MICHELLE A MASON

THE PRIMA FACIE EXCLUSIONARY RULE: A TIME FOR REFLECTION

LLM RESEARCH PAPER
MASTERS LEGAL WRITING (LAWS 582)

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CONTENTS

ABSTRACT

This paper reflects on the role of the prima facie exclusionary rule as a remedy for breaches of the New Zealand Bill of Rights Act 1990. Current New Zealand case law establishes this rule as the principal recourse for breaches of sections 21, 22 and 23 of the Bill of Rights Act.

It is the thesis of this paper that the main role of any remedy should be the effective vindication of the rights of the accused. Recent comment by the Court of Appeal, together with a recent Privy Council decision, could undermine the role of this remedy.

This paper examines the alternative approaches available, including the Law Commision's "improperly obtained evidence rule." The conclusion is that this rule allows too much judicial discretion and is not an effective remedy for a violation of human rights, while other alternatives such as the Police Complaints Authority and the civil action are also considered to be ineffective remedies.

The paper concludes that the goal of vindication is best served by the retention of the prima facie exclusionary rule in its current form.

WORD LENGTH

The text of this paper (excluding contents page, footnotes and the abstract) comprises approximately 11,960 words.

I INTRODUCTION

> The New Zealand Bill of Rights Act has to be applied in our society in a realistic way. Prima facie, however, a violation of rights should result in the ruling out of evidence obtained thereby.[1]

The New Zealand Bill of Rights Act 1990 is an affirmation of the human rights and fundamental freedoms of New Zealanders. The Act does not, however, provide a remedy for those whose rights are breached. The prima facie exclusionary rule is a judge-made remedy which is applied to deem evidence obtained in breach of the Bill of Rights inadmissible.

There are three reasons why now is an opportune time to reflect on the prima facie exclusionary rule. Firstly, there is the Court of Appeal decision in *R v Grayson and Taylor*[2] that has, at the very least, threatened the continued existence of the rule. Secondly, there is the recent Privy Council decision in *Mohammed v The State*[3] that may provide the New Zealand Court of Appeal with the opportunity to reconsider the rule. Although the *Mohammed* decision is not binding on the Court of Appeal, it is very persuasive. Lastly, the New Zealand Law Commission has recently released its Evidence Code which includes the "improperly obtained evidence rule", an alternative to the prima facie exclusionary rule.

This paper will discuss the current status of the prima facie

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1 *R v Butcher* [1992] 2 NZLR 257, 266 (CA) per Cooke P.

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

3 *Mohammed v The State* [1999] 2 WLR 552 (PC).

exclusionary rule in New Zealand. This analysis will begin with the rationale and initial development of the rule. New Zealand case law will be summarised to determine in what circumstances the rule will be applied in this country.

Part II will discuss the Privy Council decision in *Mohammed*. The reasoning adopted by their Lordships will be analysed to consider the likely effect on New Zealand jurisprudence.

The fourth part of the paper will outline the Law Commission's proposed improperly obtained evidence rule. The proposal will be discussed in the context of current New Zealand law. Other alternatives to the prima facie exclusionary rule such as the Police Complaints Authority and the civil remedy of compensation and damages will be considered in Part V. The focus will be on their effectiveness as remedies for violations of human rights.

The issue of whether there should be a distinction between the admissibility of real and confessional evidence will also be discussed in Part V. To date our Courts have resisted a wholesale embracement of this concept but there have been indications that such a distinction might be adopted.

The sixth section of this paper will discuss the best approach to be taken by the Court of Appeal when it reconsiders the prima facie exclusionary rule. The paper concludes that the rule should be retained in its current form as it is the most effective remedy for a breach of the rights protected by the Bill of Rights Act 1990.

II THE NEW ZEALAND PRIMA FACIE EXCLUSIONARY RULE

A Introduction

Prior to the enactment of the New Zealand Bill of Rights Act 1990 ("the Bill of Rights" or "the Act") the exclusion of evidence was governed by the common law principle that[4] -

> evidence obtained by illegal searches and the like is admissible subject only to a discretion, based on the jurisdiction to prevent an abuse of process, to rule it out in particular instances on the ground of unfairness to the accused.

Where evidence is challenged other than under the Bill of Rights, admissibility is still determined in accordance with the above principle.[5]

Challenges based on the Bill of Rights primarily stem from alleged breaches of section 21, 22 or 23. Section 21 provides[6] -

> 21. Unreasonable search and seizure - Everyone has the right to be secure against unreasonable search and seizure, whether of the person, property, or

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4 *R v Coombs* [1985] 1 NZLR 318, 321 (CA).

5 *R v Laugalis* (1993) 1 HRNZ 466, 474 (CA).

6 Obviously, for the Bill of Rights to apply there must be a breach of a protected right. In the case of an alleged breach of s21 it must also be shown that the search itself was unreasonable. The interpretation of this term by our Court of Appeal has prevented many accused from being able to benefit from the prima facie exclusionary rule. See Hart Schwartz "The Short Happy Life and Tragic Death of the New Zealand Bill of Rights Act" [1998] NZ Law Rev 259, 262; Andrew S Butler "The End of Precedent and Principle in Bill of Rights Cases? A Note on R v Grayson" [1997] NZ Law Rev 274; Scott Optican "Rolling Back s21 of the Bill of Rights" [1997] NZLJ 42.

correspondence or otherwise.

Section 22 states that "everyone has the right not to be arbitrarily arrested or detained."

Section 23 sets out the rights of persons detained or arrested. The section reads -

> 23. Rights of persons arrested or detained - (1) Everyone who is arrested or who is detained under any enactment -
>
> (a) Shall be informed at the time of the arrest or detention of the reason for it; and
>
> (b) Shall have the right to consult and instruct a lawyer without delay and to be informed of that right; and
>
> (c) Shall have the right to have the validity of the arrest or detention determined without delay by way of habeas corpus and to be released if the arrest or detention is not lawful.
>
> (2) Everyone who is arrested for an offence has the right to be charged promptly or to be released.
>
> (3) Everyone who is arrested for an offence and is not released shall be brought as soon as possible before a court or competent tribunal.
>
> (4) Everyone who is -
>
> (a) Arrested; or
>
> (b) Detained under any enactment -
>
> for any offence or suspected offence shall have the right to refrain from making any statement and to be informed of that right.
>
> (5) Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person.

The most commonly alleged breach under this section is related to the "right to consult and instruct a lawyer without delay and to be informed of that right."

B The Development of the Rule

1 The Rationale

The prima facie exclusionary rule was introduced in New Zealand because exclusion of evidence was seen as being the most effective way of vindicating a breach of a criminal accused's rights under sections 21, 22 and 23. Exclusion of the evidence returned the individual to the position he or she was in prior to the breach occurring. This remedy reflected the importance of the rights contained in the Bill of Rights.[7]

Richardson J, as he then was, affirmed that the vindication of rights was the basis for the rule in the *Goodwin* case.[8] He stated that the primary focus of the Act is rights centred and that "the primary thrust of the statute is on the positive assurance of rights rather than on the deterrence of official misconduct."[9] Richardson J's article entitled "Rights Jurisprudence - Justice for All?" further outlines his view on the justification of the rule as follows[10] -

> The Bill of Rights is "rights-centred" and the statement of civil and political rights is in broad and imprecise

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7 *R v Kirifi* [1992] 2 NZLR 8 (CA), *R v Butcher*, above n1.

8 *R v Goodwin* [1993] 2 NZLR 153 (CA).

9 *R v Goodwin* , above n8, 193 per Richardson J.

10 Sir Ivor Richardson "Rights Jurisprudence - Justice for All?" in Philip A Joseph (ed) *Essays on the Constitution* (Brookers, Wellington, 1995) 61, 71.

> language which may encourage a generous interpretation. Given that rights-centred focus, where there has been a violation of a right, primacy should be given to the vindication of human rights in determining what remedy should be provided.

In the case of *R v Butcher*[11], Cooke P (as he then was) discussed at length the significance to be attached to the Bill of Rights. Although not entrenched, the Act is an affirmation of the rights of New Zealanders. The "correct judicial response" could only be to give the Act primacy subject to other legislation as required by section 4.[12]

The vindication of rights approach has been widely criticised as being inappropriate and consequently is seen as likely to be abandoned.[13] Other policy issues such as deterrence and public interest have been advocated as more relevant considerations when determining the exclusion of evidence.

2 *Initial developments*

In the 1991 case of *R v Kirifi*.[14] Cooke P stated that "where a plain breach of the right declared by Parliament has been established, it is a proper course for the Court to rule out an admission or confession obtained in consequence."[15] Evidence

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11 *R v Butcher*, above n1.

12 *R v Goodwin*, above n8, 267. Section 4 of the Bill of Rights Act provides that no Court shall hold any other enactment to be repealed, revoked, invalid or ineffective by reason of that enactment being inconsistent with any provision of the Bill of Rights.

13 See Richard Mahoney "Vindicating Rights: Excluding Evidence Obtained in Violation of the Bill of Rights" in Huscroft and Rishworth (eds) *Rights and Freedoms* (Brookers, Wellington, 1995) 447, 449 and Campbell Thomas Walker "Wilkes and Liberty: A Critique of the Prima Facie Exclusionary Rule" (1996) 17 NZULR 69.

14 *R v Kirifi*, above n7.

15 *R v Kirifi*, above n7, 12.

obtained in consequence of a breach was to be excluded unless there were circumstances in the particular case that satisfied the Judge that it would be fair and right to admit the evidence. This principle differs significantly from the common law rule by reversing the presumptive admissibility of evidence and substituting a prima facie exclusionary rule.

The principle set down in *Kirifi* was applied by the Court of Appeal a short time later in the case of *R v Butcher*.[16] Cooke P elaborated on the rule, stating that the onus of convincing the Court that the evidence should be admitted notwithstanding the breach rested on the Crown.[17] It was also decided that a trivial or inconsequential breach may not lead to the exclusion of evidence.[18]

3 Real and confessional evidence

In *Butcher* the Court held that some of the real evidence obtained as a result of the breach of the appellants' rights was admissible. The evidence had been found when one of the accused had shown Police where it was hidden. The Court of Appeal held that the items would have been found without the breach because the Police would have made a thorough search and located the items one way or another. However, other pieces of physical evidence were not admissible because it was not likely that the Police would have found them without the help of the accused.

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16 *R v Butcher*, above n1.

17 *R v Butcher*, above n1, 266.

18 *R v Butcher*, above n1, 266.

The Court of Appeal has to date resisted making a distinction between the admissibility of real and confessional evidence. Such a distinction would likely be based on the concept that real evidence, being a tangible item, is able to be discovered regardless of a rights violation as in the *Butcher* case, whereas confessional evidence is unlikely to be otherwise obtained. The likelihood of a distinction being adopted by the New Zealand Courts is discussed below.[19]

4 *Circumstances where the rule does not apply*

Gault J made it clear in *Butcher* that he did not favour a strict prima facie exclusionary rule. He held that flexibility was necessary to ensure that the remedy was appropriate to the particular breach.[20] He went on to say[21] -

> I consider that the correct approach should be to exclude as a general rule evidence obtained by conduct clearly involving denial of the rights included in s23 which can be said to have induced provision of the evidence in question. Where there is no clear breach, a purely technical breach or a breach which has not induced the provision of the evidence, exclusion should be in the discretion of the Court exercised on the basis of fairness and the interests of justice.

It is significant that this formulation of the rule by Gault J is remarkably similar to that which the majority of the Court developed in later cases.[22]

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19 In Part V.

20 *R v Butcher*, above n1, 272.

21 *R v Butcher*, above n1, 273.

22 See *R v Jefferies* [1994] 1 NZLR 290 (CA).

The cases of *Ministry of Transport v Noort*[23] and *R v Te Kira*[24] established the "real and substantial connection" test. Richardson J (as he then was) held in *Te Kira* that there must be more than a "slender temporal link" between the violation and the obtaining of the evidence in order to exclude it.[25] Anything less was deemed to be contrary to the statutory intent. The onus is on the Crown to prove that there was no real and substantial connection between the breach and the obtaining of the evidence. If the Crown cannot do so, it must prove that it would nonetheless be fair and right to admit the evidence.[26]

5 Good faith

In *R v Narayan*[27] the accused had not been advised of his right to consult a lawyer before making an inculpatory statement. The Court of Appeal held that there had been a serious breach of the Bill of Rights. In determining whether he should allow for police good faith and whether there were any circumstances that would justify admitting the evidence the Cooke P took into account the fact that the accused spoke little English and was in an alien country. Therefore, the rights provided by the Act were of special value to the accused and he should not be deprived of his rights "merely because the police acted in good faith."[28]

The possibility of a "good faith" exception was discussed at

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23 *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA).

24 *R v Te Kira* [1993] 3 NZLR 257 (CA).

25 *R v Te Kira*, above n24, 272.

26 *R v Te Kira*, above n24, 273.

27 *R v Narayan* [1992] 3 NZLR 145 (CA).

28 *R v Narayan*, above n27, 149.

length in the subsequent case of *R v Goodwin*.[29] Cooke P made it clear that he did not support adopting such an exception, stating that to do so 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."[30]

Hardie Boys J also warned against a good faith exception in *Goodwin* saying that it can rarely be relevant because it would place a premium on ignorance of the law.[31] In addition, the Judge cautioned against consideration of the consequences of exclusion as he held that vindication of the right should be the overriding factor. However, it is significant to note that Hardie Boys J categorised the denial of rights in that case as unintentional and accidental and did not believe that vindication was necessary.[32]

6 *The future of the prima facie exclusionary rule*

By 1994 the prima facie exclusionary rule was well settled in New Zealand rights jurisprudence. In summary, the rule stated that evidence obtained by a breach of a person's rights was prima facie inadmissible unless the Court was satisfied that there were circumstances that would justify admission. Cooke P in *Goodwin* outlined the circumstances that had been used to justify admission as follows[33] -

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29 *R v Goodwin*, above n8.

30 *R v Goodwin*, above n8, 172.

31 *R v Goodwin*, above n8, 202.

32 *R v Goodwin*, above n8, 203.

33 *R v Goodwin*, above n8, 171.

> waiver of rights by the person affected; inconsequentiality, in the sense that the Court can be satisfied that the admission would have been made without a breach; reasonably apprehended physical danger to the law enforcement officer or other persons; other reasons for urgency such as the risk of destruction of evidence; and the triviality of the breach if it is only a marginal departure from the individual's rights

Richardson J added to the list in the *Te Kira* case with the "real and substantial connection" test.

In a decision that has evoked considerable academic comment, *R v Grayson and Taylor*,[34] the Court of Appeal has stated that "on an appropriate occasion the Court would be prepared to re-examine the prima facie exclusion rule."[35] That decision was delivered in 1996 and to date the Court of Appeal has not taken the opportunity to revisit the rule, despite having had occasion to do so.[36]

C *Reasonableness*

Although not a part of the prima facie exclusionary rule, the development of the reasonableness jurisprudence under s21 is very important to the rule. The reasonableness of an alleged breach of s21 must be determined before the rule itself becomes relevant. However, the interpretation and application of the term "unreasonable" have meant that the rule is being applied

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34 *R v Grayson and Taylor*, above n2.

35 *R v Grayson and Taylor*, above n2, 412.

36 See *R v N* (12 May 1999) unreported, Court of Appeal, CA 26/99, 13.

less and less as the Court "moves the goal posts" to uphold police conduct.[37] The Court of Appeal - particularly since the departure of President Cooke - has indicated its dissatisfaction with the rule and the reasonableness jurisprudence has become a means of avoiding the application of the rule in many cases.

The *Jefferies*[38] case was the first to accept that there may be cases where "for special reasons" an unlawful search may nevertheless be deemed to be a reasonable one.[39] However, Cooke P cautioned that would be "a path down which a Court should surely be reluctant to go."[40] McKay J made it very clear in this case that he believed that it could never be reasonable to "infringe the legal rights of others."[41]

The *Grayson* case is very important in this context. This decision did not expressly overrule the previous cases, but it did significantly change the way that Bill of Rights cases, particularly challenges under section 21, will be approached.[42]

The factors that had previously been excluded by the Court of Appeal when determining the application of the prima facie exclusionary rule were introduced at an earlier stage in the *Grayson* decision - at the point of determining whether the search and seizure was "reasonable" in terms of section 21. The *Grayson* court also considered factors such as the "police officer's beliefs" which had previously been ruled as irrelevant in applying the

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37 Schwartz, above n6, 262.

38 *R v Jefferies*, above n22.

39 *R v Jefferies*, above n22.

40 *R v Jefferies*, above n22, 296.

41 *R v Jefferies*, above n22, 316.

42 See Butler, above n6; Schwartz, above n6.

prima facie exclusionary rule even, ironically, in section 21 cases. In an unanimous judgment the Court held that what is unlawful is not necessarily unreasonable. The lawfulness of an action would always be highly relevant but not determinative.[43]

The effect of the *Grayson* decision is that the Police can violate rights of an individual that are meant to be protected by the Bill of Rights, and their actions can still be seen as reasonable and not constituting a breach. The *Grayson* court also held that it was relevant that "significant real evidence was found" during the illegal search.

This interpretation diminishes the effectiveness of the Bill of Rights because the Courts are using the Act to validate unlawful Police behaviour. The prima facie exclusionary rule does not become an issue because there is no breach to remedy.

It is clear that the Court of Appeal believe that there are now other remedies that may be more appropriate than the prima facie exclusionary rule. The *Grayson* Court commented on the issue of remedies as follows[44] -

> The remedies might, in the first place, relate to the trial itself. For example evidence might be rejected, with the possible consequence of the prosecution failing, the penalty imposed might be reduced or there might be an appropriate order for costs. There is the possibility of police disciplinary proceedings, criminal prosecution, and civil proceedings. Proceedings brought by an aggrieved person might lead to damages or

43 *R v Grayson and Taylor*, above n2, 407.

44 *R v Grayson and Taylor*, above n2, 411.

compensation, a declaration, or future looking relief.

III THE MOHAMMED CASE

A Introduction

The *Mohammed* case was decided by the Privy Council in December 1998 and concerned an appeal from the Court of Appeal of Trinidad and Tobago. The appellant, Allie Mohammed ("Mohammed") had been convicted and sentenced to death on the strength of a confession obtained in breach of his right to a lawyer guaranteed by the Constitution. The appellant sought to have the unconstitutionally obtained evidence excluded. The Court of Appeal, exercising an overall fairness jurisdiction, declined to exclude. The appellant argued before the Privy Council that the Court of Appeal should have applied an automatic exclusionary rule of unconstitutionally obtained evidence.

The Privy Council held that a breach of the constitutional right to communicate with a lawyer is a "somewhat lesser right" than the right to a fair trial.[45] The consequence of a breach of the former right will not necessarily be exclusion of the evidence obtained. In other words, a prima facie exclusionary rule does not apply in Trinidad and Tobago.

This decision may have important ramifications for the New Zealand prima facie exclusionary rule. Their Lordships explicitly considered the New Zealand rule and, despite saying

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45 *Mohammed v The State*, above n3.

that the decisions were "powerfully reasoned", declined to adopt it. Instead, their Lordships used a hierarchical rating of human rights to justify their refusal to vindicate the clear breaches of the appellant's rights. In addition, their Lordships incorrectly interpreted the Irish jurisprudence in support of their decision.

The New Zealand Court of Appeal has already indicated that it is willing to revisit our exclusionary rule. The *Mohammed* case may be used as a justification by those who wish to move away from the current position in this country. If our Court does intend to revisit the rule based on the Privy Council's decision, it is vital that the implications of their Lordships' reasoning be considered.

B The Facts of the Case

On the evening of the murder a Police patrol car followed a vehicle driven by Mohammed to a lookout and saw a man (identified as Ali) transfer from Mohammed's car to another car. The occupants of the second car were known to the Police and they followed it away from the lookout but then lost the vehicle in traffic. A short time later and nearby, a drive-by shooting took place. An eye witness told Police that he had seen a particular vehicle drive past, shots were fired and the vehicle was then driven away. The vehicle was the same car that the Police had followed away from the lookout.

Mohammed, aware that the Police wanted to speak to him, voluntarily went to the Police station the following day. He made a written statement to the effect that he had been driving his taxi the previous evening. Mohammed acknowledged that

he had been driving his vehicle about the time that the Police had allegedly seen him the night before. The next day the Inspector who had taken Mohammed's statement went to see him. The Inspector told Mohammed that the statement he had made was untrue and that he wanted the truth. Mohammed was cautioned but was not informed of his right to consult a lawyer.

Mohammed then made a second statement to the Inspector. He admitted driving Ali to the lookout for a rendezvous with a hired gunman. He then waited for Ali nearby while "the deed was done" and drove him home afterwards. As it was clear from this statement that Mohammed was privy to the murder plan and had acted as the getaway driver, he was charged with murder.

The prosecution conceded that the second statement made by Mohammed was obtained in breach of his constitutional rights. However, the trial judge made a finding of fact that the breach had occurred accidentally.

At the trial, defence counsel declined to make a closing address to the jury. The Judge allowed the prosecutor to address the jury. The prosecutor urged the jury "in emotive language" to convict the defendant.[46] The Court of Appeal of Trinidad and Tobago held that the address amounted to an irregularity, but that the result was inevitable once the second statement was admitted into evidence.

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46 *Mohammed v The State*, above n3, 557.

C *The King Case*

Mohammed's counsel relied on the United States Supreme Court decision in *Miranda v Arizona*[47] where it was held that confession evidence obtained in breach of the Constitution of the United States of America is inadmissible.

This submission was acknowledged by counsel as being inconsistent with the earlier Privy Council judgment in *King v The Queen*[48] decided under the Jamaican constitution. In the latter case, King was found to have been searched in a manner that breached his constitutional rights. Lord Hodson had held that it did not matter whether the right existed at common law or was enshrined in a written form; the discretion of the Court remained and must be exercised.[49]

Mohammed's counsel sought to distinguish *King* on the basis that the case dealt with real evidence not confessional evidence and therefore should not be applied. Their Lordships held that *King* was "highly material" as Lord Hodson had cited authorities that concerned the admissibility of confession evidence.[50] *King* was deemed "weighty authority for the proposition that in such a case a judge has a discretion to exclude or admit the confession."[51]

However, the part of the decision in *King* relating to the significance of enshrined rights was held to be too narrow and

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47 *Miranda v Arizona* (1966) 384 US 436.

48 *King v The Queen* [1969] 1 AC 304 (PC).

49 *King v The Queen*, above n48, 319.

50 *Mohammed v The State*, above n3, 560.

51 *Mohammed v The State*, above n3, 560.

no longer good law. Their Lordships held that the incorporation of rights in a Constitution is "not meaningless: it is clear testimony that an added value is attached to the protection of the right."[52]

D Miranda v Arizona

The Privy Council declined to adopt the *Miranda* argument stating that "such an absolute rule does not easily fit into a system based on English criminal procedure."[53] The Court maintained that at the time that the Constitution of Trinidad and Tobago was enacted the common law provided a judicial discretion to admit or exclude a confession obtained in breach of the Judges' Rules.

Their Lordships found that when framing the Constitution of Trinidad and Tobago "the legislature was not writing on a blank sheet".[54] The Privy Council went on to say that although such rights are fundamental it does not follow that they can only be protected by an absolute exclusionary rule such as that found in the *Miranda* decision.

In effect their Lordships were saying that the Constitution of Trinidad and Tobago did not replace the common law nor abolish it: it simply recognised the existence and importance of the rights. The Constitution stands alongside the common law and basically replicates it. In comparison, the Bill of Rights

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52 *Mohammed v The State*, above n3, 562.

53 *Mohammed v The State*, above n3, 560.

54 *Mohammed v The State*, above n3, 560.

contained in the Constitution of the United States of America replaced the common law.

E The Prima Facie Exclusionary Rule

In the alternative, Mohammed's counsel argued that if *Miranda* was not followed then a prima facie exclusionary rule should apply. Without such a rule, it was submitted, little or no value would be given to the rights protected by the Constitution. Case law from three jurisdictions, Ireland, New Zealand and Canada, was relied upon by counsel.

1 Irish Case Law

Their Lordships referred to the cases of *Lynch, O'Brien* and *Kenny*.[55] They stated that "the Irish decisions do not establish a general prima facie rule against admitting confessions obtained in breach of a constitutional right."[56]

In fact, it is clear from the Supreme Court of Ireland decisions that Irish case law **does** establish a prima facie exclusionary rule. The exclusionary rule developed by the Supreme Court of Ireland is to the effect that evidence obtained by a "deliberate and conscious violation" of a person's constitutional rights is inadmissible except in "extraordinary excusing circumstances".[57]

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55 *The People (Attorney-General) v O'Brien* [1965] IR 142 (SC); *The People (Director of Public Prosecutions) v Kenny* [1990] 2 IR 110 (SC); *The People (Director of Public Prosecutions) v Lynch* [1982] IR 64 (SC).

56 *Mohammed v The State*, above n3, 561.

57 *The People (Attorney-General) v O'Brien*, above n55.

The phrase "deliberate and conscious" breach or violation was explained by O'Hanlon J as follows[58] -

> ... knowledge of the common law and statute law, and of the constitutional guarantees, must - generally speaking - be imputed to the law enforcement agencies, and if they are breached in a manner which infringes the constitutional rights of an accused person, it may be regarded as a deliberate and conscious violation without regard to the actual state of knowledge or bona fides of the garda officer or other person committing such violation.

The cases of *O'Brien* and *Kenny* illustrate the rule. In *O'Brien* the police had applied for and been granted a search warrant which they duly executed, resulting in the seizure of real evidence. Through an administrative error, the incorrect address was put on the warrant documentation. The Supreme Court held that the warrant was unlawful but went on to hold that there had not been a breach of the accused's constitutional rights. The officer concerned was unaware of the error and therefore there had not been a deliberate and conscious violation of the constitution. The admissibility of the evidence could be dealt with pursuant to the fairness principles of the common law.

In *Kenny* the police officer had followed a long standing procedure in obtaining a search warrant. The warrant was executed and evidence seized. The warrant was held to be unlawful as the peace commissioner (the Irish equivalent of a Justice of the Peace), when determining the application, had relied solely on the suspicion of the police officer and had not

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58 *The People (Director of Public Prosecutions) v Kenny*, above n55, 119.

made the required inquiries as to the basis of that suspicion. Despite accepting that the officers involved were acting pursuant to the warrant and had no knowledge that they were invading the constitutional rights of the accused, the Supreme Court held that there had been a deliberate and conscious violation of the constitution as defined by O'Hanlon J in the quote above. The evidence was excluded.

Interestingly, the rule in Ireland is, like the New Zealand prima facie exclusionary rule, based on the vindication of rights. This is clear from various decisions, but in particular that of *O'Brien* where Walsh J stated[59] -

> The defence and vindication of the constitutional rights of the citizen is a duty superior to that of trying such citizen for a criminal offence. The Courts ... must recognise the paramount position of constitutional rights ...

This statement reflects the New Zealand position as discussed above. Both jurisdictions have developed stronger rules to give effect to protected rights.

2 *Canadian Case Law*

The Canadian Charter of Rights and Freedoms differs significantly from the constitutional legislation of other jurisdictions because its remedies provision explicitly enacts a specific principle for exclusion of unconstitutionally obtained evidence. Section 24(2) of the Charter provides that evidence obtained in breach of the Charter is inadmissible when

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59 *The People (Attorney-General) v O'Brien*, above n55, 170.

admission would "bring the administration of justice into disrepute". It has been held by the Supreme Court of Canada that evidence obtained in breach of a person's right to consult a lawyer is inadmissible.[60]

The Privy Council effectively dismissed the Canadian jurisprudence because the Charter provides an express provision to deal with the breach of a constitutional right.[61] There is no further examination of the Canadian case law or its possible application to the breach of the appellant's rights.

3 *New Zealand Case Law*

The New Zealand decisions were deemed to be "the most directly relevant" even though our Bill of Rights does not have the constitutional standing of the rights law of the other jurisdictions.[62] Their Lordships summarised the New Zealand position as "that only such a prima facie exclusionary rule gives proper effect to the constitutionality of the particular provision."[63]

Despite stating that the decisions were "powerfully reasoned" their Lordships did not adopt the New Zealand view.[64] They simply said that they had reached a view that "does not entirely accord with the view which has prevailed in New Zealand."[65] Their Lordships did not provide any reasons for not following

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60 *Collins v The Queen* (1987) 33 CCC 3d 1.

61 *Mohammed v The State*, above n3, 561.

62 *Mohammed v The State*, above n3, 561.

63 *Mohammed v The State*, above n3, 562.

64 *Mohammed v The State*, above n3, 562.

65 *Mohammed v The State*, above n3, 562.

the New Zealand developments.

F The Privy Council's Approach

Their Lordships decided that there is a two step process to be followed. Firstly, the facts relating to the alleged breach must be determined. If there is any dispute the burden of proof rests on the prosecution. Secondly, the Judge's discretion must be exercised. Their Lordships followed the *King* balancing exercise - the Judge must weigh the interests of the community in securing the evidence against the interests of the individual whose rights have been infringed. This second step mirrors Richardson P's thesis developed in Bill of Rights cases in the New Zealand Court of Appeal.[66]

Their Lordships stated that the nature of the particular constitutional guarantee and the nature of the particular right had to be considered. A breach of an individual's right to a fair trial "must inevitably result in the conviction being quashed."[67] However the breach of a person's right to consult a lawyer was deemed to be a "somewhat lesser right" and a breach would not necessarily result in a confession being excluded.

The *Mohammed* decision goes on to state that "a breach of a constitutional right is a cogent factor militating in favour of the exclusion of the confession" and that "it would generally not be right to admit a confession where the police have deliberately

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66 Richardson, above n10.

67 *Mohammed v The State*, above n3, 562.

frustrated a suspect's constitutional rights."[68]

The Privy Council held that the Court of Appeal of Trinidad and Tobago had correctly upheld the admission of the second statement into evidence. Their Lordships do not attempt to justify their decision, nor do they outline the balancing exercise undertaken. Despite a relatively long passage on the "fundamental importance" of the fact that the people of Trinidad and Tobago attached sufficient significance to the right to want it enshrined in a Constitution, their Lordships held that this particular right in these circumstances was not important enough to exclude Mohammed's confession. It appears to be extremely relevant that the police acted in good faith.[69]

The Privy Council did however, quash the appellant's murder conviction. This decision had nothing to do with the breach of his constitutional rights, but was a direct result of the prosecutor's address to the jury. Their Lordships could not be satisfied that, without the speech, the jury would have convicted the appellant.

G *Analysis of the Privy Council Decision*

The New Zealand Court of Appeal should not adopt the decision of the Privy Council in *Mohammed*. To do so would be contrary to the International Covenant on Civil and Political Rights ("the Covenant") to which we are a signatory. The decision is not well reasoned and the analysis of the Irish jurisprudence is flawed.

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68 *Mohammed v The State*, above n3, 562-563.

69 *Mohammed v The State*, above n3, 563.

The Privy Council in the *Mohammed* case seem to want to isolate the New Zealand case law on the basis that it is unique. It is clear that our prima facie exclusionary rule is not unusual but is in fact parallel to the Irish rule. In addition, their Lordships are incorrect in their statement that Irish decisions do not establish a general prima facie rule - they clearly do. The Irish rule may, in fact, be stricter than its New Zealand equivalent as our Court of Appeal has introduced more exceptions to justify admission. The Irish courts continue to use the term "extraordinary excusing circumstances" and have kept exceptions to a minimum.

The decision in the *O'Brien* case would have been different had there been a breach of the constitution - the much stronger exclusionary rule would have been applied in recognition of the importance of the accused's rights. This case is similar to the New Zealand case of *R v Faasipa* where the taking of a blood sample was held to be unlawful but not in breach of the Bill of Rights.[70] Had there been a finding that the accused's rights had been violated the prima facie exclusionary rule would have applied.

Their Lordships quote at pages 561 to 562, from the New Zealand Court of Appeal decision in *R v Te Kira* [71] where Hardie Boys J stated[72]

> Often the only effective way in which the Court can affirm the right is by refusing to recognise or to give effect to what has resulted from it. That may mean

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70 *R v Faasipa* (1995) 2 HRNZ 50 (CA).

71 *R v Te Kira*, above n24.

72 *R v Te Kira*, above n24.

> rejection or exclusion of a confessional statement ... [H]ad the police observed the law the evidence would not have been obtained anyway.

Without the second statement made by Mohammed the prosecution case was extremely weak. The three men who allegedly carried out the shooting had been acquitted after a Judge directed that there was no case to answer. The prosecution case against Mohammed rested on the second statement. It is highly likely that Mohammed would never have made the second statement had he been advised that to do so could result in him being charged with murder rather than a lesser offence.

Using the New Zealand exclusionary rule the second statement made by Mohammed would have been excluded. The breach was certainly not inconsequential and there was a direct link between the breach and the obtaining of the evidence. As already discussed, the evidence would not have come to light in any other way.

The Privy Council did not exclude Mohammed's second statement because it deemed the right to counsel to be a lesser right than that of a fair trial. The Covenant refers to the "equal and inalienable rights of all members of the human family" and does not provide for any rights to be more or less important. Their Lordships have adopted a hierarchical structure of rights to support their decision and this is in direct contrast to the Covenant. In addition, New Zealand courts have accepted that a breach of the right to consult a lawyer is sufficient to justify

exclusion of evidence.[73]

The right to consult a lawyer is, of course, connected to the fundamental right of an individual against self-incrimination. The consequences of not having legal advice can be enormous as they were in the present case. If a serious breach such as the one in the present case is not sufficient to exclude the resulting evidence, it is difficult to imagine a case that would justify exclusion.

H The Implications for New Zealand

The New Zealand Court of Appeal is not bound by the Privy Council's decision in this case. The decision is, however, highly persuasive. It is likely that the decision will be used to develop the good faith exception in this country, but will not be adopted in support of treating real and confessional evidence in the same way.

1 A Good Faith Exception

In most cases a breach will have a significant effect regardless of whether it was unintentional or deliberate. The effect of the breach in *Mohammed* was not lessened by the fact that the police were found not to have deliberately infringed the appellant's rights. The fact is, Mohammed's rights were breached and the effect of that breach was catastrophic for him. If the prosecutor had not been incorrectly permitted to make a closing speech to the jury Mohammed would have been sentenced to death.

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73 *Ministry of Transport v Noort*, above n23.

Their Lordships have effectively embraced a "good faith" exception to the exclusionary rule. New Zealand courts have expressly refused to adopt such an exception. In *R v Goodwin* [74] President Cooke, as he then was, recognised the danger inherent in accepting a good faith exception, stating that "Bill of Rights Act violations do not depend on a kind of mens rea on the part of the officer. Otherwise 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."[75]

The *Grayson* decision introduced the good faith issue as one of the factors to be considered when determining the reasonableness of a search in terms of section 21 of the Bill of Rights. This development echoes Richardson J's judgment in *R v Jefferies* (dissenting on this point).[76] It is likely, given the makeup of the current Court of Appeal, that New Zealand will adopt a good faith exception to the prima facie exclusionary rule when it "re-examines" the rule. The decision in *Mohammed* will only strengthen the President's clear preference for such an exception.

It is significant that Irish jurisprudence provides a different interpretation of the good faith exception. Under Irish jurisprudence the law enforcement agencies are imputed with knowledge of the legislation and common law, and a breach of a person's constitutional rights will be deemed a conscious and deliberate violation. This approach does not allow a consideration of the Police officer's actual state of knowledge or his intentions. This is illustrated by the *Kenny* case, discussed

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74 *R v Goodwin*, above n8.

75 *R v Goodwin*, above n8, 172.

76 *R v Jefferies*, above n22.

above, where a search pursuant to what Police believed was a valid warrant, was held to be a deliberate and conscious breach because of the way that the warrant was issued. The Police in fact acted completely in good faith but were still deemed to have deliberately breached the defendant's rights.

2 *A Distinction Between Real and Confessional Evidence*

The New Zealand cases cited in *Mohammed* are concerned only with confessional evidence. Our Court of Appeal has not yet formally embraced a distinction between the admissibility of real and confessional evidence obtained by breach. The *Grayson* decision indicates that this issue may also be revisited. The Court states that "whether there should be the same response to breaches of rights in the course of activities resulting in the discovery of real evidence as to breaches of rights in the course of obtaining, for example, confessional evidence also requires careful consideration."[77]

Post-*Grayson* cases have further indicated that the New Zealand Court of Appeal favours a distinction. Richardson P in *R v Hooker* [78] states that *Grayson* related to "the admission of physical evidence."[79] In the more recent case of *R v H* Elias J for the Court of Appeal, when determining the admissibility of real evidence, stated "the evidence obtained was real evidence which ... does not conscript the accused against himself in the nature of confessional statements."[80] In a judgment delivered by the Court of Appeal in May of this year, one of the factors taken into

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77 *R v Grayson and Taylor*, above n2, 412.

78 *R v Hooker* (16 June 1997) unreported, Court of Appeal, CA 163/97.

79 *R v Hooker*, above n78, 4.

80 *R v H* (15 March 1999) unreported, Court of Appeal, CA 411/98.

account when deciding upon the admissibility of real evidence was that the evidence was non-confessional. [81]

Irish case law does not distinguish between real and confession evidence. The *O'Brien* [82] case which is followed in both *Kenny* and *Lynch* concerned real evidence. In *Lynch* O'Higgins CJ stated that he could not see anything in the *O'Brien* case "which confines or should confine the principles there enunciated to property or 'real evidence'".[83] The Chief Justice went on to say that[84]

> even if the *O'Brien* case did not effectively decide that statements obtained as a consequence of a deliberate and conscious violation of the constitutional rights of an accused should be excluded except in the circumstances mentioned, it seems to me that such a proposition must be accepted.

IV THE IMPROPERLY OBTAINED EVIDENCE RULE

A Introduction

The Law Commission is an independent and publicly funded statutory body created to review and reform the laws of New Zealand.[85] The work of the Law Commission is becoming increasingly more important and the Courts are taking more

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81 *R v N*, above n36, 13.

82 *The People (Attorney-General) v O'Brien*, above n55.

83 *The People (Director of Public Prosecutions) v Lynch*, above n55, 78.

84 *The People (Director of Public Prosecutions) v Lynch*, above n55, 78.

85 New Zealand Law Commission *Evidence*: NZLC R55 Volume 2 (Wellington, 1999). Law Commission act 1985.

judicial notice of the Commission's proposals for reform.

The Law Commission has proposed major reform to our evidence laws in the recently released Evidence Code.[86] The Commission proposes to replace the prima facie evidence rule with the "improperly obtained evidence rule" contained in section 29 of the Code. This rule is also intended to abrogate the common law fairness discretion.[87]

The Court of Appeal may choose to informally adopt the rule as it allows for more judicial discretion than does the current prima facie exclusionary rule. Such a rule would find favour with many members of the bench. Alternatively, the Court may leave it to Parliament to enact the improperly obtained evidence rule as part of a reform of the evidence legislation.

It is important that the improperly obtained evidence rule is examined in the context of the prima facie exclusionary rule and the implications for New Zealand's rights jurisprudence.

B The Law Commission's rule

The improperly obtained evidence rule provides as follows -

> Section 29
>
> (1) The improperly obtained evidence rule in subsection (3) applies to evidence offered by the prosecution in a criminal proceeding only if
>
> (a) the defendant, or a co-defendant against

86 New Zealand Law Commission, above n85.

87 New Zealand Law Commission, above n85, 85.

whom the evidence is offered, raises an issue of whether the evidence was improperly obtained and informs the judge and the prosecution of the grounds for raising the issue; or

(b) the judge raises an issue of whether the evidence was improperly obtained and informs the prosecution of the grounds for raising the issue.

(2) If the defendant, a co-defendant or the judge raises the issue of whether the evidence was improperly obtained, the improperly obtained evidence rule applies unless the prosecution satisfies the judge on the balance of probabilities that the evidence was not improperly obtained.

(3) Improperly obtained evidence offered by the prosecution in a criminal proceeding is inadmissible unless the judge considers that the exclusion of the evidence would be contrary to the interests of justice.

(4) Evidence is improperly obtained if it is obtained

(a) in consequence of a breach of the New Zealand Bill of Rights Act 1990; or

(b) in consequence of a breach of any enactment or rule of law; or

(c) in consequence of a statement made by a defendant that is or would be inadmissible if it were offered in evidence by the prosecution; or

(d) unfairly.

(5) In exercising the power to admit evidence under subsection (3), the judge must consider, among other relevant matters,

(a) the significance of the New Zealand Bill of Rights Act 1990 as an Act to affirm, protect and promote human rights and fundamental freedoms in New Zealand, and

(b) the nature and gravity of any impropriety, and

(c) whether any impropriety was the result of bad faith, and

(d) whether the evidence existed and would have been discovered or otherwise obtained regardless of any impropriety.

(6) A statement made by a defendant that is inadmissible because of section 27 (the reliability rule) or section 28 (the oppression rule) cannot be admitted as evidence under subsection (3) of this section.

1 When would the Improperly Obtained Evidence Rule Apply?

The prosecution must intend to offer the evidence in a criminal proceeding and the defendant, or co-defendant against whom the evidence is intended to be used, or the presiding judge must raise the issue of whether the evidence has been improperly obtained. The person raising the issue must advise their grounds for doing so.

This procedure is the same under our current laws. However, the Code also allows a co-defendant or the Court to raise the issue of admissibility. At present, the defendant advises the prosecution before trial that he does not accept the evidence and the prosecution must then file a notice to alert the court of the

challenge to the evidence. A voir dire hearing is then held to determine the admissibility of the evidence. Presumably this procedure would remain the same if the Code was adopted.

The next step is to consider whether the evidence has been improperly obtained. The proposed subsection (4) outlines when evidence is deemed to have been improperly obtained and includes when it is obtained in consequence of a breach of the Bill of Rights Act. This section of the paper will concentrate on this type of improperly obtained evidence.

At this stage, the determination of this issue would proceed as it does under current law. The Judge must decide whether there has been a breach of the Bill of Rights Act, and would do so based on the principles established by the Courts to date.

The improperly obtained evidence rule can only be considered once it is established that the evidence has been obtained as detailed in subsection (4). The burden of proof is on the prosecution to show, on the balance of probabilities, that the evidence was not improperly obtained.

As discussed above in Part II, the difficulty with the current method of determining a breach of the Bill of Rights is the interpretation that the Court of Appeal has placed on s21. As a result of the *Grayson* case, the reasonableness test is likely to preclude many otherwise clear breaches of the Act from being accepted as breaches by New Zealand courts. The Law Commission's rule would therefore not be invoked to exclude real evidence, whether in the interests of justice or not.

2 The Interests of Justice

If a breach is accepted, the evidence obtained as a result is deemed to be improperly obtained. The evidence is then prima facie inadmissible unless the Court considers exclusion to be contrary to the interests of justice. This term is not defined but a list of matters that the Court must consider is included in subsection (5). In their commentary to the Code, the Commission states that a "factual and policy judgment" is called for and the judge must balance "various public interests" which extend beyond those in the particular case to those concerning the general administration of the law.[88] The Commission further states that the section does not require a rigid or technical approach.[89]

In respect of the factors to be considered by the judge, the Commission asserts that all are interdependent and the importance placed on each will depend on the facts of each case.

(a) The significance of the New Zealand Bill of Rights Act 1990 as an Act to affirm, protect and promote human rights and fundamental freedoms in New Zealand

The New Zealand Courts have done a lot to emphasise the significance of our Bill of Rights Act, particularly as it is not entrenched legislation. As is discussed below, the Court of Appeal has created remedies to give effect to the Act's provisions in recognition of our responsibilities under the International Covenant on Civil and Political Rights and the

88 New Zealand Law Commission, above n85, 85.

89 New Zealand Law Commission, above n85, 85.

Universal Declaration of Human Rights. This consideration in itself should not pose any difficulties. However, the New Zealand Courts have never explicitly denied the importance of the Bill of Rights Act but they have discovered ways of denying its application.

(b) The nature and gravity of any impropriety

This would involve a consideration of the behaviour of the Police in obtaining the evidence. Issues such as the inconsequentiality or triviality of the breach, or a reasonably apprehended physical danger to the officer or any other person would be relevant.[90] The intent of the Police will be discussed in the next paragraph as it is inextricably linked.

(c) Whether any impropriety was the result of bad faith

This is effectively the good faith exception that Cooke P warned against many years ago, and which has been introduced by the Court of Appeal when determining reasonableness under s21. A breach of s21 of the Bill of Rights that was actually deemed to be unreasonable could be saved (from the prosecution's point of view) by this section. This consideration has been included so that some good faith actions can protect admissibility of evidence by deeming exclusion to be contrary to the interests of justice. With the make up of our Court of Appeal it is not hard to imagine situations that would be covered by this section.

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90 These are some of the current exceptions to the prima facie exclusionary rule. See *R v Goodwin*, above n8.

(d) Whether the evidence existed and would have been discovered or otherwise obtained regardless of any impropriety

The issue becomes whether, if the Police had not violated the defendant's rights, they would have discovered the evidence anyway. This will have to be determined on a case by case basis as each has its own particular facts. There will be cases where it is clear that the evidence would not have been obtained without the breach, and equally there will be cases where the evidence may have been obtained anyway. However, it is important that the defendant receives the benefit of any doubt.

This consideration also creates a split between real and confessional evidence. This issue is discussed in Part V below.

This factor was considered in the *Butcher* case and resulted in some evidence being excluded and the remainder admitted on the basis that it would have been found by the Police.

(e) Other relevant matters

The court must give consideration to the four matters outlined above "among other relevant matters." This term could involve things such as a waiver of rights by the affected person; the risk of destruction of evidence; lack of connection between the breach and the evidence obtained (the "real and substantial connection test" formulated in *Te Kira*) and other matters specific to particular cases such as the fact that the defendant did not speak English.[91]

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91 *R v Narayan*, above n27.

C Conclusion

The improperly obtained evidence rule enables the presiding judge to take into account any considerations that he or she deems relevant to the particular case, and directs that the court must consider four matters. The latter includes factors that have expressly been excluded by New Zealand courts when considering breaches of the Bill of Rights, such as the intentions of the Police officer involved at the time of the rights violation.

The Commission's rule gives the presiding judge more scope when considering whether evidence that meets the criteria of "improperly obtained evidence" should be excluded, than does the prima facie exclusionary rule. The Courts have, to date, disallowed the consideration of a number of factors. Pursuant to the Commission's rule the judge is able to take any matter into account, and he or she decides the weight to be given to each factor.

Pursuant to section 7 of the Law Commission's Evidence Code, the "fundamental principle" in evidence law is that relevant evidence is admissible.[92] The Code considers the admissibility of evidence from the wrong angle; the admissibility of evidence should be grounded in the protection of human rights. To premise the consideration of evidence on its relevance detracts from the effectiveness of the remedy for breach.

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92 New Zealand Law Commission, above n85, 31.

V EFFECTIVENESS

A Introduction

The touchstone, or measure, of the remedy for a violation of a protected right should be its effectiveness. Other considerations should be irrelevant as the protection of human rights is the only basis upon which the remedy should be postulated.

In the *Grayson* decision the Court of Appeal noted the possible alternatives to the prima facie exclusionary rule and expressly included police disciplinary proceedings and civil actions. At present in New Zealand, the Police Complaints Authority is responsible for investigating police behaviour and recommending disciplinary action. The strength of this institution as an alternative to the rule will be discussed in this section as will the effectiveness of the civil proceedings available in New Zealand.

B The Police Complaints Authority

The Police Complaints Authority ("the PCA" or "the Authority") is a single person who is appointed by the Governor General and who is responsible to Parliament.[93] The PCA was created by the Police Complaints Authority Act 1988 ("the PCA Act") to provide an independent body to investigate complaints against the Police.

For those who believe that deterrence is a principal justification

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93 There is also a Deputy PCA who is appointed under s8 of the Police Complaints Authority Act 1988.

for the existence of the prima facie exclusionary rule, the PCA may be seen as a suitable alternative to the exclusion of evidence. If an officer has acted improperly the PCA can investigate and, if the complaint is sustained, can recommend suitable punishment. In theory at least, this punishment should act as a deterrent to other officers.

However, in his "Five Year Review" published in the 1996 Annual Report, the then Authority effectively declared that he was not having a deterrent effect.[94] At page 13 he states -

> The first proposition I advance of the failure of the PCA in New Zealand has been to make the breakthrough to what I call a real impact on Police, which I will explain. From the beginning, of the PCA by statute in 1988 the Police department has come from firm opposition to our establishment, through to benign tolerance, and onto acceptance of the PCA's value, but has remained resistant to its real impact. By real impact I mean when the Police of their own volition are prepared to take the results of complaints against themselves for misconduct and neglect of duty, and investigations of incidents, as a resource for education and management of the service.

Another difficulty with the PCA is the public perception of its effectiveness. Although the Authority is a Crown Entity "entirely independent of the Police service", most investigations are carried out by Police investigators.[95] Every investigation is reviewed by the Authority (or his staff) but nonetheless the

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94 Police Complaints Authority "Police Complaints Authority Annual Report for the Year Ended 30 June 1996" [1996] AJHR G51.

95 Police Complaints Authority, above n94, 19 - 20.

public perceive the PCA as being biased in favour of the Police. The involvement of the Police in looking into complaints derogates from the independence of the Authority, and the public see it as the Police looking after their own.

There are advantages to the PCA. It does not cost anything to make a complaint and have it investigated. Anyone can make a complaint to the Authority alleging misconduct or neglect of duty by a Police officer, or concerning any practice, policy or procedure of the Police.[96] However, the Authority does have a discretion to take no action in respect of a complaint.[97]

What the Authority once described as "civilian to Police officer interface" is characterised as the "bread and butter" of the PCA.[98] In the year ended 30 June 1996 the Authority received 2,635 complaints of which only 93 were s13 notifications.[99] It is not possible to determine from the PCA statistics how many (if any) of these complaints related to alleged Bill of Rights violations.[100] A further and significant problem with the PCA is the lack of information on what action was recommended and whether it was followed through. There are no statistics detailing what punishments were recommended as a result of sustained complaints. The Authority has the power to recommend

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96 Police Complaints Authority Act 1988, s12(1).

97 Police Complaints Authority Act 1988, s18.

98 Police Complaints Authority, above n94, 7.

99 Section 13 provides that the Commissioner of Police must advise the PCA (in writing) if a member of the Police, whilst acting in the execution of his or her duty, causes or appears to cause death or serious bodily harm to any person.

100 In response to an enquiry under the Official Information Act, Judge Borrin the Deputy PCA advised that the Authority does not investigate Bill of Rights complaints unless they come up in the course of an enquiry. There are no records that identify such reports as including a Bill of Rights issue. Judge Borrin advised that the Authority usually leaves such issues to the Courts.

disciplinary action or that criminal proceedings be instituted.[101] However, it is the public's perception that the Police are left to discipline their own and this is seen as ineffectual. In addition, there is no right of appeal from the Authority's decision - an issue that the Authority has itself raised for consideration by Parliament.[102]

In conclusion, until such time as the PCA is perceived to be an effective and independent investigator of the Police service, it is not a viable alternative to the exclusion of improperly obtained evidence. A possible solution is to amend the PCA Act to include a provision that the Authority must investigate all alleged breaches of the Bill of Rights Act, and must not delegate the investigation to a member of the Police.

C Civil Proceedings

In the case of *Simpson v Attorney General* ("Baigent's case") the Court of Appeal held that there was a public law remedy available for breaches of the New Zealand Bill of Rights Act.[103]

The Act does not itself provide a remedy for breaches of its provisions and the Court relied upon the obligations imposed on New Zealand pursuant to the Covenant. New Zealand ratified the Covenant in 1978, and the Bill of Rights is stated as affirming and promoting our commitment to the Covenant.

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101 Police Complaints Authority Act 1988, s28.

102 Police Complaints Authority, above n94, 17.

103 *Simpson v Attorney General [Baigent's Case]* [1994] 3 NZLR 667 (CA).

Article 2(3) of the Covenant states that each State Party undertakes the following -

> (a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an ***effective*** remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and ***to develop the possibilities of judicial remedy;***
>
> (c) To ensure that the competent authorities shall enforce such remedies when granted.
>
> (Emphasis added)

It is the words emphasised above that the Court of Appeal relied on in finding a public law remedy, with Casey J stating that Parliament cannot have intended there to be no remedy for those whose rights had been infringed.[104] To accept that Parliament did so intend would be to regard the Act as "legislative window dressing".[105]

In support of this argument is the development in the criminal jurisdiction of the prima facie exclusionary rule.

The Universal Declaration of Human Rights ("the Declaration") is also relevant and was discussed by Hardie Boys J in Baigent's

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104 *Simpson v Attorney General [Baigent's Case]*, above n103, 691.

105 *Simpson v Attorney General [Baigent's Case]*, above n103, 691.

case. Article 8 of the Declaration states that everyone has the right to an **effective** remedy for acts that violate fundamental rights granted by constitution or law.

In holding that this remedy is a public law action rather than a private action in the nature of a tort claim, the Court ensured that the Crown immunity contained in the Crown Proceedings Act 1950 cannot be invoked.

1 *The Cost of Civil Proceedings*

In any proceedings filed against the state there is a large financial cost to the applicant. With the recent tightening of legal aid, it will be extremely difficult for plaintiffs to gain assistance from the Legal Services Board. A certificate of success has always been required when applying for aid, but this requirement will now be strictly enforced. The chances of success are discussed below.

If the applicant has been denied the assistance of the prima facie exclusionary rule and has been convicted and imprisoned, he or she will find it near impossible to finance a civil claim, particularly if denied legal aid.

2 *The Onus of Proof*

In any civil proceedings the onus of proof is on the plaintiff. He or she must prove, on the balance of probabilities, that there has been a breach of the Bill of Rights. In contrast, in the criminal jurisdiction the onus is on the Crown to show that there has not been a breach, or that if there was a breach, the evidence was not obtained as a result of it.

If the current judicial trend continues, it is unlikely that many breaches will be held to be unreasonable in the criminal jurisdiction. In the civil jurisdiction, the onus of proof moves onto the plaintiff and it will be extremely difficult for an individual to prove that the Police acted in breach of his or her rights.

3 *Judge or Jury?*

The Court of Appeal made it clear in Baigent's case that any civil proceeding under the Bill of Rights Act is likely to be heard by a Judge alone. Cooke P held that any compensation for breach was not pecuniary damages in terms of the Judicature Act 1908 and that therefore there is no prima facie right to trial by jury although the judicial discretion to permit a jury trial remains.[106] Cooke P went on to say[107] -

> One would not expect jury trial to be commonly ordered in Bill of Rights cases. Generally speaking and in accordance with international tendencies these cases will be more appropriately dealt with by Judges.

Casey J concurred with the President, holding that the selection of the remedy which would best vindicate the infringed right is best left to a Judge to decide rather than a jury.[108]

The advantage of a jury trial for a person whose rights have been violated, is that it is possible that his peers may be more willing

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106 *Simpson v Attorney General [Baigent's Case]*, above n103, 678.

107 *Simpson v Attorney General [Baigent's Case]*, above n103, 678.

108 *Simpson v Attorney General [Baigent's Case]*, above n103, 692.

to compensate him for a breach of his rights by the Police. On the other hand, many commentators believe that there is less likelihood of such an advantage because of the attitude of society to convicted criminals.[109] This attitude would also probably apply to a person who had escaped a criminal conviction because the evidence was excluded, as society's perception is that he was guilty but was acquitted on a technicality.

4 *Are Compensation and Damages an Effective Remedy?*

Despite the hurdles outlined above, there may be cases that succeed in the civil jurisdiction. It is yet to be seen what kinds of awards will be made by New Zealand courts. Cooke P made it clear in Baigent's case that "extravagant awards are to be avoided"[110] and the likelihood of a Judge alone trial will probably ensure conservative awards.

Compensation and/or damages provide monetary relief to a person whose rights have been violated by the State. Financial gains are unlikely to vindicate the rights of such a person and certainly do not provide restitution. If the victim of a breach has already been through a criminal trial where improperly obtained evidence has been admitted, and they have been convicted as a result, they would have lost more than anything that money can compensate for. They would have received a conviction which will be entered against their name and which they will have to disclose to various people and institutions in the future. They may have lost their liberty for a period of time. Compensation may make up for a loss of earnings but it cannot replace all of the

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109 See Walker, above n13; Bernard Robertson "Police Questioning" (1999) 5 HRLP 52.

110 *Simpson v Attorney General [Baigent's Case]*, above n103, 678.

non-financial things that have been lost.

The strongest argument against the adoption of this civil remedy as an alternative to the exclusionary rule, is the message that it gives to the Police. The Courts would effectively be condoning improper Police behaviour by admitting the evidence in the criminal jurisdiction on the basis that the person whose rights have been violated may be compensated in the civil court. The State would be buying the right to obtain evidence using any available method, knowing that the evidence would be admitted anyway.

5 Conclusion

There is no reason why exclusion and a civil remedy should be mutually exclusive. However, the civil action to claim compensation and damages should not be adopted at the expense of the prima facie exclusion rule. There are too many hurdles to be overcome by a prospective plaintiff. Although the Court of Appeal relied on the Covenant and the Declaration to allow them to create a remedy, compensation and damages are not the most effective remedy available.

Section 23 of the Bill of Rights Act recognises the reality that an individual is "ordinarily at a significant disadvantage in relation to the informed and coercive powers available to the State."[111] This fact must also be reflected in the alternative remedies available to a breach victim.

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111 *R v Noort*, above n23, 279 per Richardson J.

D Confessional v Real Evidence

As discussed in Part III above, the New Zealand Court of Appeal has not yet formally adopted a distinction between the application of the prima facie exclusionary rule to confessional and real evidence.

If a distinction is to be made it is likely to be justified on the basis that real evidence may be discovered regardless of the breach of the defendant's rights, whereas confessional evidence would not otherwise be obtained. However, although it may be less likely, confessional evidence can be obtained through statements made to other people, or from the defendant after receiving legal advice. It cannot be presumed that a defendant would not make the same statement after being given his rights pursuant to s23 of the Act.

It is the process followed in obtaining the evidence that is important rather than the possible outcomes. The effectiveness of exclusion as a remedy would be diminished if such a distinction were to be made. The incidence of exclusion of improperly obtained real evidence would decrease upon the adoption of such a rule because the court would focus on the type of evidence rather than the fact that there has been a violation of a human right.

It is significant that the improperly obtained evidence rule provides that the court must take into account "the likelihood that the evidence would have been discovered or otherwise obtained" without the breach. If the courts are to make a distinction or the Code is adopted by Parliament, then confessional evidence is likely to be excluded more often than

real evidence, because it is seen as less likely to have been otherwise obtained.

The Privy Council appears to support treating real and confessional evidence in the same way. The *Mohammed* decision seems to suggest that the exclusion of evidence rules apply equally to real and confessional evidence obtained by a rights breach. This is not explicitly stated by their Lordships even though defence counsel attempted to distinguish *King* on the basis that the two types of evidence should be treated differently.

VI THE BEST APPROACH

There are numerous problems with the alternatives to the prima facie exclusionary rule, the most important being their lack of effectiveness. The improperly obtained evidence rule provides a wide discretion and allows the presiding judge to consider any matters he or she deems relevant. The advantage of this rule is that it can be utilised by a co-defendant when evidence obtained from another defendant is to be used against him or her. This rule does however produce similar difficulties to those caused by the *Grayson* case - it allows consideration of factors previously disregarded by the Court of Appeal because they did not result in adequate protection of human rights.

The Law Commission's proposed improperly obtained evidence rule is not considered to be an effective remedy if looked at from a human rights perspective. If the principal reason for having a remedy for rights breaches is deterrence or judicial integrity the Commission's rule may be acceptable. However, it is submitted

that the remedy must reflect the fact that a breach of rights has occurred and must be effective to vindicate that violation. The Commission's rule provides for too much judicial discretion, and is based on the assumption that relevant evidence is admissible.

The two primary alternatives to the prima facie rule, the Police Complaints Authority and civil proceedings, are also considered to be ineffective.

The cost of issuing civil proceedings against the Police will be prohibitive for most potential plaintiffs, and the burden of proving a breach of the Act may be too hard for many. In any event, the available civil remedies of damages and/or compensation do not vindicate breached rights. Adoption of the civil remedy in place of the prima facie exclusionary rule would be a dangerous move. It would signal to the Police that they could effectively breach a person's rights to obtain evidence safe in the knowledge that it would be admissible and the only punishment would be a possible claim for damages or compensation that would be unlikely to succeed. There is no deterrence factor present.

The Police Complaints Authority has never been regarded as being an effective body to investigate and sanction the Police. Until such time as the Authority is truly independent of the Police and is seen by the public as such, it cannot be considered to be a viable alternative to the exclusionary rule.

The New Zealand Bill of Rights Act 1990 is stated to be an Act "to affirm, protect and promote human rights and fundamental

freedoms in New Zealand".[112] As the Act itself does not provide any remedies, the Court has developed the exclusionary rule and the civil remedy of compensation and/or damages.

The civil remedy does not protect a person's rights nor does it promote them. The only way to truly protect and promote human rights is to punish a breach by restoring the person whose rights have been breached to the same place they were before the breach took place - by excluding the evidence obtained. The State should not be able to benefit in any way from the violation.

This statement must of course be tempered slightly to recognise that there are cases where exclusion would be completely out of proportion to the effect of the violation on the individual. Such cases are catered for in the exceptions to the prima facie exclusionary rule as developed by our Court of Appeal and discussed in Part II above. Section 5 of the Bill of Rights itself provides that the rights are "subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." However, the public policy argument must not be extended to restrict the application of the rule in those cases not covered by the existing exceptions.

VII CONCLUSION

The justifications for exclusion of evidence obtained in breach of an individual's rights include vindication, deterrence, and judicial integrity. The prima facie exclusionary rule was

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112 New Zealand Bill of Rights Act 1990, long title.

introduced in New Zealand because it was seen as the most effective manner in which to vindicate a violation of a criminal accused's rights. Although not the principal justifications for the rule, the elements of deterrence and maintenance of judicial integrity are by-products of this remedy.

It is clear from New Zealand case law that the prima facie exclusionary rule is being applied in fewer cases, particularly in those involving s21 of the Act. This is not as a result of the development of the rule itself, but rather the way in which section 21 of the Act is being applied.

The most significant difficulty with the way in which breaches of s21 of the Bill of Rights are dealt with, is the manner in which the Court of Appeal has interpreted the term "unreasonable". In order for a search to be deemed to have been in breach of the Act, it must first be accepted as being unreasonable.

Until the *Grayson* decision the Court of Appeal had, with some exceptions, developed and applied the prima facie exclusionary rule relatively well. The Court had indicated that there were matters, such as the good faith or otherwise of the Police officer, that would rarely be taken into account in considering whether a breach had occurred. The *Grayson* decision has allowed all of the factors that had previously been excluded from consideration to be taken into account. This has resulted in fewer searches being held as breaching the Bill of Rights. In such situations, the prima facie exclusionary rule cannot be applied as there has been no breach of the Act.

The *Grayson* case involved clear trespass by the Police and misuse of a search warrant yet the Court held that this was not

unreasonable. It can be presumed that only an extremely serious breach will be deemed to be unreasonable by the current Court of Appeal.

The Court of Appeal has indicated that it is willing to revisit the status of the prima facie exclusionary rule. However, the Court has not done so to date. It is submitted that the Privy Council's decision in *Mohammed* should not be adopted by the Court when it does reexamine the rule, because the decision is considered to be fundamentally flawed.

It is submitted that the Court of Appeal should continue to apply the prima facie exclusionary rule as outlined by Cooke P in the *Goodwin* case.[113] The rule is based on the premise that the most effective way of vindicating a breach of a criminal accused's rights is to exclude the evidence. It should not be relevant whether or not the Police deliberately infringed the person's rights or whether the evidence obtained was real or confessional. The fact that there has been a breach of the Bill of Rights should be enough for a remedy to invoked. It is accepted that the Courts may recognise extraordinary situations in which exclusion would be out of proportion to the violation.

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113 See quotation from *R v Goodwin* on page 15 above.