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Improperly obtained evidence in the Commonwealth: lessons for England and Wales?

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Abstract English law's traditional approach to the admissibility of improperly obtained evidence is currently being rethought in response to a range of domestic and international pressures. With the position in England and Wales following the House of Lords' decision in *A and Others* (2005) firmly in mind, this article undertakes a selective review of comparative approaches to the admissibility of improperly obtained evidence in Australia, Canada and New Zealand. Having analysed relevant legislation and case law in each jurisdiction, general principles are derived to guide future developments in English law, in conformity with the European Convention on Human Rights.

In this article we offer, from the perspective of academic lawyers in England and Wales, some thoughts on recent developments in Commonwealth jurisdictions on the treatment of evidence that has been

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obtained illegally or otherwise improperly, but the reliability of which is not disputed.¹ Rules regulating evidence-gathering are an acknowledgement that the need to protect the public from crime should be balanced against a general principle of procedural fairness.² Once relevant, reliable evidence has been uncovered as a result of official rule-breaking, there will be a fundamental shift in this balance. The general theory of procedural rights, which guarantees protection to suspects from improper treatment, will now be in conflict with the public interest in convicting the guilty and in preventing crime. Resolving such a conflict amounts to ‘a choice of policy about the protection of civil liberties’.³

Our discussion of recent developments in the Commonwealth will be selective rather than comprehensive, focusing on issues which in some way illuminate the debate on improperly obtained evidence in England and Wales. An examination of developments in Commonwealth jurisdictions is particularly timely for two reasons. First, the debate on improperly obtained evidence has recently resurfaced in England and Wales as a result of the decision of the House of Lords on evidence obtained by torture.⁴ Secondly, as will be demonstrated below, English law has become increasingly reliant, for its approach to improperly obtained evidence, on the guarantee of the right to a ‘fair trial’ in Article 6 of the European Convention on Human Rights, and the associated jurisprudence of the European Court of Human Rights. Developments in the other major Commonwealth jurisdictions in relation to improperly obtained evidence have attracted somewhat limited judicial and academic attention in England and Wales, resulting in the failure to learn a number of valuable lessons from these developments, not least for the interpretation of Article 6 itself.

1. The position in England and Wales: where are we now?

The House of Lords in *A and Others v Secretary of State for the Home Department*⁵ appears to have accepted that in appropriate circumstances the manner in which evidence is obtained could render it inadmissible in judicial proceedings, notwithstanding

1 We are grateful for the helpful comments of participants at the Matrix Chambers seminar, where an earlier version of this article was first presented in December 2003.

2 It may be argued ‘that by imposing these restrictions the state has staked out the boundaries for lawful access to evidence and has indicated that beyond these limits it is willing to forego evidence of crime in deference to individual freedom’: A. A. S. Zuckerman, *The Principles of Criminal Evidence* (Clarendon Press: Oxford, 1989) 346.

3 *Ibid.* at 347.

4 *A and Others v Secretary of State for the Home Department* [2005] UKHL 71, [2006] 2 AC 221, discussed below.

5 *Ibid.* See N. Grief, ‘The Exclusion of Foreign Torture Evidence: A Qualified Victory for the Rule of Law’ [2006] *European Human Rights Law Review* 201; N. Rasiyah, ‘A v Secretary of State for the Home Department (No. 2): Occupying the Moral High Ground?’ (2006) 69 *MLR* 995.

its source or reliability. This seems wholly inconsistent with the conventional approach to the treatment of improperly obtained evidence which we discuss below.⁶ The question for consideration in *A and Others* was whether statements obtained by torture by non-UK authorities could be used in appeals to the Special Immigration Appeals Commission. The Secretary of State argued that there was no rule in English law precluding the use of such statements as evidence.⁷ While there was some disagreement on the test for exclusion, the seven Law Lords unanimously rejected any suggestion that evidence obtained by torture could ever be used as evidence in an English court.⁸ Focusing on the constitutional importance of this decision, Lord Bingham was reluctant to treat the issue as an argument about the law of evidence, which in his opinion would trivialise it.⁹ Nevertheless, the ruling in *A and Others* sheds some light on current judicial thinking in England and Wales on improperly obtained evidence. Although *A and Others* concerned evidence of statements, which carry obvious dangers of unreliability, the Law Lords clearly assumed that their ruling would cover *any* evidence. The rationale for excluding evidence on the ground of its inherent unreliability requires little explanation.¹⁰ The reasoning behind the exclusion of relevant, reliable and possibly crucial evidence on the ground that it was obtained in an offensive manner is, however, more opaque and involves consideration of the ethical and moral dimensions of criminal adjudication.

6 See generally A. J. Ashworth, 'Excluding Evidence as Protecting Rights' [1977] Crim LR 723; A. L.-T. Choo and S. Nash, 'What's the Matter with Section 78?' [1999] Crim LR 929; I. H. Dennis, 'Reconstructing the Law of Criminal Evidence' (1989) 42 *Current Legal Problems* 21; K. Grevling, 'Fairness and the Exclusion of Evidence under Section 78(1) of the Police and Criminal Evidence Act' (1997) 113 LQR 667.

7 The Secretary of State did not suggest that evidence obtained by torture in the United Kingdom was admissible. He argued that any exclusionary rule was confined to cases in which agents of the United Kingdom were involved.

8 The Secretary of State argued that the party seeking to have evidence excluded should be required to establish factual grounds for the challenge to its admissibility. Lords Hope, Rodger, Carswell and Brown considered that once a detainee had raised the issue of torture, the onus to investigate the matter passed to the Commission. Evidence should not be admitted if the Commission concludes on the balance of probabilities that it was obtained by torture. However, if the Commission 'is left in doubt as to whether the evidence was obtained in this way' (at [118], *per* Lord Hope), it should be admitted. Disagreeing with the majority, Lords Bingham, Nicholls and Hoffmann were of the opinion that, provided it is plausible that evidence has been obtained by torture, the evidence should be excluded unless the Commission is able 'to conclude that there is not a real risk that the evidence has been obtained by torture' (at [56], *per* Lord Bingham).

9 [2005] UKHL 71, [2006] 2 AC 221 at [51].

10 A. J. Ashworth, 'Excluding Evidence as Protecting Rights' [1977] Crim LR 723 at 723-4; W. Twining, *Rethinking Evidence: Exploratory Essays*, 2nd edn (Cambridge University Press: Cambridge, 2006) ch. 6.

While there is no automatic exclusionary rule for improperly obtained evidence in English law,¹¹ the courts have accepted that improperly obtained evidence can be excluded in the exercise of discretion if its use would render the trial unfair. Explaining the mechanisms used in England and Wales to guarantee a fair trial, Lord Bingham observed:

The institutions and procedures established to ensure that a criminal trial is fair vary almost infinitely from one jurisdiction to another, the product, no doubt, of historical, cultural and legal tradition. In some countries provision is made for judicial oversight of criminal investigations. That is, for better or worse, entirely contrary to British practice. Instead, the achievement of fairness in a trial on indictment rests above all on the correct and conscientious performance of their roles by judge, prosecuting counsel, defending counsel and jury. Save in defined circumstances ... the judge is not a factual decision-maker. His task is to ensure that the trial is conducted in a fair and even-handed way. For this latter purpose he is entrusted with numerous discretions ...¹²

The trial judge has discretionary powers to exclude improperly obtained evidence under the general common law duty to ensure a fair trial, and under s. 78(1) of the Police and Criminal Evidence Act 1984 ('PACE') which provides that prosecution evidence may be excluded if its admission would affect the fairness of the proceedings.¹³

The common law exclusionary discretion is narrow and has generally been limited to excluding evidence of questionable relevance or improperly obtained confessions.¹⁴

11 In *Kuruma v R* [1955] AC 197 at 203 the Privy Council held that 'the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained.' See generally J. D. Heydon, 'Illegally Obtained Evidence (1)' [1973] Crim LR 603.

12 *R v H* [2004] UKHL 3, [2004] 2 AC 134 at [13]. See generally D. Ormerod and D. Birch, 'The Evolution of the Discretionary Exclusion of Evidence' [2004] Crim LR 767; R. Pattenden, *Judicial Discretion and Criminal Litigation* (Clarendon Press: Oxford, 1990).

13 'In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.'

14 *R v Christie* [1914] AC 545; *Kuruma v R* [1955] AC 197; *R v Sang* [1980] AC 402. Although the extent of this exclusionary discretion is somewhat uncertain, the courts have demonstrated a willingness to exclude evidence where its prejudicial effect outweighs its probative value (*Noor Mohamed v R* [1949] AC 182; *Harris v DPP* [1952] AC 694; *Selvey v DPP* [1970] AC 304) and a reluctance to sanction its use to secure the exclusion of improperly obtained, but reliable, evidence (*R v Sang* [1980] AC 402).

The statutory discretion provided by s. 78(1) is also narrowly applied.¹⁵ This narrow application is due mainly to the courts' restrictive interpretation of the concept of a 'fair trial'. While this discretionary power has on occasion been used to exclude confession evidence, the Court of Appeal has repeatedly refused to accept that the use of improperly obtained but reliable evidence has adversely affected the fairness of the trial.¹⁶ Consequently, both at common law and under statute, the conventional approach to the problem of improperly obtained non-confession evidence has been to focus almost exclusively on reliability. Noting the increasingly 'obscure' relationship between the unfairness caused to the defendant at the pre-trial stage by official impropriety, on the one hand, and trial fairness, on the other, Professor Sir John Smith suggested that the courts were:

still influenced in interpreting section 78 by the common law discretion which, according to Lord Diplock in *Sang*, sprang from the principle that no one can be required to be his own betrayer, an aspect of the privilege against self-incrimination: 'That is why there is no discretion [at common law] to exclude evidence discovered as a result of an illegal search but there is discretion to exclude evidence which the accused has been induced to produce voluntarily if the method of inducement was unfair.'¹⁷

Despite the extensive jurisprudence on s. 78(1), the courts have provided minimal guidance on specific factors that inform a decision on whether improperly obtained evidence should be excluded in any particular case.¹⁸ However, it is evident from the case law that the quality of the evidence and the factual accuracy of the verdict are significant factors. The fact that non-confession evidence is usually reliable is a strong factor affecting its admissibility. Indeed, it has been suggested that s. 78(1) should not be used to exclude relevant, highly probative non-confession evidence unless its quality may have been affected by the manner

15 The Court of Appeal initially made strong statements about the utility of s. 78(1) in addressing police failure to follow the rules of investigation, but its use has generally been limited to confession evidence. See e.g. *R v Mason* [1988] 1 WLR 139; *R v Samuel* [1988] QB 615; *R v Keenan* [1990] 2 QB 54; *R v Canale* [1990] 2 All ER 187.

16 See e.g. *R v Cooke* [1995] 1 Cr App R 318; *R v Khan* [1996] 3 All ER 289; *R v Chalkley* [1998] 2 All ER 155; *R v Sanghera* [2001] 1 Cr App R 20 (p. 299); *R v Loveridge* [2001] EWCA Crim 973, [2001] 2 Cr App R 29 (p. 591).

17 Commentary on *R v Khan* [1995] QB 27 at [1994] Crim LR 832, quoting from *R v Sang* [1980] AC 402 at 436.

18 See e.g. M. Hunter, 'Judicial Discretion: Section 78 in Practice' [1994] Crim LR 558.

in which it was obtained.¹⁹ The appellate courts have maintained this position even where evidence has been obtained in breach of the right to privacy, which is guaranteed by Article 8 of the European Convention on Human Rights.²⁰ Excluding evidence merely on account of a breach of Article 8 is seen not only as contrary to common sense²¹ but also as having ‘the consequence of interfering with the achievement of justice’.²²

Since the Human Rights Act 1998 came into force,²³ making it unlawful for courts and tribunals to act in a manner which is incompatible with a Convention right, English courts have, in approaching improperly obtained evidence, looked increasingly to the fair trial guarantees provided by Article 6 of the Convention.²⁴ Article 6 contains both a general right to a fair hearing²⁵ and a number of specific rights including the right to certain minimum standards of procedural fairness. In addition, Article 6 has been interpreted by the European Court of Human Rights as impliedly incorporating the right to remain silent and the right not to incriminate oneself, which have become ‘generally recognised international standards

19 In *R v Chalkley* [1998] 2 All ER 155, the Court of Appeal suggested that the discretion to exclude evidence on the ground that it had been improperly obtained was limited to confession evidence; evidence obtained from the accused after the commission of the offence; evidence obtained in an undercover police operation; and evidence which is of questionable quality as a result of the way it was obtained. See also *R v Bray*, unreported, 31 July 1998, in which the Court of Appeal held: ‘Here the quality of the evidence is simply unaffected by the ... illegality and in our judgment the decision under section 78 therefore had to go in favour of the prosecution.’

20 Article 8 provides that:

- ‘1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.’

21 In *R v Khan* [1996] 3 All ER 289 at 302 the House of Lords remarked: ‘It would be a strange reflection on our law if a man who has admitted his participation in the illegal importation of a large quantity of heroin should have his conviction set aside on the grounds that his privacy has been invaded.’

22 *R v Sanghera* [2001] 1 Cr App R 20 (p. 299) at [17].

23 See generally A. L.-T. Choo and S. Nash, ‘Evidence Law in England and Wales: The Impact of the Human Rights Act 1998’ (2003) 7 E & P 31.

24 Section 6 of the Human Rights Act 1998 provides that courts and tribunals in the United Kingdom are obliged to act in a way which is compatible with the rights guaranteed by the European Convention on Human Rights unless provisions in primary legislation require them to act differently, and must take into account any relevant jurisprudence of the European Court of Human Rights.

25 ‘In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.’

which lie at the heart of the notion of a fair procedure'.²⁶ These procedural rights are deemed necessary to safeguard suspects from oppression and coercion and are closely linked to the presumption of innocence.²⁷ Accordingly, trial fairness will be compromised by the admission of evidence obtained in breach of the right against self-incrimination.²⁸ Similarly, the use of statements obtained from the accused during an investigation in breach of the right to silence will render the trial unfair.²⁹ However, the protection afforded by Article 6 in such contexts does not necessarily extend to all types of evidence.³⁰ A distinction has been drawn between compelled statements and the production of a pre-existing document or real evidence.³¹ While it is considered objectionable to use evidence which the accused was coerced into creating, using compulsory powers to require the production of evidence that was already in existence is considered less likely to present a problem.³²

Article 6 does not include any reference to specific evidentiary rules, the admissibility of evidence being seen as a matter for regulation under national law.³³ The European Court of Human Rights has held that whether the required standard of trial fairness has been achieved in any particular case will depend

26 *Serves v France* (1999) 28 EHRR 265 (judgment of 1997) at [46].

27 *Saunders v United Kingdom* (1997) 23 EHRR 313 (judgment of 1996) at [68]. The European Court of Human Rights held that regardless of whether transcripts obtained under compulsory powers were directly self-incriminating, the fact that the authorities made use of them in subsequent criminal proceedings was a violation of Art. 6. The public interest in the prosecution of complex and serious cases was insufficient to justify the admission of the evidence.

28 *Funke v France* (1993) 16 EHRR 297; *Saunders v United Kingdom* (1997) 23 EHRR 313 (judgment of 1996).

29 In *Allan v United Kingdom* (2002) 36 EHRR 12 (p. 143), it was found that the use of an informer to obtain information from a suspect amounted to 'the functional equivalent of interrogation' (at [52]).

30 In *Saunders v United Kingdom* (1997) 23 EHRR 313 (judgment of 1996) at [69], it was held that the privilege against self-incrimination did not extend to 'material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, *inter alia*, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing'.

31 Some doubt remains in Convention jurisprudence as to whether the right against self-incrimination applies to documentary evidence. While in *Funke* this right attached to bank documents and chequebooks in the applicant's possession, in *Saunders* a distinction was drawn between compelled statements and real evidence. Evidently preferring *Funke* to *Saunders* on this point, the court in *JB v Switzerland*, Application No. 31827/96, 3 May 2001, found that a prosecution for failing to produce possibly incriminatory documents breached Art. 6. For further discussion see A. S. Butler, 'Funke v France and the Right against Self-Incrimination: A Critical Analysis' (2000) 11 *Criminal Law Forum* 461.

32 See *Funke v France* (1993) 16 EHRR 297; *Attorney-General's Reference (No. 7 of 2000)* [2001] EWCA Crim 888, [2001] 2 Cr App R 19 (p. 286).

33 *Schenk v Switzerland* (1991) 13 EHRR 242 (judgment of 1988); *Ferrantelli v Italy* (1997) 23 EHRR 288 (judgment of 1996).

upon its assessment of the proceedings as a whole, which can include consideration of the nature of the evidence and the manner in which it was obtained.³⁴ Using improperly obtained evidence at trial will not be considered to infringe Article 6 providing proper procedural safeguards are in place, and the veracity of the evidence is not in question. This is the position even if the evidence was obtained in breach of another Convention right. In *Khan v United Kingdom*,³⁵ for example, it was held that the trial judge's refusal to exclude evidence of private conversations recorded in breach of Article 8 did not interfere with the fairness of the trial. The contested evidence was a tape-recording of a conversation in which the applicant acknowledged his involvement in the importation of heroin. Although critical of the UK Government for failing to ensure that the national law regulating the use of covert surveillance at the time was Convention compliant, on the issue of admissibility the court noted that:

the applicant had ample opportunity to challenge both the authenticity and the use of the recording. He did not challenge its authenticity, but challenged its use at the '*voire dire*' and again before the Court of Appeal and the House of Lords. The Court notes that at each level of jurisdiction the domestic courts assessed the effect of admission of the evidence on the fairness of the trial by reference to section 78 of PACE ...³⁶

Focusing on the strength and reliability of the evidence in this case, it was considered irrelevant that the conviction was based solely on the tape-recording. The availability of an exclusionary discretion at the domestic level was considered to provide sufficient guarantees against unfairness.

Support for the introduction of a mandatory exclusionary rule for evidence obtained in breach of a Convention right can be found in a number of dissenting opinions. Disagreeing with the majority in *Khan* on the use of this type of evidence, Judge Loucaides remarked:

I cannot accept that a trial can be 'fair', as required by Article 6, if a person's guilt for any offence is established through evidence obtained in breach of the human rights guaranteed by the Convention. ... I do not think one can speak of a 'fair' trial if it is conducted in breach of the law. ... The exclusion of evidence obtained

34 *Kostovski v Netherlands* (1990) 12 EHRR 434 (judgment of 1989); *Kraska v Switzerland* (1994) 18 EHRR 188 (judgment of 1993); *Khan v United Kingdom* (2001) 31 EHRR 45 (p. 1016) (judgment of 2000).

35 (2001) 31 EHRR 45 (p. 1016) (judgment of 2000).

36 *Ibid.* at [38].

contrary to the protected right to privacy should be considered as an essential corollary of the right, if such right is to be of any value. ... Breaking the law, in order to enforce it, is a contradiction in terms and an absurd proposition.³⁷

This view has been endorsed by Judge Tulkens in her dissent on the Article 6 issue in *PG v United Kingdom*.³⁸ She asked rhetorically:

Will there come a point at which the majority's reasoning will be applied where the evidence has been obtained in breach of other provisions of the Convention, such as Article 3 [which imposes an absolute prohibition on torture and inhuman or degrading treatment], for example? Where and how should the line be drawn? According to which hierarchy in the guaranteed rights? Ultimately, the very notion of fairness in a trial might have a tendency to decline or become subject to shifting goalposts.³⁹

There is no indication that such powerful dissenting opinions are likely to destabilise the principle established in *Khan*.⁴⁰ Subsequent English authority indicates that appropriate use of the discretionary powers to exclude evidence provided by domestic law can ensure compliance with Article 6.⁴¹ Consequently, the prevailing position in both domestic and Convention jurisprudence is that improperly obtained, but apparently reliable, evidence 'may be inadmissible but is not *ipso facto* so. Nor is a trial in which it is relied upon necessarily unfair'.⁴²

The English common law provides a further procedural mechanism to protect the right to a fair trial. Criminal proceedings can be halted as an abuse of the process of the court⁴³ if a fair trial is impossible because of unjustifiable

37 Ibid. at [O-14], [O-17], [O-18].

38 Application No. 44787/98, 25 September 2001.

39 Ibid. at [5] of Judge Tulkens's opinion.

40 Attempts to distinguish *Khan* have generally failed. See *Elahi v United Kingdom*, Application No. 30034/04, 20 June 2006.

41 See e.g. *R v Perry*, *The Times* (28 April 2000); *R v Sanghera* [2001] 1 Cr App R 20 (p. 299); *R v P* [2001] 2 WLR 463 at 475; *R v Loveridge* [2001] EWCA Crim 973, [2001] 2 Cr App R 29 (p. 591); *R v Button* [2005] EWCA Crim 516.

42 *R v Hardy* [2002] EWCA Crim 3012, [2003] 1 Cr App R 30 (p. 494) at [19].

43 See generally A. L.-T. Choo, 'Halting Criminal Prosecutions: The Abuse of Process Doctrine Revisited' [1995] Crim LR 864; A. L.-T. Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings* (Clarendon Press: Oxford, 1993); D. Corker and D. Young, *Abuse of Process in Criminal Proceedings*, 2nd edn (Butterworths: London, 2003); C. Wells, *Abuse of Process: A Practical Approach* (Legal Action Group: London, 2006).

delay,⁴⁴ prejudicial pre-trial publicity⁴⁵ or the loss of relevant material by the prosecution.⁴⁶ In recent years the abuse of process doctrine has also been used to stay proceedings even where there is no suggestion that the trial itself would be unfair. This second limb of the doctrine is usually reserved for cases where the actions of the authorities are such that it would be ‘an affront to the public conscience’ to allow the prosecution to proceed.⁴⁷ It is accepted that in some circumstances ‘certainty of guilt cannot displace the essential feature of this kind of abuse of process, namely the degradation of the lawful administration of justice’.⁴⁸ In *R v Horseferry Road Magistrates’ Court, ex p. Bennett*,⁴⁹ the House of Lords held that the power to stay proceedings as an abuse of process could be used in unlawful rendition cases where the authorities had acted in blatant disregard of international law. The court’s jurisdiction to halt proceedings in these circumstances exists because ‘the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law’.⁵⁰ The Court of Appeal has noted that:

it seems to us that *Bennett*-type abuse, where it would be offensive to justice and propriety to try the defendant at all, is different ... from the type of abuse which renders a fair trial impossible ... It arises not from the relationship between the prosecution and the defendant, but from the relationship between the prosecution and the Court. It arises from the Court’s need to exercise control over executive involvement in the whole prosecution process, not limited to the trial itself.⁵¹

The second limb of the abuse of process doctrine has also been applied in cases of improper entrapment on the ground that it would be unacceptable to prosecute a case where the authorities have instigated the crime. A stay of proceedings is

44 *R v S* [2006] EWCA Crim 756, [2006] 2 Cr App R 23 (p. 341).

45 *R v Taylor* (1994) 98 Cr App R 361 (decision of 1993).

46 *R v Beckford* [1996] 1 Cr App R 94.

47 *R v Latif* [1996] 1 WLR 104 at 112. In appropriate cases ‘the judge must weigh in the balance the public interest in ensuring that those that are charged with grave crimes should be tried and the competing public interest in not conveying the impression that the court will adopt the approach that the end justified any means’ (ibid. at 113).

48 *R v Mullen* [1999] 2 Cr App R 143 at 155.

49 [1994] 1 AC 42.

50 Ibid. at 62, *per* Lord Griffiths. See generally C. Gane and S. Nash, ‘Illegal Extradition: The Irregular Return of Fugitive Offenders’ (1996) 1 *Scottish Law and Practice Quarterly* 277.

51 *R v Mullen* [1999] 2 Cr App R 143 at 158.

regarded as the appropriate solution in these cases rather than excluding evidence obtained by entrapment under s. 78(1).⁵²

Traditionally, the discretion to stay proceedings, which can involve, under its second limb, balancing competing interests to determine whether it would be an affront to the public conscience to allow the prosecution to continue, was not considered to share the same juridical basis as the exclusionary discretion provided by s. 78(1). Auld LJ remarked in *R v Chalkley*:

The determination of the fairness or otherwise of admitting evidence under s. 78 is distinct from the exercise of discretion in determining whether to stay criminal proceedings as an abuse of process. Depending on the circumstances, the latter may require consideration, not just of the potential fairness of a trial, but also of a balance of the possibly countervailing interests of prosecuting a criminal to conviction and discouraging abuse of power.⁵³

In *A and Others*, however, it was argued before the House of Lords that obtaining evidence by torture was such a serious breach of international standards that the admission of the evidence would, regardless of its reliability, degrade the administration of justice. Consequently, it would be appropriate for a court to exercise its discretion to exclude the evidence on the basis that its admission would constitute an abuse of the process of the court. The House of Lords unanimously agreed. Lord Hoffmann noted that:

the law has moved on. English law has developed a principle ... that the courts will not shut their eyes to the way the accused was brought before the court or the evidence of his guilt was obtained. Those methods may be such that it would compromise the integrity of the judicial process, dishonour the administration of justice, if the proceedings were to be entertained or the evidence admitted. In such a case the proceedings may be stayed or the evidence rejected on the

52 *R v Looseley* [2001] UKHL 53, [2001] 1 WLR 2060. See generally A. Ashworth, 'Re-Drawing the Boundaries of Entrapment' [2002] Crim LR 161; D. Ormerod and A. Roberts, 'The Trouble with *Teixeira*: Developing a Principled Approach to Entrapment' (2002) 6 E & P 38; D. Squires, 'The Problem with Entrapment' (2006) 26 *Oxford Journal of Legal Studies* 351.

53 [1998] 2 All ER 155 at 178. In his Review of the Criminal Courts Auld called for an investigation into the interplay between s. 78(1) and the abuse of process doctrine: Lord Justice Auld, *A Review of the Criminal Courts of England and Wales* (TSO: London, 2001) ch. 11, para. 111, accessible via www.criminal-courts-review.org.uk, last accessed 12 March 2007.

ground that there would otherwise be an abuse of the processes of the court.⁵⁴

In the words of Lord Carswell, ‘the duty not to countenance the use of torture by admission of evidence so obtained in judicial proceedings must be regarded as paramount and ... to allow its admission would shock the conscience, abuse or degrade the proceedings and involve the state in moral defilement’.⁵⁵

The decision in *A and Others* represents an acknowledgement that there may be circumstances in which a court should be prepared, ‘on moral grounds’,⁵⁶ to exclude reliable evidence because of the manner in which it was obtained. It may signify a recognition that the mismatch between the courts’ divergent approaches to exclusion of improperly obtained evidence and stays for abuse of process has finally been laid to rest, and that integrity considerations do have a role to play in determinations of exclusion. Yet what is remarkable is that the House of Lords has achieved this reconciliation by casually uncovering a common law principle of exclusion that had previously been thought not to exist, and thereby extending the reach of *Ex p. Bennett* into the realm of evidential exclusion.

2. Australia

The traditional Australian approach to the exclusion of improperly obtained but reliable evidence⁵⁷ is neatly encapsulated in the following extra-judicial statement by the Chief Justice of New South Wales: ‘The discretion to exclude evidence illegally or improperly obtained serves public policy objectives other than the principle of a fair trial.’⁵⁸ The High Court of Australia recognised the existence at common law of a specific judicial discretion to exclude improperly obtained evidence which was meant to reflect the fact that convictions obtained on the basis of such evidence ‘may be obtained at too high a price’.⁵⁹ This discretion involves:

the weighing against each other of two competing requirements of public policy, thereby seeking to resolve the apparent conflict between the desirable goal of bringing to conviction the wrongdoer

54 [2005] UKHL 71, [2006] 2 AC 221 at [87].

55 *Ibid.* at [150].

56 *Ibid.* at [148], *per* Lord Carswell.

57 See generally B. Selway, ‘Principle, Public Policy and Unfairness—Exclusion of Evidence on Discretionary Grounds’ (2002) 23 *Adelaide Law Review* 1.

58 Hon. J. J. Spigelman AC, ‘The Truth Can Cost Too Much: The Principle of a Fair Trial’ (2004) 78 *Australian Law Journal* 29 at 38.

59 *R v Ireland* (1970) 126 CLR 321 at 335, *per* Barwick CJ.

and the undesirable effect of curial approval, or even encouragement, being given to the unlawful conduct of those whose task it is to enforce the law.⁶⁰

Such a discretion is considered to be independent of the right to a fair trial. Trial fairness is not regarded as the appropriate legal concept by reference to which to attempt to secure the exclusion of ‘what might loosely be called “real evidence”, such as articles found by search, recordings of conversations, the result of breathalyzer tests, fingerprint evidence and so on’. According to the High Court of Australia:

‘Fair’ or ‘unfair’ is largely meaningless when considering fingerprint evidence obtained by force or a trick or even the evidence of possession of, say, explosives or weapons obtained by an unlawful search of body or baggage, aided by electronic scanners.⁶¹

To admit evidence obtained as a result of ‘the unlawful search of person or premises’, for example, cannot, if the evidence is reliable, have the potential to lead to an unfair trial. Thus it cannot compromise trial fairness ‘to use, against a person accused of having in his possession weapons or explosives, evidence obtained by means of an unlawful body search so long ... as that search is so conducted as to provide all proper safeguards against weapons or explosives being “planted” on the accused in the course of the search’.⁶² The judicial discretion to exclude improperly obtained evidence, rather, is rooted in the responsibility of courts to protect their own integrity and that of the criminal justice system as a whole. As the High Court of Australia remarked in the context of considering a breach of certain legislative safeguards:

These safeguards the executive, and, of course, the police forces, should not be free to disregard. Were there to occur wholesale and deliberate disregard of these safeguards its toleration by the courts would result in the effective abrogation of the legislature’s safeguards of individual liberties, subordinating it to the executive arm. This would not be excusable however desirable might be the immediate end in view, that of convicting the guilty. ... Moreover the courts should not be seen to be acquiescent in the face of the unlawful conduct of those whose task it is to enforce the law. On the other hand

60 *Bunning v Cross* (1978) 141 CLR 54 at 74, per Stephen and Aickin JJ.

61 *Ibid.* at 75.

62 *Ibid.* at 77. See also *R v Swaffield* [1998] HCA 1 at [54], [70], per Toohey, Gaudron and Gummow JJ.

it may be quite inappropriate to treat isolated and merely accidental non-compliance with statutory safeguards as leading to inadmissibility of the resultant evidence when of their very nature they involve no overt defiance of the will of the legislature or calculated disregard of the common law and when the reception of the evidence thus provided does not demean the court as a tribunal whose concern is in upholding the law.⁶³

Three Australian jurisdictions have passed virtually identical Acts of Parliament that provide a comprehensive statement of substantial parts of the law of evidence. These are the Evidence Act 1995 (Commonwealth) (which applies not only in the Commonwealth jurisdiction but also in the courts of the Australian Capital Territory), the Evidence Act 1995 (New South Wales) (applicable in the state of New South Wales) and the Evidence Act 2001 (Tasmania) (applicable in the state of Tasmania).⁶⁴ Section 138 of the Uniform Evidence Acts (as the Acts are collectively known) provides:

(1) Evidence that was obtained:

- (a) improperly or in contravention of an Australian law; or
- (b) in consequence of an impropriety or of a contravention of an Australian law;

is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

...

(3) Without limiting the matters that the court may take into account under subsection (1), it is to take into account:

- (a) the probative value of the evidence; and
- (b) the importance of the evidence in the proceeding; and
- (c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding; and
- (d) the gravity of the impropriety or contravention; and
- (e) whether the impropriety or contravention was deliberate or reckless; and

⁶³ *Bunning v Cross* (1978) 141 CLR 54 at 77–8, per Stephen and Aickin JJ.

⁶⁴ See generally J. Anderson, J. Hunter and N. Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (Butterworths: Sydney, 2002).

- (f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights; and
- (g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and
- (h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.

No guidance is provided in the legislation on the relative weighting to be accorded to the matters specified, or on the way in which they are to be taken to relate to one another. At common law, by contrast, the High Court of Australia provided specific guidance on the manner in which the probative value (cogency) and the importance of the evidence ought to be taken into account in the exercise of judicial discretion, also emphasising situations where neither cogency nor importance would suffice to condone deliberate rule-breaking:

To treat cogency of evidence as a factor favouring admission, where the illegality in obtaining it has been either deliberate or reckless, may serve to foster the quite erroneous view that if such evidence be but damning enough that will of itself suffice to atone for the illegality involved in procuring it. For this reason cogency should, generally, be allowed to play no part in the exercise of discretion where the illegality involved in procuring it is intentional or reckless. To this there will no doubt be exceptions: for example where the evidence is both vital to conviction and is of a perishable or evanescent nature, so that if there be any delay in securing it, it will have ceased to exist.

Where ... the illegality arises only from mistake, and is neither deliberate nor reckless, cogency is one of the factors to which regard should be had. It bears upon one of the competing policy considerations, the desirability of bringing wrongdoers to conviction.⁶⁵

Again, 'the nature of the relevant offence' appears in s. 138(3)(c) as a compulsory consideration with no guidance on the manner in which it is to be taken into account. As a member of the New South Wales Court of Criminal Appeal remarked:

⁶⁵ *Bunning v Cross* (1978) 141 CLR 54 at 79, per Stephen and Aickin JJ.

There are two opposing ways in which the gravity of the charge may be taken into account and may be relevant. It is, obviously, in the interests of the community that persons guilty of more serious offences be dealt with according to law. As a general proposition, the more serious the charge, the greater the community interest in the conviction and punishment of the guilty. On the other hand, it may equally be said that the more serious the charge faced, the more rigorous should be the insistence on adherence to statutory provisions enacted to protect the rights of individuals. Section 138 affords no guidance as to whether the requirement that ‘the nature of the relevant offence’ be taken into account in the balancing exercise demanded by s. 138(1) points towards greater leniency or greater strictness in the enforcement of legal requirements.⁶⁶

The position at common law, by contrast, is clear: the more serious the offence charged the more likely the evidence should be admitted. This was exemplified by the High Court of Australia in the leading case of *Bunning v Cross*, where admissibility was said to depend on the nature of the particular offence in question:

A[n] ... important factor is the nature of the offence charged. While [drink-driving] is not one of the most serious crimes it is one with which Australian legislatures have been much concerned in recent years and the commission of which may place in jeopardy the lives of other users of the highway who quite innocently use it for their lawful purposes. Some examination of the comparative seriousness of the offence and of the unlawful conduct of the law enforcement authority is an element in the process required ...⁶⁷

The generally accepted position is that s. 138(3)(c) should be interpreted in the same way, although an interesting minority view was expressed by one member of the New South Wales Court of Criminal Appeal:

In my opinion it would be wrong to accept as a general proposition that, because the offence charged is a serious one, breaches of the law will be more readily condoned. In my judgment there may be cases in which the fact that the charge is a serious one will result in a

⁶⁶ *R v Dalley* [2002] NSWCCA 284 at [95], per Simpson J.

⁶⁷ *Bunning v Cross* (1978) 141 CLR 54 at 80, per Stephen and Aickin JJ.

more rigorous insistence on compliance with statutory provisions concerning the obtaining of evidence.⁶⁸

The Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission concluded, in the light of their recent review of the Uniform Evidence Acts, that the prevailing approach to the interpretation of s. 138(3)(c) was correct and unproblematic.⁶⁹ More generally, the Commissions considered that while ‘some concern is expressed that it is unclear how [the] factors [articulated in s. 138(3)] should be applied and what weight should be given to them, ... it would be inappropriate to attempt to guide the balancing test legislatively. This is particularly so given that the weight to be given to any particular factors listed in s. 138(3) will vary depending on which of the other factors in that subsection arise in the context of a particular case.’⁷⁰

Presser undertook empirical research on Australian cases from the mid-1980s until 1999 in which attempts were made to secure the exclusion of evidence on the ground that it had been obtained improperly. Some 39 cases were examined in total, covering all types of allegedly improperly obtained evidence, including confession evidence. In six of the 39 cases the evidence was excluded by the trial court. Some 26 of these 39 cases went on appeal. In only three of the 26 cases did the appellate court hold that the evidence should have been excluded. Presser notes:

68 *R v Dalley* [2002] NSWCCA 284 at [97], *per* Simpson J. The other two judges took the orthodox view. Spigelman CJ said (*ibid.* at [3]): ‘In the case of criminal proceedings, in my opinion, the public interest in admitting evidence varies directly with the gravity of the offence. The more serious the offence, the more likely it is that the public interest requires the admission of the evidence.’ Blanch AJ ‘agree[d] with the remarks of the Chief Justice that the public interest in conviction and punishment can be expected to have greater weight in crimes of greater gravity ...’: *ibid.* at [102].

69 Australian Law Reform Commission, *Uniform Evidence Law*, ALRC 102 (Australian Law Reform Commission: Sydney, 2005) [16.95]: ‘Submissions and consultations express some concern regarding the majority interpretation of this provision. ... the Commissions are of the view that the correct approach is that the more serious the offence, the more weight should be given to the public interest in admitting evidence which might result in the apprehension of criminal offenders. However, this does not mean that breaches of the law will necessarily be condoned where the offence is a serious one. The nature of the offence is only one of the factors which the court is to take into account in the exercise of this discretion. Whether illegally or improperly obtained evidence is admitted will also depend on factors such as the nature of the impropriety or illegality. Where the infringement involves isolated or accidental non-compliance, the weight to be given to the nature of the offence may be greater than if the infringement involves a serious and deliberate breach of procedure. Hence, the fact that the offence charged is serious is by no means determinative of how the discretion in s. 138 will be exercised.’

70 *Ibid.* at [16.93].

In almost all jurisdictions, there appears to be a significant degree of tolerance of police misconduct, such that judges are willing to give police a high degree of latitude in the conduct of their criminal investigations.

Often judges will refuse to even classify the alleged misconduct as unlawful. Yet, even when judges are willing to classify police conduct as such, they will often find the misconduct to have only been accidental and not deliberate or reckless. In so doing, they greatly lessen the likelihood of the evidence obtained as a result of that misconduct being excluded.⁷¹

The latitude extended to police investigations was found to be especially pronounced in drug-trafficking cases.⁷² Strikingly, Presser's conclusion overall was that:

judicial latitude seems to have *increased* in NSW since the introduction of the uniform evidence legislation ... It may be speculated that the fact that evidence obtained illegally is now *prima facie* inadmissible is, at least in part, responsible for the heightened tolerance of police misconduct amongst NSW judges, particularly those at trial level. If the proper exercise of the discretion requires that judges start from a position of inadmissibility, it is easier for judges to avoid having to consider the issue altogether by classifying the conduct as lawful. This allows judges to substantively continue the pre-uniform evidence legislation trend of admitting contested evidence in the balance of competing public policy interests.⁷³

This impact is ironic in view of the fact that the Australian Law Reform Commission, on whose work the Uniform Evidence Acts were based, envisaged that placing the onus on the prosecution would increase the incidence of exclusion.⁷⁴

71 B. Presser, 'Public Policy, Police Interest: A Re-Evaluation of the Judicial Discretion to Exclude Improperly or Illegally Obtained Evidence' (2001) 25 *Melbourne University Law Review* 757 at 777.

72 *Ibid.* at 779.

73 *Ibid.* at 778 (*italics added*).

74 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) vol. 1 (Australian Government Publishing Service: Canberra, 1985) [964]: 'Those who infringe the law should be required to justify their actions and thus bear the onus of persuading the judge not to exclude the evidence so obtained. Practical considerations support this approach. Evidence is not often excluded under the [common law] discretion. This suggests that the placing of the onus on the accused leans too heavily on the side of crime control considerations.'

To update Presser's study (albeit without replicating his more systematic empirical methodology), we conducted a cursory search for decisions in which the New South Wales Court of Criminal Appeal has considered s. 138 in some detail since 2000. We limited our investigation to non-confession evidence alleged to have been obtained in breach of rules relating to stops, entry, search, seizure or detention.⁷⁵ Four such decisions were found. Three of these—*R v Chen*,⁷⁶ *R v McKeough*⁷⁷ and *O'Meara v R*⁷⁸—provide instances of the tendency, identified by Presser, to classify conduct as lawful and thus avoid applying s. 138. In *R v Rondo*, however, where the 'amount of illegal conduct in obtaining evidence [was] significant',⁷⁹ the court thought that it could not 'be said that the desirability of admitting the evidence improperly and unlawfully obtained outweighs the undesirability of admitting that evidence'.⁸⁰ The court was clearly influenced by

75 We used the Austlii database: www.austlii.edu.au, last accessed 12 March 2007.

76 [2002] NSWCCA 174. The court stated (*ibid.* at [21]): 'It seems to us to be ... clear that the *Uniana* was within Australian territorial waters at the time it was actually boarded and searched, and at the times at which, subsequently, persons were arrested and items were seized. It seems to us to follow necessarily that the actual boarding, the actual search, the actual arrests, and the actual seizures were all lawful at the times at which, respectively, they took place. ... Even if it be granted that there was some such irregularity deriving from things occurring outside the strict nautical limit of Australian territorial waters, the result cannot be, in our opinion, to make unlawful the seizure and search within Australian waters of the particular vessel. All that follows from such an irregularity occurring outside the territorial limit is that the lawful seizure and search were accomplished only as a result of the antecedent irregularity. That cannot, [in] our view, make the seizure and search itself unlawful ... Further, even if the actual boarding, the actual search, the actual arrests and the actual seizures were unlawful, as the trial judge was prepared to assume contrary to his primary approach, he was right to conclude that the desirability of admitting the evidence outweighed the undesirability of admitting it for the reasons which he gave, namely the "extraordinarily high" probative value of the evidence, the importance of the evidence, the seriousness of the offences, the understandable and non-deliberate character of the contravention and the difficulty of obtaining the evidence without the contravention alleged.'

77 [2003] NSWCCA 385 at [33], [34], *per* Dunford J: '... I am satisfied that [the trial judge] was in error in finding that the search of the vehicle was illegal and, therefore, there was no ground for excluding the evidence of the finding of the drugs ... However, on the hypothesis that the search of the vehicle was illegal, I am still satisfied that his Honour was in error in excluding the evidence.' Spigelman CJ took the view that 'there was no basis for the search of the vehicle ... and, accordingly, the evidence had been obtained as a consequence of impropriety or contravention, within the meaning of s. 138(1)' (*ibid.* at [52]), but concluded, 'on balance, that the alternative way in which Dunford J outlined in his reasons, namely, on the assumption that there was illegality, is justified' (*ibid.* at [59]). Hidden J (*ibid.* at [61]) found it 'unnecessary to determine whether the search was legal. It is sufficient to say that I agree that [the trial judge] does not appear to have performed the balancing act that s. 138 of the Act requires.'

78 [2006] NSWCCA 131 at [100], *per* Simpson J: 'There was nothing unlawful or improper about the entry by police. Accordingly, there is no call for this Court to consider whether the s. 138 test had been met.'

79 [2001] NSWCCA 540 at [137], *per* Smart AJ.

80 *Ibid.* at [138].

the cumulative gravity of the misconduct,⁸¹ but did not engage in any detailed discussion of the relevant factors to be considered.

3. Canada

The contemporary approach to improperly obtained evidence in Canada is encapsulated in s. 24(2) of the Canadian Charter of Rights and Freedoms, which provides:

Where ... a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

The judicial approach to the interpretation of s. 24(2)⁸² can be summarised as follows. 'Disrepute' is effectively to be interpreted objectively:

The concept of disrepute necessarily involves some element of community views, and the determination of disrepute thus requires the judge to refer to what he conceives to be the views of the community at large. This does not mean that evidence of the public's perception of the repute of the administration of justice ... will be determinative of the issue ... Members of the public generally become

81 Ibid. at [137]: 'In this case not only should the individual acts of illegality be carefully and separately assessed but regard should be had to the combined effect of all three aspects, namely, the unlawful stopping of the Supra, the invalid detention warrant and the invalid search warrant including the applications disclosing no sufficient ground for the issue of the warrant.'

82 See generally J. Andres Hannah-Suarez, 'Bringing the Administration of the Charter into Disrepute: A Critique of the Third Branch of the Collins Test for Excluding Evidence under Section 24(2) of the Charter' (2004) 18 *Windsor Review of Legal and Social Issues* 63; P. Cory, 'General Principles of Charter Exclusion (Exclusion of Conscriptive and Non-Conscriptive Evidence)' (1998) 47 *UNB Law Journal* 229; W. D. Delaney, 'Exclusion of Evidence under the Charter: Stillman v The Queen' (1997) 76 *Canadian Bar Review* 521; R. C. Fraser and J. A. I. Addison, 'What's Truth Got to Do with It? The Supreme Court of Canada and Section 24(2)' (2004) 29 *Queen's Law Journal* 823; N. J. S. Gorham, 'Eight Plus Twenty-Four Two Equals Zero-Point-Five' (2003) 6 *Criminal Reports (6th)* 257; D. M. Paciocco, 'Evidence about Guilt: Balancing the Rights of the Individual and Society in Matters of Truth and Proof' (2001) 80 *Canadian Bar Review* 433; J. Parfett, 'A Triumph of Liberalism: The Supreme Court of Canada and the Exclusion of Evidence' (2002) 40 *Alberta Law Review* 299; S. Penney, 'Taking Deterrence Seriously: Excluding Unconstitutionally Obtained Evidence under Section 24(2) of the Charter' (2004) 49 *McGill Law Journal* 105; M. C. Plaxton, 'Who Needs Section 24(2)? Or: Common Law Sleight-of-Hand' (2003) 10 *Criminal Reports (6th)* 236; D. Stuart, 'Buhay: No Automatic Inclusionary Rule under Section 24(2) When Evidence is Non-Conscripted and Essential to Crown's Case' (2003) 10 *Criminal Reports (6th)* 233; D. Stuart, 'Eight Plus Twenty-Four Two Equals Zero' (1998) 13 *Criminal Reports (5th)* 50; D. Stuart, 'Stillman: Limiting Search Incident to Arrest, Consent Searches and Refining the Section 24(2) Test' (1997) 5 *Criminal Reports (5th)* 99.

conscious of the importance of protecting the rights and freedoms of accused only when they are in some way brought closer to the system either personally or through the experience of friends or family. ... The approach ... may be put figuratively in terms of [a] reasonable person test ... The reasonable person is usually the average person in the community, but only when that community's current mood is reasonable.⁸³

The judge must try to discern a political community's reflective preferences, purged of any transitory enthusiasms or emotional outbursts:

[T]he judge ... should not render a decision that would be unacceptable to the community when that community is not being wrought with passion or otherwise under passing stress due to current events.⁸⁴

In contrast with the position in Australia under the Uniform Evidence Acts, the onus in Canada lies with the defendant: 'the use of the phrase "if it is established that" places the burden of persuasion on the applicant, for it is the position which he maintains which must be established. ... [T]he applicant must [establish that it is] more probable than not that the admission of the evidence would bring the administration of justice into disrepute.'⁸⁵

There are two ways in which 'disrepute' may be caused by the admission of evidence obtained as a result of a Charter violation. First, if the evidence is *conscriptive evidence*, its admission may result in an unfair trial, such that 'the evidence *must* be excluded'.⁸⁶ Conscriptive evidence essentially comprises confessions and evidence obtained from the accused in a manner analogous to obtaining his or her confession. Thus:

Evidence will be conscriptive when an accused, in violation of his Charter rights, is compelled to incriminate himself at the behest of the state by means of a statement, the use of the body or the production of bodily samples. The traditional and most frequently encountered example of this type of evidence is a self-incriminating statement made by the accused following a violation of his right to

83 *R v Collins* [1987] 1 SCR 265 at [32]-[33], per Dickson CJ and Lamer, Wilson and La Forest JJ.

84 *Ibid.* at [34].

85 *Ibid.* at [30].

86 *R v Stillman* [1997] 1 SCR 607 at [72], per Lamer CJ and La Forest, Sopinka, Cory and Iacobucci JJ (italics added).

counsel ... The other example is the compelled taking and use of the body or of bodily substances of the accused, such as blood, which lead to self-incrimination. It is the compelled statements or the conscripted use of bodily substances obtained in violation of Charter rights which may render a trial unfair.⁸⁷

In determining whether the admission of the evidence will result in an unfair trial, the primary considerations for the court are ‘the nature of the evidence obtained as a result of the violation and the nature of the right violated’.⁸⁸ The view is taken that ‘the admission of evidence, which was obtained following the breach of an accused’s Charter rights resulting in the accused being compelled or conscripted to incriminate himself by a statement or the use as evidence of his body or bodily substances *will*, as a general rule, be found to render the trial unfair’.⁸⁹ The concept of trial fairness subscribed to by the Supreme Court of Canada therefore includes, but is not limited to, concerns about the reliability of evidence. The seriousness of the offence charged is not a relevant consideration in determining the issue of trial fairness: ‘if the admission of the evidence would result in an unfair trial, the seriousness of the offence could not render that evidence admissible. If any relevance is to be given to the seriousness of the offence in the context of the fairness of the trial, it operates in the opposite sense: the more serious the offence, the more damaging to the system’s repute would be an unfair trial.’⁹⁰

Secondly, in the case of *non-conscriptive evidence* obtained in breach of the Charter, ‘disrepute’ resulting ‘from judicial condonation of unacceptable conduct by the investigatory and prosecutorial agencies’ must be weighed against ‘any disrepute that may result from the exclusion of the evidence’.⁹¹ The concept of disrepute is capable of justifying the exclusion of improperly obtained evidence, but also of mandating its admission notwithstanding the taint of impropriety. As the Supreme Court elaborated:

It would be inconsistent with the purpose of s. 24(2) to exclude evidence if its exclusion would bring the administration of justice into greater disrepute than would its admission. [Additionally], it must be emphasized that even though the inquiry under s. 24(2) will

87 *Ibid.* at [80].

88 *R v Collins* [1987] 1 SCR 265 at [37], *per* Dickson CJ and Lamer, Wilson and La Forest JJ.

89 *R v Stillman* [1997] 1 SCR 607 at [98], *per* Lamer CJ and La Forest, Sopinka, Cory and Iacobucci JJ (*italics added*).

90 *R v Collins* [1987] 1 SCR 265 at [39], *per* Dickson CJ and Lamer, Wilson and La Forest JJ.

91 *Ibid.* at [31].

necessarily focus on the specific prosecution, it is the long-term consequences of regular admission or exclusion of this type of evidence on the repute of the administration of justice which must be considered.⁹²

Factors regarded as relevant for the trial court to consider may include the following:

- Was the Charter violation serious or was it of a merely technical nature?
- Was it deliberate, wilful or flagrant, or was it inadvertent or committed in good faith?
- Did it occur in circumstances of urgency or necessity?
- Were there other investigatory techniques available?
- Would the evidence have been obtained in any event?
- Is the offence serious?
- Is the evidence essential to substantiate the charge?⁹³

Setting aside the robust approach to be taken to conscriptive evidence, the possible exclusion of improperly obtained evidence is therefore to be determined by reference to ‘integrity’ concerns and by the application of a broad balancing test. It may be inappropriate for a court, whose duty it is to uphold the law, effectively to condone improprieties committed in the course of enforcing it. This is analogous to the Australian approach outlined earlier, and to the approach taken in England and Wales to the second limb of the abuse of process doctrine.

Notwithstanding the presumption of admissibility that must be rebutted by the defendant, Canadian courts have been willing to use the exclusionary power in s. 24(2) in relation to non-conscriptive evidence. An empirical study conducted by Gorham surveyed all reported Supreme Court, appellate court and trial court decisions concerning evidential exclusion in relation to breaches of ss. 8 and 9 of the Canadian Charter during the period January 1998 to November 2002.⁹⁴ Section 8 guarantees ‘the right to be secure against unreasonable search or seizure’ while s. 9 guarantees ‘the right not to be arbitrarily detained or imprisoned’. Gorham found that non-conscripted evidence obtained in violation of s. 8 or s. 9 was excluded in approximately half of the 148 reported decisions in his survey. The rate of exclusion was virtually the same in prosecutions for drug offences (53 per

92 Ibid.

93 Ibid. at [35], as explained at [38]–[39].

94 N. J. S. Gorham, ‘Eight Plus Twenty-Four Two Equals Zero-Point-Five’ (2003) 6 *Criminal Reports* (6th) 257.

cent) as for all prosecutions (51 per cent). He concluded that ‘s. 24(2) of the Charter is being applied with a good measure of discretion and the seriousness of drug offences does not automatically override the seriousness of the breach’.⁹⁵ Interestingly, ‘evidence in prosecutions involving serious narcotics [was] excluded *more frequently* than in prosecutions involving marijuana’.⁹⁶ ‘One possible explanation’, according to Gorham, was that ‘many of the reported decisions involving marijuana were prosecutions for cultivation’.⁹⁷

These findings are reinforced by recent jurisprudence from the Canadian Supreme Court. *R v Law* concerned the photocopying of financial documents found in a safe without first obtaining a warrant. Bastarache J, delivering the single judgment of the entire nine-member court, held that this constituted a violation of s. 8 of the Charter, and furthermore that the photocopied documents should be excluded from evidence under s. 24(2). This decision was explicitly predicated on upholding the integrity of pre-trial criminal process. As the court reasoned:

[A]dmitting the evidence would not affect the fairness of the trial (it being real, discoverable, non-conscripted evidence), yet excluding the evidence would compromise the Crown’s case. The resolution of s. 24(2) thus turns on ... whether the violation of s. 8 is so serious that it outweighs the State’s interest in admitting the evidence.⁹⁸

In this case, the court thought, the administration of justice would be brought into ‘far greater disrepute’ by the admission of the evidence than by its exclusion.⁹⁹

To similar effect is *R v Buhay*,¹⁰⁰ which concerned the search of a bus depot locker without a search warrant, and the consequent seizure of marijuana. Arbour J, again delivering a unanimous nine-member opinion, held that this warrantless search was an ‘impermissible intrusion of the state on a legitimate and reasonable expectation of privacy’ which violated s. 8 of the Charter.¹⁰¹ But this was not sufficient in itself to render the trial unfair:

95 Ibid. at 259.

96 Ibid. at 260 (italics added).

97 Ibid.

98 [2002] 1 SCR 227 at [40].

99 Ibid. at [41].

100 [2003] 1 SCR 631.

101 Ibid. at [38].

In the present case, [the trial judge] was correct in concluding that admission of the marijuana seized following the search of locker 135 does not affect adjudicative fairness. The appellant has not been conscripted against himself in the creation of evidence and the evidence pre-existed the violation of the *Charter*. Furthermore, the evidence was clearly ‘discoverable’ without any infringement of *Charter* rights. Thus, as the marijuana is non-conscriptive, ‘discoverable’ evidence, its admission would not render the trial unfair.¹⁰²

The Supreme Court emphasised the need for trial judges to arrive at a fully contextualised decision, taking proper account of all circumstantially relevant factors: ‘Section 24(2) is not an automatic exclusionary rule ... neither should it become an automatic inclusionary rule when the evidence is non-conscriptive and essential to the Crown’s case’.¹⁰³ This provision instead demarcates a sphere of ‘discretionary power’ delegated to trial judges by the *Charter*:

The decision to exclude evidence always represents a balance between the interests of truth on one side and the integrity of the judicial system on the other ... The trial judge concluded that the vindication of the *Charter* breach in this case, which was serious, did not extract too great a toll on the truth seeking goal of the criminal justice system. In light of his concern as to the long-term effect of the law enforcement officers’ attitude in this case, it was well within [his] judicial discretionary power to conclude that the admission of the marijuana in this case would cause greater disrepute to the justice system than its exclusion would, and such decision is very well within the limits of reasonableness.¹⁰⁴

102 *Ibid.* at [51].

103 *Ibid.* at [71].

104 *Ibid.* at [73]. See also *R v Chaisson* [2006] 1 SCR 415 (evidence of finding of marijuana in car): ‘... we are satisfied that the trial judge was entitled, on the facts as he found them, to conclude that the appellant’s rights under ss. 8, 9 and 10(b) of the *Charter* had been violated. We are satisfied as well that the trial judge committed no reviewable error in concluding that the cumulative effect of these violations warranted exclusion of the impugned evidence under s. 24(2) of the *Charter*.’ (*Ibid.* at [7], *per* Fish J, delivering the judgment of the court.) (Section 10(b) guarantees everyone ‘the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right’.)

4. New Zealand

The introduction in New Zealand of the New Zealand Bill of Rights Act 1990 led to the creation by the courts of a *prima facie* rule of exclusion of evidence obtained in breach of the Act. Evidence could be admitted as an exception to this rule only where there was ‘good reason’ to do so, a concept that seemed to be interpreted restrictively. It appeared that ‘good reason’ could be demonstrated, for example, by circumstances of urgency in which the breach occurred or by the triviality of the breach. It could not be demonstrated merely by the probative value or cogency of the evidence, the importance of the evidence or the seriousness of the offence charged.¹⁰⁵

In *R v Shaheed*¹⁰⁶ in 2002, however, the New Zealand Court of Appeal decisively rejected the *prima facie* rule, on the basis that presumptive exclusion was both insufficiently flexible and failed to strike an appropriate balance between competing interests in criminal adjudication:

Importantly, a *prima facie* rule does not have the appearance of adequately addressing the interest of the community that those who are guilty of serious crimes should not go unpunished. That societal interest, in which any victim’s interest is subsumed, rather than being treated as a separate interest, will not normally outweigh an egregious breach of rights—particularly one which is deliberate or reckless on the part of law enforcement officers. But where the disputed evidence is strongly probative of guilt of a serious crime, that factor too must be given due weight. 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 which is reliable and probative of a serious crime. The vindication will properly be seen as unbalanced and disproportionate to the circumstances of the breach. Nor does a presumptive rule seem entirely consistent with the concept of a specific tailoring of remedies to the circumstances of the particular case ...¹⁰⁷

105 See generally *R v Kirifi* [1992] 2 NZLR 8; *R v Butcher* [1992] 2 NZLR 257; *Ministry of Transport v Noort* [1992] 3 NZLR 260; *R v Goodwin* [1993] 2 NZLR 153; *R v Te Kira* [1993] 3 NZLR 257.

106 [2002] 2 NZLR 377. See generally J. Ip, ‘The End of the Prima Facie Exclusionary Rule’ (2002) 9 *Auckland University Law Review* 1016; R. Mahoney, ‘Abolition of New Zealand’s Prima Facie Exclusionary Rule’ [2003] *Crim LR* 607.

107 [2002] 2 NZLR 377 at [143], *per* Richardson P and Blanchard and Tipping JJ.

Having discarded the *prima facie* test, the New Zealand Court of Appeal proffered the following advice to trial judges who are confronted by defence applications to exclude evidence obtained through official impropriety:

[W]here there has been a breach of a right guaranteed to a suspect by the Bill of Rights, a Judge who is asked to exclude resulting evidence must determine whether that is a response which is proportionate to the character of such a breach of the right in question. The Judge must make that determination by means of a balancing process in which the starting point is to give appropriate and significant weight to the existence of that breach but which also takes proper account of the need for an effective and credible system of justice.¹⁰⁸

It is notable from an English perspective that s. 25(a) of the New Zealand Bill of Rights Act 1990, which guarantees the right to a 'fair and public hearing' in identical terms to Article 6 of the European Convention, did not feature at all in the court's discussion in *Shaheed*.

The New Zealand Court of Appeal expressed the hope that its ruling in *Shaheed* would 'lead to a judicial technique which involves a greater exercise of judgment than the previous focus on a "prima facie rule" may have encouraged', whilst at the same time maintaining that this new approach 'should not lead, in most cases, to results different from those envisaged in earlier judgments of this Court'.¹⁰⁹ Whilst its impact 'in most cases' remains to be seen, an impressionistic view¹¹⁰ tends to confirm the Court of Appeal's prediction. There have been four post-*Shaheed* decisions of the New Zealand Court of Appeal in which the court held non-confession evidence of undisputed reliability to have been obtained in breach of the New Zealand Bill of Rights Act 1990. In three of these four cases the court went on to hold that exclusion was justified on the application of the *Shaheed* approach. For example, *R v Maihi* involved a breach of s. 21 of the Act, which guarantees 'the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise'. The court expressed its conclusion in clear and confident terms:

108 Ibid. at [156].

109 Ibid.

110 Gained from a search of the Nzlii database: www.nzlii.org, last accessed 12 March 2007. See also C. Danswan, 'New Zealand's Evidence Exclusionary Rule: Assessment of *R v Shaheed* in 2003' (2004) 10 *Auckland University Law Review* 174, in which it is demonstrated that post-*Shaheed* case law displays a careful consideration by the courts of the *Shaheed* test.

Although the case can be seen as coming quite close to the borderline, we consider there is not enough weight in the public interest side of the scales to outweigh the starting point, which is to give appropriate and significant weight to the fact that Mr Maihi's s. 21 rights were breached. The public interest in prosecuting him for the drug offences with which he is charged does not, in our judgment, outweigh the starting point and the features associated with it. Relief by exclusion of the evidence is not disproportionate to the breach. The vindication of Mr Maihi's rights in this the only appropriate way does not undermine the need to maintain a credible and effective system of criminal justice. It follows that in our view the Judge below was in error in his conclusion that the evidence should be admitted.¹¹¹

Decisions to exclude improperly obtained evidence were likewise reached in *R v Ihaka*¹¹² and *R v Rollinson*.¹¹³ In the fourth case, however, where the police had conducted an unlawful search of a 'lockup' storage shed, the court held:

In our view the application of the balancing exercise mandated by *Shaheed* leads to the conclusion that the evidence ought to be admitted in this case, notwithstanding the unlawful and unreasonable search. The actions of the police, while unlawful, were not in any way deliberate or cavalier. The evidence is essential to the prosecution for serious offending. The invasion of privacy was serious, but substantially less serious than an unlawful search of a residence or vehicle. We conclude, therefore, that the evidence is admissible at trial.¹¹⁴

The early indications are that exclusion is a probable, but by no means invariable, response to improperly obtained evidence under *Shaheed*. A contextualised approach is hardly surprising. After all, even the now-disfavoured *prima facie* exclusionary rule could be rebutted in appropriate cases.

5. What lessons for England and Wales?

Leaving aside the decision in *A and Others*, English law, we have seen, steadfastly clings to the idea that trial fairness remains the sole test for determining whether improperly obtained, but apparently reliable, evidence ought to be excluded. In both domestic jurisprudence and the jurisprudence of the European Court of

111 [2002] NZCA 205 at [38].

112 [2002] NZCA 134.

113 [2003] NZCA 59.

114 *R v Taylor* [2006] NZCA 76 at [43].

Human Rights it is considered that the fairness of a trial may only be compromised by the admission of evidence of doubtful reliability and, it would seem, evidence obtained in breach of the right against self-incrimination. This is consistent with the approach taken in the other Commonwealth jurisdictions we have examined. The fundamental difference appears to be that major Commonwealth jurisdictions other than England and Wales have come to recognise that broader integrity considerations constitute a separate and distinct ground for exclusion.

As a further illustration, the dichotomy between 'fair trial' and broader integrity concerns is very clearly encapsulated in the specific provision on unconstitutionally obtained evidence to be found in the South African Bill of Rights:

Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.¹¹⁵

In fact, the recognition of this dichotomy is not confined to domestic jurisdictions in the Commonwealth. For example, the Rome Statute of the International Criminal Court specifically identifies the integrity of the criminal justice system as a distinct ground for exclusion:

Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:

- (a) The violation casts substantial doubt on the reliability of the evidence; or
- (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.¹¹⁶

Another significant insight arising from the foregoing examination of Commonwealth jurisprudence is that adoption of an approach to improperly obtained evidence that is apparently more pro-defence or more pro-prosecution may not

115 Constitution of the Republic of South Africa, s. 35(5). See generally P. J. Schwikkard and S. E. van der Merwe, *Principles of Evidence*, 2nd edn (Juta: Lansdowne, 2002) ch. 12.

116 See generally K. Vanderpuye, 'The International Criminal Court and Discretionary Evidential Exclusion: Toeing the Mark?' (2005) 14 *Tulane Journal of International and Comparative Law* 127. Provisions virtually identical to this appear in the Rules of Procedure and Evidence of the International Criminal Tribunals for Rwanda and the Former Yugoslavia. Rule 95 of both sets of Rules provides: 'No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.'

necessarily translate into more or less exclusion, respectively. Trying to identify ‘substance’ may be more important than simply examining ‘form’. In Australia, the introduction of the Uniform Evidence Acts, which require the prosecution to persuade the court to admit the impugned evidence, does not appear to have increased the extent of exclusion in the Australian jurisdictions in which this legislation applies. In New Zealand, the introduction of a modified approach in 2002 that is apparently more pro-prosecution does not appear to have decreased the extent of exclusion. The announcement by the Court of Appeal of the ‘new’ approach may have reflected a contemporary concern or perceived need to appear to be committed to crime control¹¹⁷ rather than a desire to see more improperly obtained evidence in fact admitted. Canada would appear to adhere to a fairly robust exclusionary principle despite the fact that, unlike the position in the Australian Uniform Evidence Act jurisdictions, the onus of persuading the court to exclude the evidence rests on the defence.

This observation suggests that, ultimately, it is not simply the test of exclusion to be applied in a particular jurisdiction that matters. The extent to which there is an entrenched or growing ‘rights culture’ may also be significant. The Canadian Charter of Rights and Freedoms and the New Zealand Bill of Rights Act have accentuated human rights in those jurisdictions. By contrast, in the Uniform Evidence Act jurisdictions of Australia, with the exception of the Australian Capital Territory,¹¹⁸ there are as yet no human rights norms prescribed in legislation. England and Wales, it is true, has the Human Rights Act, but this provides a more general statement of human rights than its Canadian and New Zealand counterparts. Notably, the right to privacy in Article 8 of the European Convention is couched in general terms and does not make specific reference to search and seizure, unlike s. 8 of the Canadian Charter or s. 21 of the New Zealand Act. This may explain the apparently more robust response witnessed in Canada and New Zealand to violations of procedural rules regulating search and seizure.

In England and Wales, *A and Others* may well herald a new approach to the problem of improperly obtained but apparently reliable evidence. This decision acknowledges that integrity considerations, long thought to be confined to abuse of process determinations, do after all have a role to play in the context of evidential exclusion. How, then, is this to be incorporated into the law from a doctrinal perspective? *A and Others* does not provide very clear guidance, but there are

117 It is interesting in this context to note also the suggestions in Ireland that the exclusionary principle applicable there be watered down: www.dppireland.ie/filestore/documents/DIRECTOR_-_Opening_Remarks.pdf, last accessed 12 March 2007.

118 Where the Human Rights Act 2004 (ACT) now applies.

essentially two possibilities. First, the law could replicate developments in the other major Commonwealth jurisdictions, or in England and Wales itself in the context of abuse of process. That is, the concept of a 'fair trial' could continue to be interpreted narrowly, but on the basis that it stands alongside the power to exclude evidence on broader, integrity-based grounds. The alternative would be to place such broader integrity considerations under the umbrella of the 'fair trial' concept. It could be argued that the admission of improperly obtained evidence might compromise trial fairness by giving the prosecution at trial 'an advantage which is inconsistent with the fundamental moral and political values of the criminal justice system'. As Ian Dennis elaborates:

This advantage may be the use of evidence which is unreliable and prejudicial, or it may be the use of evidence obtained in violation of the accused's human rights, or it may be evidence obtained by deliberate abuse of process, and so on.¹¹⁹

The second alternative may be superior. It would mean that a distinctive interpretation of the concept of a 'fair trial' could be developed in England and Wales. While this interpretation would differ fundamentally from that taken in the other major Commonwealth jurisdictions, it would provide considerable substance to the right to a fair trial contained in Article 6 of the European Convention. It would also facilitate the accommodation within English law of the implications of the decision in *A and Others*. If a breach of Article 3's absolute prohibition on torture leads to the automatic inadmissibility of *any* evidence obtained in consequence of the breach, it could be argued that contravening *any* Convention right should also constitute a breach of Article 6. The right to privacy, it is true, is of a different dimension from the right to freedom from torture or inhuman or degrading treatment. What should be remembered, however, is that while Article 3 guarantees an unqualified right, Article 8 is subject to various qualifications and limitations; only unjustified violations of the right to privacy constitute a breach of Article 8. A breach of Article 8 is therefore, by definition, a serious breach; and the same could be said of breaches of other qualified Convention rights. Exclusion for infringing such Articles would not therefore be inconsistent with exclusion for a breach of Article 3. Furthermore, as recognised by the Supreme Court of Canada, the seriousness of the offence charged has no bearing on the importance of securing a fair trial. Trials, whether of serious or of relatively trivial offences, should always be fair. Embracing these broad principles could point the way towards the adoption of a more robust, transparent and coherent approach to improperly obtained evidence in England and Wales than has prevailed in the past.

119 I. H. Dennis, *The Law of Evidence*, 2nd edn (Sweet & Maxwell: London, 2002) 89.