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R v Shaheed: Revoking the prima facie rule of exclusion for evidence obtained through a breach of the Bill of Rights

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I INTRODUCTION

The recent change to the law of exclusion relating to evidence obtained through a breach of the New Zealand Bill of Rights by *R v Shaheed*[1] is a substantial departure from New Zealand Bill of Right's law. While it is a significant change, the decision closely follows that made by the Privy Council in *Mohammed v The State*,[2] and the change had been hinted at by the Court of Appeal five years earlier in *R v Grayson and Taylor*.[3] There are always going to be problems in protecting the rights of the individual in the face of public expectations of justice, and as such the topic of exclusion of evidence is going to be contentious. However, as this essay will show, by discarding the prima facie rule of exclusion in favour of an exercise that balances the interests of the individual with the interests of the public, the Court of Appeal has unearthed a new set of problems.

In Part III of this essay, the development of the prima facie rule of exclusion will be examined by analysing New Zealand's position on admissibility at common law and after the introduction of the Bill of Rights. This analysis will show that despite early support for the prima facie rule, there has been growing dissatisfaction with its application, resulting in judicial attempts to circumvent the rule.

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[1] *R v Shaheed* [2002] 2 NZLR 377 (CA).
[2] *Mohammed v The State* [1999] 2 AC 111 (PC).

Part IV will analyse comparable jurisdictions in light of New Zealand's stance, and will examine the approach that was taken by the Court of Appeal towards this international jurisprudence. This section will illustrate that New Zealand's prima facie rule of exclusion was moderate when compared with other countries, but that the decision in *Shaheed* was motivated by the Court of Appeal's wish to follow the recent approach taken by the Privy Council. Also notable is the lack of analysis given to South Africa's position, which would be very useful, given the recent debate in the country prior to the adoption of a qualified exclusionary rule in their new Constitution.

The rationale behind the decision of the Court of Appeal, the impact that the decision will have on the ability to provide effective remedies to individuals, and the likelihood of a diminishment of the rights contained in the Bill of Rights will be discussed in Part V. This analysis will critique the reasoning of the majority in light of earlier judgements, foreign jurisprudence, international obligations, and the need to uphold the principle of equality before the law. This essay will show that the intention of the Court of Appeal to allow judges to take into account public interest when deciding on the admissibility of evidence will not only create numerous problems for the Court later, but that it will lessen the effect of the Bill of Rights as a protector of individual rights.

II R v SHAHEED

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[3] *R v Grayson and Taylor* [1997] 1 NZLR 399 (CA).

A The Facts

The Court of Appeal in *Shaheed* was asked to consider whether DNA evidence linking a man to the sexual violation of a 14-year-old girl, was admissible because it derived from an earlier unlawful DNA sample. The Crown admitted that the police breached section 21 of the Bill of Rights by deceiving the accused into providing a DNA sample after an earlier offence. The Solicitor-General argued that New Zealand's prima facie rule of exclusion for evidence resulting from a breach was too strict and submitted that the remedy to the accused should not be disproportionate to the breach.[4] Defence counsel submitted that the prima facie rule was workable and that the greater good of the public was served by upholding individual rights.[5]

B The Decision

After espousing the need for remedies to be proportionate to the breach, and a review of comparable jurisdictions, the prima facie rule of exclusion was discarded and replaced with a balancing exercise, by a majority of 6-1.[6] Once a breach of the Bill of Rights has been established, the new balancing exercise is to take into account factors such as proportionality, the need for an effective justice system, whether the breach was deliberate, whether other investigative

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[4] *R v Shaheed*, above n 1, 394.
[5] *R v Shaheed*, above n 1, 395.

techniques were available, the nature of the evidence, the centrality of the evidence, and the seriousness of the offence.[7] The breach of the Bill of Rights will be relegated to a factor that is to be given "significant weight"[8] in determining whether evidence should be excluded. The balancing exercise effectively gives judges a discretion to admit evidence depending on the circumstances of each case.

III DEVELOPMENT OF THE PRIMA FACIE RULE OF EXCLUSION

A Position at Common Law

The position in New Zealand at common law was stated in *R v Coombs*[9] where it was held that improperly or unlawfully obtained evidence was admissible in court, subject to the need to prevent an abuse of process and an unfair trial. The common law was heavily in favour of admission of evidence, and the discretion of judges involved a balancing of interests. This discretion was described by Eichelbaum CJ in *R v Dally* as requiring "the weighing of competing requirements of public interest; on the one hand the need to bring to conviction those who commit criminal offences, on the other the public interest in the protection of the individual from unlawful and unfair

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[6] Despite the adoption of a balancing test the DNA evidence was excluded by a majority of 4-3. By a majority of 4-3 the Court held that the victim's identification of the accused was admissible. The accused was subsequently convicted at trial.

[7] *R v Shaheed*, above n 1, 387 per Blanchard J.

treatment."[10] Evidence can still be excluded under this common law principle as well as under the Bill of Rights.[11]

B Relationship to the New Zealand Bill of Rights

The introduction of the New Zealand Bill of Rights Act 1990 affirmed New Zealand's commitment to the International Covenant on Civil and Political Rights, but provided no explicit consequences for a breach of rights. The question of remedying a breach was first considered in *R v Kirifi*[12] where the Court found that there had been a breach of the right to a lawyer under section 23(1)(b). Cooke P simply stated, "once a breach of s23(1)(b) has been established, the trial Judge acts rightly in ruling out a consequent admission unless there are circumstances in the particular case satisfying him or her that it is fair and right to allow the admission into evidence."[13] This stance led to what has become known as the prima facie rule of exclusion. In *R v Butcher and Burgess* the rule was further expressed as meaning that evidence obtained through a breach of the Bill of Rights would be prima facie excluded, subject to various Crown arguments that may lead to the Court exercising its discretion in admitting the evidence.[14]

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[8] *R v Shaheed*, above n 1, 387 per Blanchard J.
[9] *R v Coombs* [1985] 1 NZLR 318 (CA).
[10] *R v Dally* [1990] 2 NZLR 184, 192 (CA) per Eichelbaum CJ.
[11] *R v Laugalis*, (1993) 1 HRNZ 466, 474 (CA).
[12] *R v Kirifi* [1992] 2 NZLR 8 (CA).
[13] *R v Kirifi* above n 12, 12 per Cooke P.
[14] *R v Butcher and Burgess* [1992] 2 NZLR 257, 266 (CA) per Cooke P.

The prima facie rule of exclusion placed the onus on the prosecution to satisfy the Court that despite a breach of the Bill of Rights it is "fair and right" to admit the evidence.[15] In determining whether it is fair and right that the evidence be admitted it is necessary to weigh up several factors. In the eyes of Cooke P in *R v Goodwin* the factors that can displace the presumption of exclusion are non-exhaustively defined as including waiver of the rights concerned, triviality of the breach, the need for urgency in obtaining the evidence, physical danger to police officers, and inconsequentiality of the breach.[16] Since the emergence of the rule the prima facie rule has been extended to apply to evidence obtained through unreasonable search and seizure,[17] arbitrary detention,[18] a breach of the rights of an arrested or detained person,[19] and a breach of the rights of a person charged with an offence.[20]

In *Goodwin* the Court of Appeal unanimously rejected arguments for replacing the prim facie rule with a balancing exercise.[21] The Court, which included Richardson P and Gault J from *Shaheed* indicated that once a breach was established, the onus for proving admission of the evidence should be on the Crown, and that evidence must be excluded unless there is good reason to the contrary.[22]

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[15] James Bruce Robertson (ed) *Adams on Criminal Law*, (2nd student edition, Brookers, Wellington, 1998) 966.
[16] *R v Goodwin* [1993] 2 NZLR 153, 171 (CA) per Cooke P.
[17] *R v Jefferies* [1994] 1 NZLR 290 (CA).
[18] *R v Goodwin (No. 2)* [1993] 2 NZLR 390 (CA).
[19] *R v Te Kira* [1993] 3 NZLR 257 (CA).
[20] *R v Donaldson* [1995] 3 NZLR 641 (CA).
[21] *R v Goodwin* above n 16, 154.
[22] *R v Goodwin* above n 16, 202.

Although the Bill of Rights has no provision allowing exclusion of evidence, great weight is placed on the fact that the legislature saw fit to affirm fundamental rights.[23] Cooke P believed the prima facie rule to be the best method of upholding the rights as "it would be inconsistent with the concept of the Bill of Rights to relegate them [the rights] to be matters to be given some weight in the exercise of judicial discretion".[24] In her dissenting judgement in *Shaheed*, Elias CJ cites similar reasons:[25]

> the presumption to exclude unless there is good reason to admit evidence obtained in breach of rights implements a balance struck by the Bill of Rights Act between minimum standards of criminal process and the public interest in the detection and prosecution of crime.

As evident from these statements, both these Judges believed that the prima facie rule of exclusion was the most suitable method for New Zealand circumstances.

However, support for the prima facie rule has been declining amongst the judiciary. In *R v Butcher and Burgess*, Gault J diverged from full support of the prima facie rule when he stated that there was a need to ensure that each remedy should be appropriate to the breach.[26] Likewise, the dissenting judgement of Thomas J in *R v Te Kira* also signalled judicial dissatisfaction

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[23] *R v Shaheed*, above n 1, 385 per Elias CJ dissenting.
[24] *R v Te Kira* above n 19, 262 per Cooke P.
[25] *R v Shaheed*, above n 1, 386, per Elias CJ dissenting.
[26] *R v Butcher and Burgess* above n 14, 272 per Gault J.

with the prima facie rule.[27] Thomas J believed that the prima facie rule was an unnecessary response to a breach of section 23(3) of the right to be brought before a court as soon as possible.[28] While indicating his preference for a balancing approach where the right in question may be outweighed by public interest, he also stated that the prima facie rule may be an appropriate remedy for a breach of the right to consult a lawyer under of section 23(1)(b).[29] Thomas J emphasised that although the prima facie rule may uphold the affirmed right, "it is likely to do so at the expense of a proper balancing of those factors which bear on the public interest."[30]

As evidenced in *Shaheed*, there has been mounting concern that New Zealand had effectively adopted a rule of automatic exclusion for tainted evidence.[31] Despite judges stressing that the prima facie rule of exclusion was not the same as automatic exclusion[32] it is apparent that the judicial frustration with the prima facie rule stemmed from the belief that the prima facie rule was being applied too rigidly.[33]

C Circumventing the Prima Facie Rule of Exclusion

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[27] *R v Te Kira* above n 19, 285-286 per Thomas J dissenting.
[28] *R v Te Kira* above n 19, 279 per Thomas J dissenting.
[29] *R v Te Kira* above n 19, 287 per Thomas J dissenting.
[30] *R v Te Kira* above n 19, 286 per Thomas J dissenting.
[31] *R v Shaheed*, above n 1, 413, per Blanchard J.
[32] *R v Goodwin* above n 16, 206, per Gault J.
[33] *R v Shaheed*, above n 1, 413, per Blanchard J.

The approach of the Courts to determining reasonableness under section 21 has been very important to the development of the prima facie rule. As the issue of a remedy is not relevant until a breach has been determined, the interpretation of "unreasonable" gives a good indication of judicial dissatisfaction with the rule. Where there appeared to be public interest in allowing the admission of evidence, judges seemed to be reluctant to find that there had been a breach. Increasingly decisions were being made on the basis that police conduct was found not to breach the Bill of Rights as the Court of Appeal "move[d] the goal posts."[34]

In *Grayson and Taylor* the Court was asked to consider whether police conduct was unreasonable under section 21. After conceding that they did not have enough information to gain a search warrant, the police illegally entered the property of suspected drug-dealers to confirm suspicions that they were cultivating cannabis.[35] The Court of Appeal found that there was no unreasonable search under section 21 of the Bill of Rights and admitted the resulting evidence. Despite labelling the police actions illegal they stated, "this particular infringement...is not in the circumstances we have detailed of such seriousness as to call for condemnation as being unreasonable."[36] The condemnation referred to is inextricably linked to the knowledge that such a finding would likely result in the incriminating evidence being excluded. In

[34] Hart Schwartz "The Short Happy Life and Tragic Death of the New Zealand Bill of Rights Act" (1998) NZ Law Rev 259, 262.
[35] *R v Grayson and Taylor*, above n 3, 409.
[36] *R v Grayson and Taylor*, above n 3, 410.

the same decision the Court of Appeal indicated that it would be prepared to look at the appropriateness of the prima facie rule for New Zealand.[37] The circumvention of the prima facie rule that is apparent in this case is a prime example that the Court of Appeal felt that the rule did not grant enough judicial discretion to admit evidence that is obtained through a breach of the Bill of Rights.

IV POSITION IN OTHER JURISDICTIONS

A Privy Council Decision in Mohammed v The State

The rationale behind discarding the prima facie rule in favour of a balancing exercise stems from the recent Privy Council decision in *Mohammed v The State*. The Privy Council was asked to consider submissions that the Constitution of Trinidad and Tobago called for the creation of an absolute exclusionary rule, or in the alternative a prima facie rule of exclusion. Subsequently it was held that the judge had to conduct a balancing exercise that weighed the interests of the community against the interests of the individual.[38] The Court examined New Zealand's prima facie rule of exclusion, and stated that they had arrived at "a view that does not entirely accord the view which has prevailed in New Zealand."[39]

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[37] *R v Grayson and Taylor*, above n 3, 412.
[38] *Mohammed v The State*, above n 2, 123.

While the Court of Appeal had already signalled its dissatisfaction with the prima facie rule in *Grayson and Taylor*, the Privy Council decision gave it justification to review the rule. The Court of Appeal appeared eager to emphasise that the decision would not greatly impact the effectiveness of the Bill of Rights when it quoted the Privy Council, "the stamp of constitutionality on a citizen's rights is not meaningless: it is clear testimony that an added value is attached to the protection of the right."[40] However, the very real concern remains that the while the approach of the Court of Appeal gives value to the protected right, this value is significantly less than what appeared to be accorded to the Bill of Rights under the prima facie exclusionary rule.

B South Africa

Prior to the introduction of the South African Constitution in 1996, admissibility of evidence in South Africa was determined on the basis of whether or not the evidence was relevant.[41] If it was deemed relevant then the Courts were not concerned with how it was obtained.[42] While admissibility of evidence is now determined under the 1996 Constitution, South Africa went through a period of two years when it had an interim Constitution after the fall

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[39] *Mohammed v The* State, above n 2, 124.
[40] *Mohammed v The State*, above n 2, 124.
[41] Dr Penuell Maduna, "The South African Bill of Rights and Collection of Evidence in Criminal Matters" (Paper presented to the 14th Conference of the International Society for the Reform of Criminal Law, Sandton, South Africa, 6 December 2000), <http://www.isrcl.org/Papers/Maduna.pdf> (last accessed 12 August 2002)
[42] *Kuruma Son of Kaniu v R* [1955] 1 All ER 236, 239 (PC).

of the Nationalist government.[43] Like the New Zealand Bill of Rights, the interim Constitution was silent on the issue of admissibility of evidence obtained through a breach of rights. In this short period in South Africa there was strong judicial debate over whether there should be judicial discretion to admit evidence on the grounds of public policy, or whether tainted evidence should be excluded unless the breach could be justified.

In *S v Melani and others* it was determined that exclusion of evidence was a remedy that could only be deviated from if it brought the administration of justice into disrepute.[44] However, a year later it was held that the Canadian disrepute test was too narrow, and that the Irish approach of requiring "extraordinary excusing circumstances" for admitting evidence would be more satisfactory.[45] The Court approved the Irish case of *The People (Attorney General) v O'Brien,* and emphasised that "the vindication and the protection of constitutional rights is a fundamental matter for all courts...[and] that duty cannot yield place to any other competing interest."[46] The diverging views of the judiciary in this short interim period meant that the law was always unsettled, but the debate did manage to highlight the importance of not overlooking breaches of rights unless there were very compelling reasons.

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[43] This interim Constitution was in force from the first all-race election in 1994, and was repealed by the Constitution of 1996.
[44] *S v Melani and others* [1996] 1 All SA 137, 151 (E).
[45] *S v Motloutsi* [1996] 1 All SA 27, 35 (C).
[46] *S v Motloutsi*, above n 45, 35 (C).

This debate was resolved by section 35(5) of the 1996 Constitution, which included a qualified exclusionary rule requiring that evidence obtained from a breach of the Bill of Rights be excluded if it would result in an unfair trial or if its admission would be detrimental to the administration of justice. In *S v Shongwe*[47] it was determined that like the Canadian position and the earlier overturned decision of *S v Melani en Andere*, Courts could take at a range of factors into account when deciding the likely disrepute of justice. While the disrepute of justice test allows for assessing the impact that exclusion would have on the public, it is not as likely as New Zealand's balancing exercise to lead to the exclusion of evidence. Unlike the New Zealand Court of Appeal, which has indicated that public interest in a conviction can result in evidence being admitted, South African Courts have decided that despite public interest, evidence *must* be excluded if it would be detrimental to the administration of justice.[48]

Interestingly, the New Zealand Court of Appeal failed to make any reference to South African debate on the issue of exclusion of evidence. The neglect of very relevant South African jurisprudence is concerning, especially as it would have been of great help to the Court in recognising issues both for and against the retention of the prima facie rule. The South African experience would have helped to strengthen the argument for retaining the prima facie rule, if not

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[47] *S v Shongwe* [1998] 3 All SA 549 (T).
[48] *S v Myeni* (31 May 2002) South African Supreme Court, para 30 <http://www.uovs.ac.za/faculties/law/appeals/in022/31050211.htm> (last accessed 24 August 2002)

because of judicial support for the rule, then because the legislature saw fit to incorporate a qualified exclusionary rule in section 35(5) of the Constitution after two years of debate.

C Ireland

The Constitution of Ireland is silent on any specific remedies for breaches, but article 40, section 3(1) states that "the State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the rights of the citizen." This provision has been interpreted as creating a right to have evidence excluded when the constitution is breached through a conscious and deliberate act.[49] The Court of Appeal in *Shaheed* briefly described the position in Ireland, but there was no commentary on why such a stance had been adopted, or why such a stance would not work in New Zealand.

The Irish Courts chose an exclusionary rule because "the defence and vindication of the constitutional rights of the citizen is a duty superior to that of trying such a citizen for a criminal offence."[50] This stance is almost directly opposing that of the New Zealand Court of Appeal, which consistently stressed that public interest in convictions can overcome the need to vindicate

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[49] *The People (Attorney-General) v O'Brien* [1965] IR 142 (SC). This does not create a good faith exception to the exclusionary rule, as the requirement that the breach be 'conscious and deliberate' refers to the act and not the intent.

[50] *The People (Attorney-General) v O'Brien*, above n 49, 170.

the rights of the accused.[51] While the Court of Appeal does not have to justify its decision in terms of Irish case law, the dramatic departure from Bill of Rights' case law merits in-depth analysis of jurisdictions that have already contemplated such a move. Such an analysis would inevitably lead to the Court of Appeal acknowledging that the New Zealand Bill of Rights is not a powerful tool when considering exclusion of evidence, especially when compared with jurisdictions like Ireland. Rather than upholding the enshrined rights, the *Shaheed* decision has reduced the Bill of Rights to merely a significant factor that is to be taken into account.

D Canada

The Court of Appeal undertook a significant discussion on the Canadian position on exclusion, but decided not to follow their decisions. Under section 24(2) of the Canadian Charter, evidence will be excluded if a protected right was breached, and its admission would bring the administration of justice into disrepute. The Courts take a "generous approach" to determine a breach[52] and then conduct a balancing exercise to determine the likely disrepute of justice.[53] While at first glance this may appear to be similar to the New Zealand exercise that takes into account public interest, the balancing approach adopted by the Supreme Court is seriously constricted. In the interest of a fair trial, self-

[51] *R v Shaheed*, above n 1, 421 per Blanchard J.
[52] *R v Bartle* [1994] 3 S.C.R. 173, 208.
[53] *R v Collins* [1987] 1 S.C.R. 265, 281.

incriminating evidence is usually excluded,[54] while good faith on the part of the police will be given little weight.[55]

While not rejecting the Canadian disrepute test outright, the Court of Appeal repeatedly emphasised that the Canadian test allowed evidence to be admitted if public interest was such that the justice system would be brought into disrepute by its exclusion.[56] The purpose of the Canadian approach is to prevent improperly obtained evidence impinging on the fairness of the trial, to deter police misconduct, and to maintain judicial integrity.[57] While the New Zealand Court of Appeal would exclude evidence to uphold trial fairness, the other factors motivating the Supreme Court were not cited as reasons prompting the move towards the balancing exercise. Instead the Court of Appeal found itself emphasising that in Canada the taking into account of community views did not mean that the public opinion had become a determinative factor.[58] This could be viewed as an attempt to allay fears that the new balancing exercise will be trial by opinion poll.

E Other Comparable Jurisdictions

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[54] *R v Stillman* [1997] 1 S.C.R. 607. Self-incriminating evidence includes confessions and real evidence (including evidence derived from the accused) obtained with the participation of the accused.
[55] *R v Simmons* [1988] 2 S.C.R. 495.
[56] *R v Shaheed*, above n 1, 406 per Blanchard J.
[57] Debra Osborn, "Suppressing the Truth: Judicial Exclusion of Illegally Obtained Evidence in the United States, Canada, England and Australia" (2000) *Murdoch University Electronic Journal of Law*, para 29, <www.murdoch.edu.au/elaw/issues/v7n4/osborn74_text.html> (last accessed 23 August 2002).

1 The United States of America

The automatic exclusion rule for evidence obtained through a breach of the Fourth Amendment of the Constitution, was dissected at quite some length by the majority-of-three judgement in *Shaheed*.[59] The deterrence centred nature of this remedy may be effective in the United States, but the Court of Appeal has repeatedly stated that any remedy in New Zealand should be based on vindication of the breached rights rather than deterring police misconduct.[60] From the United States jurisprudence it was noted that there was a growing movement to create a "good faith" exception, whereby evidence would be admitted where the police action was pursued in good faith.[61] However, this is of minimal relevance to New Zealand as at present the good faith exception has been limited to instances where a search warrant has been relied on in good faith.[62]

The analysis of United States case law was used to illustrate the high social costs of having an exclusionary rule that did not take into account public interest.[63] While strict application of the rule in the United States was never going to be applicable to New Zealand's situation, it helped to illustrate the social costs of having a rule that conferred a benefit of such magnitude on the defendant. However, its assistance to the judges in modifying or replacing the

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[58] *R v Shaheed*, above n 1, 404 per Blanchard J.
[59] The Fourth Amendment protects against unreasonable search and seizure.
[60] *R v Shaheed*, above n 1, 418 per Blanchard J.
[61] *R v Shaheed*, above n 1, 401 per Blanchard J.
[62] *United States v Leon* (1984) 468 US 897.
[63] *R v Shaheed*, above n 1, 399 per Blanchard J.

prima facie rule of exclusion was always going to be more limited than the help provided by other jurisdictions.

2 *England*

Under the Police and Criminal Evidence Act 1984, judges have an express discretion on the admissibility of evidence. In the leading case of *Attorney-General's Reference*, judicial discretion was used to take into account the interests of the accused, the victim and their family, and the public.[64] The New Zealand Court of Appeal approved of the more flexible approach that had been developed by the Law Lords, and indicated that in New Zealand the possibility of such an approach had existed, but had not been implemented.[65] A test that weighs up all considerations is appropriate when exercising judicial discretion, but as Elias CJ points out, Parliament has already struck the balance when it enacted the Bill of Rights.[66]

A notable feature is that Lord Cooke of Thorndon sat on the *Attorney-General's Reference* and stated that New Zealand's position was that evidence obtained through a breach was prima facie inadmissible, "subject to exceptions created by the overriding demands of justice."[67] While this is just *obiter dictum* from an overseas judge, it is particularly pertinent to New Zealand

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[64] *Attorney-General's Reference (No 3 of 1999)* [1999] 2 AC 91, 118 (HL).
[65] *R v Shaheed*, above n 1, 418 per Blanchard J.
[66] *R v Shaheed*, above n 1, 385 per Elias CJ dissenting.
[67] *Attorney-General's Reference*, above n 64, 120 per Lord Cooke of Thorndon.

given Lord Cooke's previous involvement with the development of New Zealand Bill of Rights' case law on the New Zealand Court of Appeal. The exceptions to the prima facie rule of exclusion are glossed over in the *Shaheed* decision, and maybe the Court of Appeal missed an opportunity to reform the rule. This could have been done by enlarging Cooke's exceptions that allow the prima facie rule to reflect the demands of justice.

F Conclusion

Prior to *Shaheed*, New Zealand's prima facie rule of exclusion was relatively moderate when compared with approaches to exclusion in comparable jurisdictions. At one extreme is the automatic exclusion of the United States, and Ireland's readiness to exclude any evidence from a breach that was not accidental. New Zealand's rebuttable presumption of exclusion was not as likely to result in admission of evidence as Canada's balancing approach (albeit exclusive of self-incriminating evidence) and the balancing approach adopted by the Privy Council and the House of Lords. The omission of South African case law from analysis, which had adopted a qualified exclusionary rule similar to New Zealand's, was a significant oversight. It would have been very helpful to the Court of Appeal in analysing the flaws and benefits of both the prima facie rule and the balancing exercise.

While the decision to revoke the prima facie rule of exclusion was motivated by the recent Privy Council decision, it was not made out of any necessity to

bring New Zealand's position into line with other jurisdictions. After a decade of experience with the Bill of Rights, the Court of Appeal has now moved New Zealand's position more towards a common law position; a position that is more likely to allow the admissibility of evidence obtained through a breach.

V EFFECTS OF THE SHAHEED DECISION

A Introduction

While the majority-of-three judgement states that the new approach "should not lead, in most cases, to results different from those envisaged in earlier judgements of this Court",[68] the reasoning behind this belief is faulty. The removal of the onus from the prosecution to provide good reasons for admissibility is not just a matter of semantics. It will mean that the defence now has to present a full argument outlining why the breach of the Bill of Rights outweighs all the factors in favour of admission. While such a full debate would be beneficial in outlining the consequences of admission and exclusion, it is more than likely that the new test will alter future results.

Evidence is likely to be admitted under the balancing exercise because of the increase in the multitude of criteria that must be examined by judges in each case. The factors to be taken into consideration include the need for proportionality and a credible justice system, whether the breach was

deliberate, whether other investigative techniques were available to the police, the centrality of the evidence, and the seriousness of the offence.[69] One commentator has described this balancing test as "not really a 'test' at all – it is a matter of throwing all ingredients into the pot and later checking for flavour."[70] The varying weights that will be given to these factors by varying judges is going to lead to debate that will distract from the defence's emphasis that rights have been breached. While the prima facie rule of exclusion may not have been working as desired, the increased discretion available to judges under the new balancing test will lead to more cases where evidence obtained through a breach will be admitted.

B The Rationale Behind the Decision

1 Concern over automatic exclusion

A notable feature of the judgements is the lack of analysis given to justifying the departure from the prima facie rule of exclusion. While there is significant scrutiny of the development of the prima facie rule of exclusion in New Zealand, no evidence is presented to show that the rule was not working. The majority seemed to rely on the proposition that the prima facie rule of exclusion had in essence become a rule of automatic exclusion and lamented the fact that "in practice the exclusion of evidence has followed almost

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[68] *R v Shaheed*, above n 1, 422 per Blanchard J.
[69] *R v Shaheed*, above n 1, 387 per Blanchard J.

automatically once it has been established that there has been a breach."[71] The Judges did not analyse a single case where there was an unsatisfactory result, and there seemed to be a reluctance to criticise their earlier judgements.

Elias CJ not only disagreed with the principles behind the balancing exercise, but also stated, "It is not at all clear that the direction that the presumption can be displaced for good reason is not being conscientiously followed."[72] A more detailed examination of New Zealand case law was needed to support the claim of the majority that judges were almost automatically excluding evidence where there was a breach of the Bill of Rights.

The Solicitor-General proposed that *R v Pratt* was a case illustrating that the prima facie rule of exclusion had become a rule of automatic exclusion, and where the social cost of excluding the evidence was too high.[73] The Bench did not discuss this, but it is submitted that *R v Pratt* is a case where exclusion of evidence was the only satisfactory result. The case involved the accused being strip-searched by police in a public street, whereby a key was found that connected him with a locker containing a substantial quantity of cocaine. It was noted that while the key was crucial in order to obtain a conviction the police had acted in a manner that was most definitely unreasonable.[74] To claim that the prima facie rule of exclusion should be discarded because it allows a

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[70] Robert Lithgow, "Criminal Practice Section" (May 2002) NZLJ 151.
[71] *R v Shaheed*, above n 1, 418 per Blanchard J.
[72] *R v Shaheed*, above n 1, 385 per Elias CJ dissenting.
[73] *R v Pratt* [1994] 3 NZLR 21 (CA).

drug-dealer to have a conviction quashed, takes the spotlight off the outrageous actions of the police. While there is an obvious social interest in convicting drug dealers, to remove the onus on the police to act reasonably when there is such an interest is to drastically reduce the protection afforded to citizens by the Bill of Rights.

The decision that the accused's rights will no longer be a determinative factor was made without considering under what circumstances the prima facie rule of exclusion could be displaced. Under the rule adopted by Cooke P in *Butcher*, the onus fell on the prosecution to show good cause for admitting the evidence. Rather than the majority refining this rule by reminding judges that the tendency towards exclusion could be displaced, they decided, "A prima facie rule does not have the *appearance* of adequately addressing the interest of the community."[75] It was perfectly feasible for the Court of Appeal to take the opportunity presented in this case to not only express that it felt that the prima facie rule of exclusion was not working in its current form, but to reform the rule. Rather than abolishing the rule completely the Court could have created a category of exception to the prima facie rule that would allow judges to take into account factors such as the likely disrepute of justice caused by exclusion. This would still uphold the rights in the Bill of Rights and would keep the onus on the prosecution to show good cause for admitting the evidence.

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[74] *R v Pratt*, above n 73, 26.
[75] *R v Shaheed*, above n 1, 419 per Blanchard J (emphasis added).

2 *Judicial technique*

The decision in this case was motivated by an attempt to ensure a "judicial technique which involves a greater exercise of judgement."[76] The increased judicial discretion over the admissibility of evidence will allow the judges to make case-by-case decisions that reflect community interests in allowing evidence to be admitted for more serious crimes. While this may create more uncertainty in this area of the law, the majority believed that "the conscientious carrying out of the balancing exercise will at least demonstrate that the rights has been taken seriously."[77] As Anderson J pointed out, "in theory, the prima facie exclusionary approach would have achieved the same result as that reached in this case but in practice that method has become blunt with use."[78]

As illustrated, the prima facie rule of exclusion has increasingly been seen as a restraint on the judiciary's attempt to tailor remedies for specific circumstances. The balancing test is a direct result of a desire to remove the constraint on judges over the matter of evidence exclusion, and to end the artificial constructions that were adopted by the judiciary to circumvent the prima facie rule.

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[76] *R v Shaheed*, above n 1, 422 per Blanchard J.
[77] *R v Shaheed*, above n 1, 419 per Blanchard J.

3 *Desire to reflect society's interests*

Among the motivations for the move towards the balancing exercise is the need to provide proportionate responses to breaches of the Bill of Rights.[79] Determining whether exclusion is a proportionate response is done through a balancing process that starts with giving significant weight to the fact that there has been a breach. The need for proportionality recognises that society has an interest in seeing the conviction of serious offenders as "a system of justice will not command the respect of the community if each and every substantial breach of an accused's rights leads almost inevitably to the exclusion of crucial evidence."[80] The prima facie rule of exclusion no longer had the appearance of maintaining an effective and credible system of justice, which is something that the majority hoped to fix by allowing flexible responses to questions of exclusion of evidence.

A disconcerting aspect of the decision in *Shaheed* is that the centrality of the evidence to the prosecution's case and the seriousness of the crime are factors that will be taken into account when deciding if the evidence should be admitted.[81] Excluding evidence in one case because it is not vital for a conviction, and allowing it in another simply because without it the prosecution's case would fail, will bring the administration of justice into

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[78] *R v Shaheed*, above n 1, 431 per Anderson J.
[79] *R v Shaheed*, above n 1, 422 per Blanchard J.
[80] *R v Shaheed*, above n 1, 419 per Blanchard J.
[81] *R v Shaheed*, above n 1, 419 per Blanchard J.

disrepute. Yet this is a potential outcome of a balancing test that assesses how crucial the evidence is before deciding on admissibility. Likewise a breach of the rights of an accused burglar may result in the exclusion of evidence, while the same breach of rights of an accused murderer may be overlooked because the crime is so serious.

This position is in direct contrast with earlier Bill of Rights case law. In *R v Accused* the trial judge decided that the prima facie rule should be displaced because the crime was so serious.[82] This was overturned by the Court of Appeal who held that the seriousness of the crime was not a factor that should be balanced against the a breach of a fundamental right.[83]

While the Court of Appeal emphasised in *Shaheed* that they do not want the infringed right to be seen as less valuable to certain offenders, this is an obvious outcome.[84] A major benefit of the prima facie rule of exclusion was that it applied equally to all offences and to all breaches of an individual's rights. Equality before the law and equal application of the law are fundamental principles of the rule of law, and it appears that the *Shaheed* decision infringes these principles. The change to the balancing test now creates the appearance that the Courts are interested in upholding an individual's rights, but only so far as those rights do not significantly interfere

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[82] *R v Accused* (1994) 11 CRNZ 380 (CA).
[83] *R v Accused* (1994) 11 CRNZ 380, 382 per Richardson J.
[84] *R v Shaheed*, above n 1, 421 per Blanchard J.

with the prosecution's case or do not prevent the prosecution of a serious offence.

C The Need for Effective Remedies

Arguably the greatest impact of the decision in *Shaheed* is that it will be more likely to lead to the admission of evidence and therefore deny what may be the most effective remedy for the accused. While the New Zealand Bill of Rights does not explicitly require a remedy for a breach of a right, the need for remedies has had judicial support since Cooke P stated, "we would fail in our duty if we did not give an effective remedy to a person whose legislatively affirmed rights have been infringed."[85] The recognition in *Simpson v Attorney-General (Baigent's Case)*[86] of the need for effective recourse against State action is an integral part of New Zealand Bill of Rights' case law, and is the main factor for the development of the prima facie rule of exclusion. However, the Court in *Shaheed* believed that the prima facie rule of exclusion was not consistent with the notion of tailoring remedies for differing circumstances.[87] A relevant issue now is whether under the new balancing exercise New Zealand Courts can still deliver an effective remedy to those who have had their rights infringed.

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[85] *Simpson v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667, 676 (CA) per Cooke P.
[86] *Baigent's Case*, above n 85.
[87] *R v Shaheed*, above n 1, 419 per Blanchard J.

It is important to note that in his dissent in *R v Te Kira*, Thomas J commented that the need for an effective remedy "cannot mean that a remedy must or should be available every time a person's rights are infringed under the Bill of Rights Act."[88] While pragmatism may require not providing remedies for merely technical breaches, adopting a viewpoint whereby the Bill of Rights can be infringed without providing adequate recourse is dangerous. Not only does it degrade the status of the Bill of Rights, but it does little to endorse New Zealand's international obligations.

1 International obligations

Under the International Covenant on Civil and Political Rights[89] New Zealand has international obligations to provide an effective remedy to those who have had their rights infringed. This obligation was affirmed in *McVeagh v A-G* where O'Regan J referred to article 2(3), which requires parties to the Covenant to ensure that any person whose rights and freedoms are violated have an effective remedy.[90] New Zealand's ratification of the Covenant in 1978, and its subsequent affirmation in the New Zealand Bill of Rights Act 1990 means that the international covenant is of great importance when interpreting the Bill of Rights.

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[88] *R v Te Kira*, above n 19, 283 per Thomas J dissenting.
[89] International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171.
[90] *McVeagh v A-G* [2001] 3 NZLR 566 (HC).

A decision that needs to be looked at when interpreting what effect the Covenant will have on remedies in New Zealand is *Khan v United Kingdom.*[91] This case was held in the European Court of Human Rights, where the applicant was appealing against a conviction of drug offences after police used a secret listening device to obtain evidence against him. While the Court held that there had been a breach of article 8 of the European Convention on Human Rights, which guaranteed respect for private life and correspondence, the Court also ruled that the admissibility of evidence was a matter for regulation under national law.[92] Like article 2(3) of the International Covenant on Civil and Political Rights, article 13 of the European Convention guaranteed an effective remedy at a national level. Yet despite this guarantee the Court still found that it was a matter for domestic regulation.

In his dissent in *Khan*, Judge Loucaides stated, "The exclusion of such evidence in my view, becomes even more imperative in cases like the present, where no alternative effective remedy exists against the breach of the relevant right."[93] In light of this opinion it is possible to make an argument that the retention of the prima facie rule of exclusion in New Zealand is a necessary requirement to give effect to New Zealand's international obligations and to also ensure that exclusion is mandated where there are no other alternative effective remedies. However, if the International Covenant on Civil and Political Rights were to be interpreted in the same way as the European

[91] *Khan v United Kingdom* (2001) 31 EHRR 45.
[92] *Khan v United Kingdom* (2001) 31 EHRR 45, para 34.

Convention in *Khan* then it is doubtful that the requirement of an effective remedy would have any influence on decisions of the Court. While the Covenant will not be domestically enforceable in New Zealand law it should still be persuasive on New Zealand Courts when determining access to an effective remedy. Interestingly, when discarding the prima facie rule of exclusion the Court of Appeal made no mention of New Zealand's international obligations to ensure an effective remedy to those who have their rights infringed.

2 *Real evidence*

Unlike confessional evidence, real or tangible evidence is unique because it exists in its own right, regardless of whether there has been a breach of the Bill of Rights. Prior to *Shaheed* New Zealand Courts had not made a formal distinction between the admissibility of confessional and real evidence obtained through a breach of the Bill of Rights. Instead the Court has preferred to hear submissions on whether real evidence should be admitted because its discovery was inevitable regardless of the breach.[94]

However, in this case a distinction is drawn between confessional evidence and real evidence. Blanchard J states that a confession obtained through a breach of rights may be excluded due to doubts about its reliability but that,

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[93] *Khan v United Kingdom* (2001) 31 EHRR 45, para O-17 per Judge Loucaides dissenting.
[94] *R v Butcher and Burgess*, above n 14, 267.

"where real evidence...has been found, even as a result of a confession, the probative value of that discovery may be a weighty factor."[95] Leaving the door open for admitting real evidence, whose discovery is wholly dependent on an inadmissible confession, raises serious concerns about the effectiveness of a remedy to someone who confesses after having their right to counsel denied.

By contrast, the Canadian Supreme Court in *R v Stillman* found it more helpful to classify evidence as either conscriptive or non-conscriptive.[96] Recognising the self-incriminating nature of real evidence such as bodily samples, the Court held that real evidence conscripted from the accused would be just as likely to result in an unfair trial as a self-incriminating confession.[97] The New Zealand Court of Appeal rejected this approach, which favours exclusion of conscripted evidence. The Court adopted the line that the admission of evidence will not lead to an unfair trial unless the evidence is unreliable enough to lead to an unsafe verdict.[98] The significant divergence between the two Courts is best explained by the overwhelming need of the New Zealand Court of Appeal to retain a discretion over the exclusion of evidence that arises on a case-by-case basis.

Breaches of many of the rights enshrined in the Bill of Rights, such as the right to be free from unreasonable search and seizure, will often result in the police

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[95] *R v Shaheed*, above n 1, 420 per Blanchard J.
[96] *R v Stillman*, above n 54, 652.
[97] *R v Stillman*, above n 54, 655.
[98] *R v Shaheed*, above n 1, 420 per Blanchard J.

obtaining real evidence. Unlike the Canadian approach, the majority has adopted a test whereby a threshold of a potentially unsafe verdict must be reached before the probative nature of real evidence is deemed to be outweighed by the need for exclusion.[99] For an accused the most effective remedy is exclusion of the evidence that stemmed from the breach. Therefore, if evidence obtained from a breach is not excluded how effective would alternative remedies be to the accused?

3 *Alternative remedies*

The majority in *Shaheed* recognised that cases would exist where improperly obtained evidence would be admissible and the offender would have to seek alternative remedies such as *Baigent* damages or a reduced sentence. All the Judges acknowledged that such a claim would bring the administration of justice into disrepute, but there appears to be little alternative if *Baigent's Case* is not to be overturned.[100] Where evidence has been admitted and a convicted criminal is able to claim damages against the police, would the compensation metered out to such an individual be lessened to reduce public outcry? If compensation to convicted criminals brings the administration of justice into disrepute then it is likely that such compensation would not compare favourably to that which innocent individuals would receive after having their rights breached. There is the very real possibility that the Bill of Rights will

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[99] *R v Shaheed*, above n 1, 420 per Blanchard J.
[100] *R v Shaheed*, above n 1, 421 per Blanchard J.

become less of a shield for individuals once it is decided that the evidence in question should be admitted.

Furthermore, by stating that the question of alternative remedies for a breach will not be considered when contemplating exclusion, the Court of Appeal is removing the possibility of debate on whether the accused is entitled to an effective remedy.[101] In some situations where conviction would have very detrimental effects, exclusion of evidence may not only be the most effective remedy, but the only effective remedy. It is necessary for the Court to consider as part of its balancing exercise whether is also denying the only effective remedy when it is ruling out exclusion.

D Diminishing of Rights

1 Comparison with common law admissibility

The balancing approach adopted by the Court of Appeal may not only deny the most effective remedy, but it also diminishes the importance of the New Zealand Bill of Rights as a protector of rights. The balancing exercise is the same method that was used to determine admissibility prior to the introduction of the Bill of Rights. The only significant difference between common law admissibility and the *Shaheed* test is that the *Shaheed* test requires a breach of a right before the balancing test is undertaken. In future cases where

admissibility is challenged under common law principles as well as under the *Shaheed* balancing test, it appears that there will be very few circumstances when the results will differ under either approach.

Chief Justice Elias summed up the argument succinctly, implying that the majority test is the common law test under another name, "The effect of the majority judgement in the present case is that breach of the rights...simply informs the balancing required by the common law."[102] While significant weight will be given to the rights that have been breached, the rights of the individual have simply become a factor to be taken into account in the exercise of judicial discretion.

The Bill of Rights has been effectively been relegated to a code of individual rights that the Court will take into account when examining whether exclusion is a proportionate response to a breach of a right. The Court of Appeal adopted the words of the Privy Council in *Mohammed v The State* when they described that a breach would be a "cogent factor militating in favour of exclusion."[103] This statement is little more than a superficial guarantee that the Bill of Rights is still an important aspect in the balancing test. Elias CJ makes her displeasure obvious when she states that breaches are "relegated to an important factor militating against admission in the exercise of a broad discretion."[104] While the

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[101] *R v Shaheed*, above n 1, 421 per Blanchard J.
[102] *R v Shaheed*, above n 1, 384 per Elias CJ dissenting.
[103] *R v Shaheed*, above n 1, 419 per Blanchard J.
[104] *R v Shaheed*, above n 1, 384 per Elias CJ dissenting.

Court has made it clear that the Bill of Rights is still relevant, it is the broadness of the discretion that has undermined the rights enshrined in the Bill of Rights.

2 *Diminishing of individual rights*

The decision of the Court of Appeal to revoke the prima facie rule is also likely to diminish the rights enshrined in the Bill of Rights. It is necessary to note that rights are not absolute and are subject under section 5 to "reasonable limits prescribed by law". Therefore, to establish a breach it is already necessary to balance competing interests. The approach of the majority indicates that it will be necessary to conduct a balancing test to resolve the issue of the breach, and then to conduct a similar balancing test using the same factors to resolve the admissibility of the evidence. Far from causing an enhancement of judicial technique, the balancing approach has the potential to lead to double counting as the court has to reconsider issues of reasonableness.

While the prima facie rule of exclusion was circumvented in cases such as *Grayson and Taylor* by finding that there was no breach of the Bill of Rights, there is the possibility that because of this decision, courts will be more willing to acknowledge a breach. A willingness to find that there had been a breach would allow the balancing exercise to be conducted only on the issue of a remedy. This could lead to the position in Canada where it is accepted that "in

the initial inquiry as to whether evidence has been obtained in a manner that infringed or denied rights, courts should take a generous approach."[105] Readily accepting that there has been a breach of the Bill of Rights without conducting an inquiry into the competing interests will lead to an erosion of the affirmed right.

Justice Blanchard admits the undesirability of conducting two balancing exercises when he states,[106]

> Where the police have without practical justification departed from the standards required by the law, it is better that the breach be marked by a statement from the court that their behaviour was unreasonable; and that the decision whether or not to exclude the resulting evidence is then made on a principled basis in light of that conclusion.

A willingness to find a breach and then deal with public policy issues when addressing the remedy may undermine the rights in the Bill of Rights. It is possible that future debate on the competing interests that make up an enshrined right will be limited, as such arguments will be made on the issue of a remedy. Such an outcome is not a problem in a case where the breach has been admitted by the police, but where the breach is contested, the balancing approach "is likely to lead to erosion of the rights affirmed in the legislation by double-counting, in the balancing of remedy, other public interests already balanced in the determination of breach."[107]

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[105] *R v Shaheed*, above n 1, 403 per Blanchard J.
[106] *R v Shaheed*, above n 1, 418 per Blanchard J.

3 *Prima facie rule as a standard for police conduct*

If infringed rights are simply one of many factors to be taken into account and are marked with only a statement from the court, then the role of the Bill of Rights as a guide to police conduct is lessened. Although the majority indicated they did not want an approach based on deterrence, this was one of the inevitable by-products of the prima facie rule. There is little doubt that the rejection of the prima facie rule of exclusion has now opened the door for questionable investigating techniques to be used so long as they can be justified by factors such as the nature of the evidence and the availability of other investigative techniques.

The balancing exercise may also lead to the peculiar situation where police have to decide whether the public interest outweighs the individual's rights before starting any action. Without the benefit of one standard for all, police will need to decide whether their conduct will be unreasonable (in the case of section 21), and then whether the public interest outweighs any breach.

The advantage of the prima facie rule of exclusion was that is was concise and clear. If police conduct breached the Bill of Rights in obtaining evidence then that evidence was excluded unless there were good reasons for admitting it. Now the balancing test essentially means that evidence is going to be admissible unless there are good reasons that it should not be. This new test

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[107] *R v Shaheed*, above n 1, 385 per Elias CJ dissenting.

encourages police to breach the Bill of Rights and to bring the contentious evidence before the courts, putting the onus on the defence to exclude it. Far from being the guide to police conduct that it has been, the Bill of Right's status has been drastically lessened. While the majority stated that deliberate abuse of rights by police would lean towards exclusion, the fact remains that if police are unable to secure a conviction without breaching rights then there is little deterrence to prevent them from violating an individual's rights. Judges are all going to be giving different weights to different factors during the balancing exercise and the increased likelihood of evidence being admitted means that the Bill of Rights is no longer going to be as significant a guide to police conduct as it has been.

4 *Good faith*

The issue whether the good faith of police should be given any weight on the side of admissibility of evidence was rejected in *Goodwin*.[108] Cooke P emphasised that such a proposition would mean that "ignorance of the law would become an excuse and the less an officer understood about a person's rights the less the law would protect those rights."[109] However, this is a viewpoint that appears to have been overtaken by the position adopted by the Court in *Shaheed*.

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[108] *R v Goodwin*, above n 16, 153.
[109] *R v Goodwin*, above n 16, 172 per Cooke P.

The majority statement that "good faith will in itself often be merely a neutral factor"[110] is self-serving when it is taken in conjunction with the significant weight that deliberate breaches will be given in favour of exclusion. The judgement emphasised that deliberate breaches would be likely to result in exclusion, but also declared that, "action not known to be a breach of rights does not merit the same degree of condemnation."[111] In essence the mental state of the police officers in question has now become relevant. While good faith on the part of the police will not lead directly to the admission of evidence, it is a factor that can be taken into account when conducting the balancing test. In the view of commentator Robert Lithgow such a stance will mean that from a police point of view "the more naïve the better."[112] The balancing exercise will more adequately reflect society's interest in seeing criminals convicted, but there is the very real danger that it "invites the 'pernicious doctrine' that in criminal law the end justifies the means."[113]

E Future Impact of Shaheed Decision

The decision in *Shaheed* will have a significant impact on future Bill of Rights cases. Courts are going to be asked to re-examine cases in areas that have been considered settled. The new balancing test adopted is not just confined to search and seizure cases, and judgements in other Bill of Rights areas are

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[110] *R v Shaheed*, above n 1, 420 per Blanchard J.
[111] *R v Shaheed*, above n 1, 420 per Blanchard J.
[112] Lithgow, above n 70, 151.
[113] *R v Shaheed*, above n 1, 385 per Elias CJ dissenting.

going to come under scrutiny. The full impact that the decision will have on the admissibility of evidence and the strength of the Bill of Rights will not be evident for some time, but already there is an indication of the direction that the Courts will take.

The case of *R v Iles*[114] was one of the first cases to implement the balancing test of *Shaheed*. In this case Priestley J of the High Court made a peculiar comment that, "the balancing exercise does not alter the analysis and result."[115] While the result may have been the same in this case under the prima facie rule, the analysis adopted by the Judge tends to indicate confusion about the steps the *Shaheed* judgements laid down for judges to follow. This case supports the view that allowing judges to take a myriad of factors into account will create confusion as judges give different weights to different factors.

Another case that has had to apply *Shaheed* was *R v I*,[116] which resulted in evidence of drug supplying being excluded due to arbitrary detention under section 22 of the Bill of Rights. A major factor that was taken into account by the Court was that "the quantity of drugs was small and they were not of the most serious type."[117] This indicates that the Court would have overlooked the same breach and admitted the evidence if the accused was charged with a more

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[114] *R v Iles* (10 April 2002) High Court Auckland T012095, Priestley J.
[115] *R v Iles*, above n 114, para 15 per Priestley J.
[116] *R v I* (17 June 2002), CA 71/02.
[117] *R v I*, above n 116, para 20 per Anderson J.

serious crime. While these recent cases illustrate that judges are still attempting to give weight to the Bill of Rights, there are concerns about the effect of the decision. The desire of the Court in *Shaheed* to take into account societal interest in convicting criminals, with the side effect of diminishing equality before the law, has eventuated.

The confusion over how the *Shaheed* decision should be applied in lower courts is evident in the recent case of *R v Maihi*[118] where on appeal the trial judge's decision was overturned. The Court of Appeal disagreed with the trial judge conducting a single balancing test to simultaneously determine the reasonableness of police action and to decide the issue of admissibility under the *Shaheed* test.[119] This highlights the obvious problem arising out of expecting judges to conduct two separate balancing exercises to determine the breach and the remedy, both of which essentially involve the same factors.

The decision of the Court of Appeal in *R v Kau*[120] is a startling application of *Shaheed*. The accused was appealing the admission of a police interview on the basis that his right to refrain from making a statement under section 23(4) had been abused. The Court of Appeal acknowledged the breach and after pointing out that counsel had not referred to *Shaheed*, the Court excluded the evidence. They then made the extraordinary comment, "Had we been required to undertake the balancing exercise set out in *R v Shaheed* we would

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[118] *R v Maihi* (22 August 2002), CA 181/02.
[119] *R v Maihi*, above n 118, para 4.

unhesitangly have regarded exclusion...to be a proportionate response to the breach."[121] The decision to exclude the evidence once a breach was established without conducting a balancing exercise on the issue of exclusion, contradicts the entire rationale behind discarding the prima facie rule of exclusion. The three judges have totally misunderstood the nature of the decision in *Shaheed*, for it is not possible for them to exclude evidence under the Bill of Rights without conducting the new balancing test. These sorts of problems highlight the confusion that the decision in *Shaheed* has brought to Bill of Rights law.

VI CONCLUSION

The decision of the Court of Appeal in *Shaheed* to replace the prima facie rule of exclusion with a balancing test that places significant weight on the fact that a breach has occurred, is likely to lead to more problems than it resolves. The decision was motivated by a perception that the prima facie rule had in effect become a rule of absolute exclusion. It was therefore decided to follow the recent Privy Council decision in *Mohammed v The State*, in the hope of enhancing judicial technique as judges attempted to circumvent the prima facie rule, and allowing the taking into account of society's interest in seeing serious offenders being convicted.

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[120] *R v Kau* (22 August 2002), CA 179/02.
[121] *R v Kau*, above n 120, para 33.

However, the balancing test is likely to lead to courts ignoring New Zealand's international obligations to provide an effective remedy, and the courts having to examine the possibility of providing less than satisfactory alternative remedies to those who have had their rights infringed. There is also the very real possibility that the rights guaranteed under the Bill of Rights will be diminished as the majority essentially adopts the common law test towards admissibility. Other problems that arise include the fact that ignorance of the police officers of the breach may be a factor that weighs towards admissibility, and that there may be a tendency to admit real evidence regardless of the fact that it may have been conscripted by the police in breach of the Bill of Rights. Although the Court did not want a rule based on deterrence, there is no arguing that the prima facie rule provided a standard for police conduct. The balancing test has brought vagueness to the law and as a result is less likely to act as a guide to police when they have to consider the rights of suspects.

While the prima facie rule of exclusion may not have been working as satisfactorily as intended when it was created, it did uphold the primacy of the rights of the individual. The opportunity was neglected in *Shaheed* to try to reform the prima facie rule by enlarging the conditions where the presumption of exclusion could have been displaced. If judges were circumventing the rule, then their decisions should have been identified and criticised by the Court of Appeal. If this would not have altered results then the prima facie rule could have been reformed by enlarging the factors that could displace the tendency

in favour of exclusion. Instead a balancing approach has been adopted that undermines the importance of the Bill of Rights as a protective shield by relegating its fundamental rights to factors that will be taken notice of (albeit significant notice) in the exercise of judicial discretion.

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