency means that it should be accompanied by some rationale or analysis. The positioning of the statement as an afterthought invites a reader to wonder whether its potential significance was fully appreciated by the Court.

However, one must be careful not to judge the Court too harshly for providing guidance in terms too general or specific to be of much meaningful assistance to lower courts. Some degree of uncertainty is inherent in any balancing test, and any evaluation of *Williams* must acknowledge the inherent difficulty of attempting to provide meaningful guidance for the application of such a test in a context divorced from facts.

B Extent to which Williams *alleviates admissibility concerns*

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[247] *R v Bradley* (1997) 15 CRNZ 363 (CA).
[248] New Zealand Law Commission *Entry, Search and Seizure* (NZLC PP50, Wellington, 2002).
[249] *R v Williams*, above n 4, para 114, Glazebrook J and William Young P.
[250] Ibid, para 115.

While *Williams* goes some way to improve on the mechanics of the operation of the test, it leaves the problems regarding the substantive treatment of particular factors virtually untouched.

1 Existence of the breach, nature of the right, and nature of the breach

In the previous section, it was shown that the treatment of the existence of a breach, the nature of the right, and the nature of the breach meant that all but the nature of the breach were regularly overlooked in practice. With respect to these factors, the judgment in *Williams* further entrenched the status quo. Again the existence of the breach was mentioned separately from the balancing exercise where it was said that the fact "[t]hat there has been a breach is given considerable weight as a very important but not necessarily determinative factor."[251] In this respect, *Williams* may have made an unwitting departure from the language of *Shaheed*, in which the existence of a breach was never described in terms as a factor, although it seems that this change has had little practical effect.[252] *Williams* reaffirmed that the nature of the right and the breach is the "starting point" of the exercise,[253] said that in search and seizure cases the nature of the right can always be adequately dealt with by considering the nature of the privacy interest, and added that in most other circumstances "the nature of the right will not be considered separately but as part of assessing the nature of the breach."[254]

I do not object to the guidance in *Williams* with regard to the treatment of the nature of the right as it reflects the reality that in cases dealing with rights other than search and seizure, the nature of the right inquiry does not have much to contribute to the balancing exercise, as all criminal process rights are likely to be considered similarly fundamental. This treatment is also consistent with the way that this factor was treated in practice.

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[251] *R v Williams*, above n 4, para 104, Glazebrook J and William Young P.
[252] Compare *R v Shaheed*, above n 1, para 156 Blanchard, Richardson and Tipping JJ.
[253] *R v Williams*, above n 4, para 106, Glazebrook J and William Young P.
[254] Ibid, para 109.

However, by replicating the treatment of the existence of a breach in *Shaheed* the Court in *Williams* has missed an opportunity to restructure the test so as to give this consideration adequate weight. Cases applying the test since *Williams* indicate that little change has occurred in the treatment of this inquiry. Two cases have picked up on *Williams*' language and mentioned that the fact of the breach is to be "given considerable weight as an important but not necessarily determinative factor",[255] and one case referred to the need to acknowledge a breach of a "quasi-constitutional right".[256] However, as before *Williams*, the majority either pay lip service to the existence of a breach[257] or simply conduct the balancing exercise without explicitly referring to it at all.[258] The only way to minimise the effect of the conceptual divide between "the purpose notionally served by excluding evidence … and the method for determining admissibility now set out in *Shaheed*"[259] is to assert the significance of this point in real, meaningful terms. By falling short of this standard, *Williams* strikes a balance which inappropriately favours society's interest in the prosecution of crime over the vindication of fundamental rights affirmed by the Bill of Rights.

2 *Seriousness*

Prior to *Williams* the concern was that by considering the seriousness of offending on the public interest side of the equation only the test failed to give adequate protection to the accused's enhanced need for procedural safeguards in that situation. In *Williams* the Court sought to address this point by claiming that the accused's greater interest in procedural safeguards in the context of serious offending need only be taken into account with respect to confessional, rather than real, evidence.[260] Their authority for this position is a comment from *Shaheed* which rejected the idea that a trial's fairness could be undermined even

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[255] *Connelly v Police*, above n 220, para 15; *R v Wallace* (29 June 2007) CA 191/07, para 60.
[256] *R v Hansen*, above n 239, para 56.
[257] *R v Horsfall*, above n 217, para 96.
[258] For example, see *R v Boon* (13 August 2007) HC AK CRI 2006-004-21763; *Bryham v DIA*, above n 217; *R v Yeh*, above n 142; *R v Petricevich*, above n 212.
[259] Optican and Sankoff, above n 2, 22.
[260] *R v Williams*, above n 4, para 136, Glazebrook J and William Young P.

by the use of real evidence of undoubted reliability.[261] However, *Williams* effectively extends the effect of the proposition by not acknowledging that there may be situations where the reliability of real evidence is doubtful. Later in the judgment they admit that this could occur where the evidence has been compromised by the breach itself in some manner.[262] Given that this possibility exists, the blanket distinction drawn between real and confessional evidence imports an inappropriate bias in favour of admissibility where physical evidence is concerned.[263]

The Court explicitly and correctly rejects the possibility that the seriousness of the offence could operate as a mitigating factor on the seriousness of the breach side of the equation, due to a fear of "unnecessary double counting."[264] However, they do not appear to advert to the possibility that it might be more aptly treated as an aggravating factor. In order to adequately implement its commitment to vindicating rights, the Court should acknowledge that the public interest in a serious offending situation must at least to some extent be neutralised the by accused's corresponding increased need for procedural safeguards, whether the evidence is real or not.

3 Centrality

At the time that *Williams* was decided, the Court was aware that the concerns about the appropriateness of considering the centrality of the evidence on the public interest side of the ledger had persuaded the Select Committee to remove it as an "extraordinarily inappropriate factor" from consideration under s 30(3) of the Evidence Act.[265] Against that background, it is surprising that the Court saw fit to maintain that the centrality may nevertheless continue to be legitimately taken into account as a subset of the nature and quality of the evidence inquiry. As a consequence of this approach, the Court in *Williams*

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[261] *R v Shaheed*, above n 1, para 151 Blanchard, Richardson and Tipping JJ.
[262] *R v Williams*, above n 4, para 140, Glazebrook J and William Young P.
[263] Optican and Sankoff, above n 2, note 80.
[264] *R v Williams*, above n 4, para 131, Glazebrook J and William Young P.
[265] (15 November 2006) 635 NZPD 6564; Evidence Bill 2006, no 256-2, cl 25.

preserves intact the bias towards admissibility within the *Shaheed* framework insofar as centrality is concerned.

4 Reliability

While I do not take exception to the role ascribed to reliability in the *Shaheed* test, its development in *Williams* introduces the possibility that this factor may come to be illegitimately double-counted. As well as being relevant to the nature and quality of the evidence, it is indirectly relevant as a result of confining the issue of the accused's increased interest in exclusion of evidence when charged with more serious offences to confessional evidence situations, as this distinction rests on the perceived unreliability of confessional statements as opposed to real evidence. A simple way to remove this concern would be to hold that the accused's interest in procedural safeguards under the Bill of Rights are relevant in all situations where serious crime is charged, not just those where the reliability of the evidence is in doubt.

5 Cumulative effect

In summary, Williams perpetuates the problems with the existence of a breach, the seriousness of the offence and the centrality of the evidence for a conviction that existed after *Shaheed*, as well as introducing a concern that reliability may be double-counted.

IV RELATIONSHIP WITH SECTION 30 EVIDENCE ACT 2006

Shortly after the judgment in *Williams* was delivered, the *Shaheed* test for admissibility of improperly obtained evidence as modified by Williams was replaced by the statutory test in s 30 of the Evidence Act 2006. The following section of this essay will consider the extent to which the judgment in *Williams* will survive the coming into force of the statutory test and consider the best way to interpret the new test in order to alleviate the persistent concerns about the nature of the *Shaheed* test, particularly those regarding inadmissibility.

A Section 30

Under s 30 of the Evidence Act 'improperly obtained evidence' is defined as evidence obtained in breach of "any rule or enactment",[266] unfairly,[267] or in consequence of a statement made by a defendant that would be inadmissible if offered by the prosecution.[268]

Section 30(2) reflects the structure with which courts already tend to approach questions of admissibility under *Shaheed*. Evidence must first be found to have been improperly obtained on the balance of probabilities, before a determination is made as to whether exclusion of evidence is a proportionate response to the breach. In undertaking the latter inquiry, it specifies that appropriate weight must be given to the impropriety as well as "the need for an effective and credible system of justice",[269] two concerns lifted directly from the general guidance paragraph which follows the setting out of the balancing exercise in *Shaheed*.[270]

The next subsection lists the factors that the court may have regard to when considering admissibility.[271] The list of factors is explicitly non-exhaustive, and no indication is given as to whether a specific factor points towards admissibility or exclusion.[272] The first is the "importance of the right breached" and the "seriousness of the intrusion",[273] picking up on the "starting point" in the *Shaheed* exercise.[274] The concerns from *Shaheed* about varying levels of culpable police conduct are reflected in the "nature of the impropriety" factor.[275] However, while *Shaheed* makes clear that conduct that is deliberate, reckless or grossly careless will point strongly towards inadmissibility but that

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[266] Evidence Act 2006, s 30(5)(a).
[267] Ibid, s 30(5)(c).
[268] Ibid, s 30(5)(b).
[269] Ibid, s 30(2)(b).
[270] *R v Shaheed*, above n 1, para 156 Blanchard, Richardson and Tipping JJ.
[271] Evidence Act 2006, s 30(4).
[272] Ibid.
[273] Ibid, s 30(3)(a).
[274] *R v Shaheed*, above n 1, para 147.
[275] Evidence Act 2006, s 30(3)(b).

good faith is a neutral factor,[276] the statutory test for the nature of the impropriety asks whether the breach was "deliberate, reckless, or done in bad faith",[277] a semantic difference which could support an argument that s 30 is not aimed at conduct which attracts the gross carelessness label but not worse. The nature and quality of the evidence factor is taken directly from *Shaheed*,[278] as is the seriousness of the offence[279] and the situation where lawful alternative investigative techniques were known to the police but not used.[280] Interestingly, the availability of alternative remedies that may be able to adequately redress the breach is included as a factor in the statutory test,[281] despite the conclusion in *Shaheed* that "other remedies are unlikely to be found satisfactory to provide vindication of the right in a criminal case".[282] The final two factors, the consideration of whether the evidence was obtained in circumstances of physical danger[283] or urgency,[284] were not separate factors under *Shaheed* but were explicitly mentioned as relevant to the question of the nature of the breach.[285] The only factor from *Shaheed* that is not reflected in some way in the statutory list is the centrality of the evidence, which was originally incorporated under the nature and quality limb but was deleted at the Select Committee stage.[286]

B Continued relevance of Williams

The value of the Court in *Williams* undertaking such a comprehensive review of the *Shaheed* test structure may be questioned because of the imminent introduction of the statutory test for admissibility of improperly obtained evidence with the coming into force of Evidence Act 2006. However, there are a number of reasons to suggest that *Williams* will continue to inform the interpretation of s 30 now that it has come into force. Firstly, it is generally

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[276] *R v Shaheed*, above n 1, para 148-149 Blanchard, Richardson and Tipping JJ.
[277] Evidence Act 2006, s 30(3)(b).
[278] Ibid, s 30(3)(c); *R v Shaheed*, above n 1, para 151 Blanchard, Richardson and Tipping JJ.
[279] Evidence Act 2006, s 30(3)(d); *R v Shaheed*, ibid, para 152.
[280] Evidence Act 2006, s 30(3)(e); *R v Shaheed*, ibid, para 150.
[281] Evidence Act 2006, s 30(3)(f).
[282] *R v Shaheed*, above n 1, para 153 Blanchard, Richardson and Tipping JJ.
[283] Evidence Act 2006, s 30(3)(g).
[284] Ibid, s 30(3)(h).
[285] *R v Shaheed*, above n 1, para 147 Blanchard, Richardson and Tipping JJ.
[286] Evidence Bill 2006 no 256-6, cl 25.

accepted that s 30 adopts the *Shaheed* test, with only minor alterations and supplements.[287] Secondly, by stating that their guidance will "assist trial judges in determining the weight and relevance to be given to each statutory factor",[288] the Court indicates that it intends for its analysis to survive the Act. Also, the majority judgment in *Williams* is expressly characterised as not conflicting with s 30 of the new Act,[289] although this conclusion is by no means obvious on a close comparison with the statutory test. In particular, the judicial insistence that the centrality of evidence to the prosecution's case may still be a relevant factor is a departure from s 30,[290] given its express removal by the Select Committee.[291] Another example may be the assertion that the inevitability of discovery ought to be considered within the balancing exercise despite the silence of s 30 on the point.[292] Finally, when applying the new s 30 the courts have continued to treat *Williams* as relevant.[293] This background clarifies that it is almost certain that *Williams* will continue to inform the application of the new statutory test.

C Suggestions for the future

Having set out the balancing test in *Shaheed*, Blanchard J expressed his hope that the new approach "should not lead, in most cases, to results different from those envisaged in earlier judgments of this Court".[294] However, in practice approximately half the cases applying the test resulted in the admission of disputed evidence,[295] far from the "almost automatic exclusion of evidence"[296] that some commentators argued had been the practical effect of the prima facie exclusion rule. The tendency to admit evidence half of the time continues after *Williams*, confirming that *Williams* has done nothing to address

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[287] Richard Mahoney *Evidence* [2004] 4 NZ Law Review 717, 729; (15 November 2006) 635 NZPD 6564; *R v Williams*, above n 4, para 149, Glazebrook J and William Young P.
[288] *R v Williams*, ibid, para 150.
[289] Ibid, para 150.
[290] Ibid, para 141.
[291] Evidence Bill, above n 175, cl 25.
[292] *R v Williams*, above n 4, para 149, Glazebrook J and William Young P.
[293] *R v Horsfall*, above n 217, paras 31 and 103; *R v Boon*, above n 258, paras 48-79.
[294] *R v Shaheed*, above n 1, para 156 Blanchard, Richardson and Tipping JJ.
[295] From my sample of 76 applications of *Shaheed* to disputed evidence between Optican's 2004 article and *Williams*, in 36 instances evidence was admitted.
[296] *R v Shaheed*, above n 1, para 152 Blanchard, Richardson and Tipping JJ.

the substantive biases inherent in the structure of our *Shaheed* analysis.[297] Overall, the proportion supports Optican's theory that an unspoken objective of the Court in *Shaheed* was to "fashion a jurisprudence of exclusion permitting more improperly obtained evidence to be admitted".[298]

This essay does not attempt to debate the relative merits of a balancing test for the admissibility of improperly obtained evidence and a prima facie exclusion rule. Like Mount, who argued that "balancing tests tend to develop rule-like characteristics over time, and that rules tend to attract exceptions created to deal considerations of balance and proportionality",[299] I doubt that it can firmly be said that either approach is preferable. It suffices to say that in New Zealand there is no need to take the extreme step of reverting to a prima facie exclusionary rule because we have not yet fully explored the capacity for adequate vindication of rights within the framework of a balancing test. Until the possibility of correcting the bias within the test by changing the way the various factors interrelate is fully explored, there is no reason to assume that the a balancing test is inherently incapable of vindicating rights. The introduction of s 30 provides an ideal backdrop for this exercise, because if the statutory factors were interpreted with such an objective in mind, the bias within the test could well be ameliorated. The following sections consider the aspects of the s 30 test that can be interpreted to alleviate lingering concerns about a bias towards admissibility, and their appropriate interpretation.

1 Nature and quality: a continued role for centrality?

It will be most interesting to see whether the courts will continue to follow *Williams*' lead and insist that the centrality of the evidence to the prosecution's case can be legitimately considered within the "nature and quality of the improperly obtained evidence" inquiry.[300] It is unusual to see a Court so blatantly disregarding a clear indication of legislative intent. The two High Court cases that have applied s 30 at the time of writing suggest a judicial

[297] Seven of the 15 cases applying *Shaheed* since *Williams* have admitted disputed evidence.
[298] Optican and Sankoff, above n 2, 19.
[299] Mount, above n 58, 64.
[300] Evidence Act 2006, s 30(3)(c).

willingness to adopt and support *Williams*' inclusion of centrality in the balancing exercise. In *R v Boon*, Asher J referred to the original clause 30(3)(c) in the Evidence Bill which read:[301]

> (c) The nature and the quality of the improperly obtained evidence, *in particular whether it is central to the case of the prosecution.*

He decided that:[302]

> the centrality clause removed in the drafting process was only providing a particular of the 'nature and quality of the improperly obtained evidence.' The centrality of the evidence was not a stand-alone individual consideration, and it therefore cannot be taken from the deletion, or from the reason expressed by the committee, that it was intended that the centrality of the evidence should be put entirely to one side.

The deletion of the clause was characterised as "reflecting a concern that the centrality of the evidence to the case of the prosecution ought not to have particular emphasis",[303] and therefore it was legitimate to take the centrality of the evidence into account "with appropriate caution".[304] His treatment of the centrality issue was cited with approval in *R v Horsfall*.[305]

I find this reasoning artificial and difficult to reconcile with the Select Committee's statement that "we find it difficult to envisage a circumstance where [the centrality of the evidence to the prosecution's case] would be relevant"[306] and their characterisation of centrality as an "extraordinarily inappropriate factor." [307] A possible reason why the courts have been willing to engage in this kind of sophistry may be that they are concerned to preserve the availability of a factor that they have historically found to be particularly compelling. In 2004 Optican reported that exclusion of evidence is often linked to a situation where "the loss of otherwise probative evidence will not lead to a

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[301] *R v Boon*, above n 258, para 72.
[302] Ibid, para 75.
[303] Ibid, para 76.
[304] Ibid..
[305] *R v Horsfall*, above n 217, para 103.
[306] Select Committee Report on the Evidence Bill, 4.
[307] (15 November 2006) 635 NZPD 6564; Evidence Bill 2006, no 256-2, cl 25.

total failure of the Crown case."[308] The cases included in my sample show a similar correlation between the centrality of the evidence and the outcome of the balancing test. Of the 69 cases applying *Shaheed* or s 30 since October 2004 which specifically dealt with the centrality of the evidence, 47 either admitted evidence found to be central or excluded evidence found to be superfluous to a successful prosecution. Regardless of their underlying motivation, the courts' treatment of centrality does not withstand scrutiny when compared with clear statements of the Select Committee's intent when the centrality clause was deleted. This seems like an aspect of the *Williams* guidance that could well be reconsidered by the Supreme Court.

While it seems disingenuous for the courts to continue treating the centrality of evidence as a factor in light of the available statements of legislative intent, I do not believe that the Supreme Court's overturning of this aspect of the judgment in *Williams* is necessary to ensure the adequate protection of rights. I do not accept the argument that centrality needs to be discarded altogether as representing the "worst kind of consequentialist logic",[309] because some degree of consequentialist reasoning is inherent in any kind of public interest proportionality-balancing test. A preferable approach is to consider it to the extent that it remains a live issue after the accused's increased interest in procedural safeguards and the public interest in discouraging police transgressions have been taken into account. For this reason, it would be legitimate to have centrality as a factor supporting admission although it should be acknowledged that the extent to which it can do so is necessarily limited. In practice, this factor as well as the seriousness of offending should be subordinate to factors on the other side, such as the dominant consideration of the existence of breach. Thus, even if the Supreme Court were to endorse the *Williams* approach to centrality, adequate safeguards for the rights of defendants could be provided for if Asher J's acknowledgement that this factor must be treated "with appropriate caution" were to be given meaningful effect in this manner.[310]

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[308] Optican, above n 3, 530.
[309] Optican and Sankoff, above n 2, 24.
[310] *R v Boon*, above n 258, para 76.

Should the Supreme Court insist that centrality is not a relevant factor, Optican's argument that the reliability of challenged evidence should be treated as a knockout blow would be effectively defeated, as the "nature and quality of the improperly obtained evidence" limb would be hollow.[311] The cases that have been decided to date applying *Shaheed* do offer some candidates for what this inquiry could encompass if both centrality and reliability were considered not to have a place within the balancing test. The volume of evidence found has been considered in some search and seizure cases, although usually and more appropriately in relation to the seriousness of the offending rather than quality of the evidence.[312] Another possible element that has been considered as part of the quality factor is the inculpatory or exculpatory nature of the evidence, although there is apparently some doubt as to which side of the balance it supports. In *R v Mitchell* the fact that information gained through a breach was exculpatory and consistent with later statements was found to point towards admissibililty,[313] while in *R v Hooper* inculpatory statements were found to point the same way.[314] A third candidate is the probative value of evidence, which was considered separately from reliability in *R v Paku*.[315] *Williams* states that quality inquiry encompasses "probative value, relevance, and reliability."[316] However, its inclusion in s 30(3)(c) would be superfluous given the presence of the general probative value versus prejudicial effect provision in the new Act.[317] If the centrality of the evidence, its volume, its probative value, and its inculpatory and exculpatory nature are too problematic to form the basis of the quality inquiry, that only leaves reliability. Therefore, there is force to the argument that without a reliability component the quality inquiry would be hollow.

2 Seriousness

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[311] Evidence Act 2006, s 30(3)(c).
[312] See for example *R v Pierce*, above n 117, para 45; *R v Harris* (10 December 2004) HC ROT CRI 2003-087-003480, para 25; R v M, above n 83, para 24.
[313] *R v Mitchell* (HC), above n 96, para 35.
[314] *R v Hooper*, above n 150, para 38.
[315] *R v Paku*, above n 157, para 42.
[316] *R v Williams*, above n 4, para 140, Glazebrook J and William Young P.
[317] Evidence Act 2006, s 8.

Under s 30, "the seriousness of the offence with which the defendant is charged" is one statutory factor. No indication is given as to whether it points wholly or partially towards admissibility or otherwise, but subsequent case law suggests that courts will continue to treat it as favouring the public interest side of the balance.[318] However, especially given the silence of the section as to which way this factor points, there is nothing to stop the courts from being explicitly acknowledging that the seriousness of the offence factor, like centrality of the evidence, must be used with caution because of its inherently conflicted nature.

3 Alternative remedies

At first glace, the inclusion of "whether there are alternative remedies to exclusion of the evidence which can adequately provide redress to the defendant" as a statutory factor seems like a retrograde step in terms of protecting rights.[319] Blanchard J in *Shaheed* instructed that "[i]t is … preferable where a conviction ought to lead to a sentence of imprisonment, to put out of consideration the possibility of a means of redress other than exclusion of the disputed evidence".[320] As a result, cases applying *Shaheed* before the introduction of the statutory test have omitted any analysis of alternative remedies from their analysis, with one exception.[321] However, it is often overlooked that *Shaheed* was silent as to whether consideration of alternative remedies was appropriate where the likely punishment was something less than imprisonment. For example, when fines are the relevant penalty, monetary compensation would probably be capable of providing adequate recompense. If the relevance of the alternative remedies statutory factor was treated as being confined to the few cases where a penalty short of imprisonment is anticipated, some meaning could be given to this factor without compromising the rights of criminal defendants.

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[318] *R v Horsfall*, above n 217, paras 106 and 107; *R v Boon*, above n 258, paras 62-63.
[319] Evidence Act 2006, s 30(3)(f).
[320] *R v Shaheed*, above n 1, para 155 Blanchard, Richardson and Tipping JJ.
[321] *R v Merrett* (3 March 2006) CA 280/05, para 26.

4 *Existence of a breach*

The need to take into account the existence of a breach is reflected in the statutory test with the requirement that the balancing process "gives appropriate weight to the impropriety but also takes proper account of the need for an effective and credible system of justice."[322] By including these considerations separately from the list of factors to be weighed in the balancing exercise, s 30 mirrors the approach taken in both *Shaheed*[323] and *Williams*.[324] While the separation from the other factors may have been intended to indicate overriding significance, it has been shown that this often amounts to this "very important but not necessarily determinative factor" being ignored, a practice which is likely to continue.[325] While the statutory language does not describe the fact of a breach as emphatically as *Williams* does, the wording of the test is perfectly capable of bearing an interpretation that gives the fact of the impropriety greater significance. In terms of adequately vindicating rights, the existence of a breach is a more logical starting point than the nature of the right and breach, which was described as such in *Shaheed* and *Williams* and is reproduced in s 30(3)(a).[326] In addition, a judicial practice should be developed of treating the fact of a breach as a conceptual, rather than merely chronological, starting point. The effect of this would be that the "very important" factor of the existence of the breach, while still "not necessarily determinative", would only be overridden in cases of minor breach.[327]

5 *Effect on certainty concerns*

Optican suggested that the problems of certainty he identified in *Shaheed* were a result of "more fundamental contradictions arising from the new proportionality-balancing test".[328] It may indeed be the case that certainty

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[322] Evidence Act 2006, s 30(2)(b).
[323] *R v Shaheed*, above n 1, para 156.
[324] *R v Williams*, above n 4, para 104, Glazebrook J and William Young P.
[325] Ibid.
[326] *R v Shaheed*, above n 1, para 147 Blanchard, Richardson and Tipping JJ; *R v Williams*, ibid, para 106.
[327] Ibid.
[328] Optican, above n 3, 475.

concerns can never be fully minimised until the substantive concerns within the test are addressed. The unhelpfully general or specific guidance provided in *Williams* can be seen as symptomatic of the conflict involved in "mak[ing] the usual bow" to the vindication of rights while preserving the structural elements of the *Shaheed* test which send "a clear message…that not all breaches of rights will be vindicated".[329] If the structural elements of the test were brought into line with its ostensible rationale, there would be no need for judicial guidance to shy away from clear statements in abstract terms about which factors are to be subordinate to others.

Even if the uncertainty concerns were not resolved as a consequence of addressing the bias towards admissibility, these issues were largely corrected by *Williams*. After all, some degree of certainty will always be expected in any balancing test.

V CONCLUSION

Prior to *Williams*, the *Shaheed* test and its application in New Zealand had been criticised for its uncertainty as well as its promotion of crime control values at the expense of a commitment to due process.[330] *Williams* largely addresses the certainty concern by providing an explicit structure to guide the exclusionary calculus. However, parts of its guidance are understandably phrased either too generally problematically specifically to create certainty or meaningfully guide lower courts in difficult cases.

While achieving partial success with respect to uncertainty concerns, *Williams* does nothing to alleviate the problem of the inadequate protection of rights, as its adoption of the treatment of particular factors from *Shaheed* perpetuates the bias towards admissibility that characterises that test. The criticism that the exercise can be justifiably viewed as "a judicial tool to

[329] Optican and Sankoff, above n 2, 21.
[330] Optican, above n 3, 533.

sanction police misconduct, rather than a mechanism for vindicating fundamental rights"[331] is as equally applicable after *Williams* as it was before.

With the recent introduction of the statutory test for admissibility of improperly obtained evidence in s 30 of the Evidence Act 206, the courts have an opportunity to reconsider the way the factors are conceived of and interrelate in order to give adequate protection to the rights of the accused. The test would be better able to vindicate rights effectively if the existence of a breach is given greater weight, the inherently conflicted nature of the seriousness and centrality factors is acknowledged, and the scope for consideration of alternative remedies is narrowly construed.

[331] Ibid, 532.

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