

## THE POISONED TREE: INADMISSIBLE CONFESSIONS, SUBSEQUENT FACTS AND RELIABILITY

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It is better by far to allow a few guilty men to escape than to compromise the standards of a free society.<sup>1</sup>

In the case from which the above quotation was taken, the Privy Council allowed an appeal from the Hong Kong Court of Appeal, holding that a videotape of the three accused accompanying the police to a waterfront and pointing out, in turn, where a knife<sup>2</sup> had been thrown into the sea was inadmissible, as the accuseds' actions constituted a confession which had not been shown to have been voluntary. In the result, there was no other admissible evidence linking the accused with the murder weapon and their convictions could not therefore be upheld. The question as to when part or all of an otherwise inadmissible confession will be rendered admissible by its confirmation<sup>3</sup> by facts discovered as a consequence of that confession is one which has vexed the common law courts since the early part of the eighteenth century, spawning a confusing array of responses. Taken in isolation, evidence that a particular item was found in a particular place will rarely<sup>4</sup> advance the prosecution's case. It will usually be necessary to link the finding with the accused by proving that he or she had prior<sup>5</sup> knowledge of the whereabouts of the item. On the facts of *Lam Chi-Ming* the relevance of this evidence can be demonstrated by the use of the syllogism. Using the evidentiary fact (or *factum probans*) that the accused knew the location of the murder weapon as the minor premise, the major premise would be that persons with such knowledge are likely to have been implicated in the killing, leading to the conclusion (or *factum probandum*) that such persons may be guilty of the murder. The evidentiary "fact" here refers to two distinct items of evidence; evidence of the accused's knowledge derived from the confession, and evidence of the fact of "finding". At least so far as English authority is concerned, it does not appear to have been doubted that the fact of finding could be proved.<sup>6</sup> Most of the debate has centred on the question of whether

1 Per Lord Griffiths in *Lam Chi-Ming v R* [1991] 2 WLR 1082 at 1090.

2 A piece of metal found embedded in the skull of the victim was part of the blade of the knife found; thus there was independent evidence that this knife was the murder weapon.

3 The expression used by Wigmore, *Treatise on the Law of Evidence* (3rd ed 1940), Sect 856, and adopted by A. Gotlieb in the *locus classicus* on this subject; "Confirmation by Subsequent Facts", (1956) 72 LQR 209.

4 In some cases the finding has independent relevance eg *R v Warickshall* (1783) 1 Leach 263 where on a charge of receiving stolen property was found concealed in the accused's bed, raising an inference of guilt; compare *Black v R* (1989) 50 CCC (3d) 1 where the only evidence that a knife removed by the accused from her kitchen and given to the police was used in a stabbing came from the accused herself as part of an inadmissible confession.

5 It does not follow that the discovery should necessarily follow the confession. The confession is relevant in this context in indicating knowledge of a relevant fact eg the location of a concealed murder weapon, and on this basis it should not matter whether discovery of the fact precedes or follows the making of the confession - see Craig J A (dissenting) in *R v Coons* (1980) 51 CCC (2d) 388 at p 400.

6 But see *R v Barker* [1941] 2 KB 381, discussed *post*.

the prosecution should or should not be permitted to adduce evidence of the confession and thus take advantage of police wrongdoing in obtaining it.

If it is accepted that all cogent, logically relevant evidence should be placed before the trier of fact unless there is some valid policy reason for its exclusion,<sup>7</sup> then it follows that the existence and relative importance of any such policy reason to the decision to admit or exclude should be clearly explained. This paper therefore seeks to identify and examine the reasons why confessions are excluded and to consider whether and to what extent the obvious reliability of evidence such as that excluded by their Lordships in *Lam Chi-Ming* should figure in the equation. It is acknowledged at the outset that decisions as to the admissibility of confessions, turning as they do on consideration of a necessarily heterogeneous group of factors, are not readily susceptible of deductive analysis. It is submitted, however, that there is a need, in cases where apparently cogent and reliable evidence is excluded in the court's discretion, for a reasoned explanation of the decision including, as an irreducible minimum, identification of the policy factors bearing on the decision to exclude.<sup>8</sup>

## I. HISTORICAL OVERVIEW

### 1. England

The earliest reported English cases on the issue supported the view that the subsequently discovered facts alone were admissible, and that they could not be connected with the inadmissible confession in any way.<sup>9</sup> It was argued, however, that that part of the inadmissible confession which "related to" the fact discovered should be admitted, on the basis that improperly induced confessions were excluded because of the danger of falsity and this danger was obviated, insofar as that part of the confession was concerned, by the subsequent discovery.<sup>10</sup> This argument seems to have been accepted in at least two later cases,<sup>11</sup> but it did not meet with universal approval.<sup>12</sup> Following something of a hiatus in reported English decisions, the case of *Barker*<sup>13</sup> muddied the waters a little further. As a result of an assurance published in *Hansard* of an amnesty for tax evaders the appellant produced books and documents which disclosed past tax frauds. He was subsequently prosecuted

7 This assumes that the primary aim of adjudication is rectitude of decision ie the pursuit of truth; see W L Twining, *Rethinking Evidence*, Oxford 1990, p 72.

8 See the comments of Sir Robin Cooke, (1989) 19 VUWLR 421; "I am against hidden policy factors. Major premises should not be inarticulate, although they do not need constant restatement. A just decision is surely more likely if the judge recognises a responsibility to be frank."

9 Gotlieb, *op cit*, pp 211-212.

10 See notes to *R v Mosey* (1783) 1 Leach 265. This view had the support of a number of learned authors, including Stephen, Phipson, Cockle and Archbold; see Gotlieb, *op cit*, p 220.

11 *R v Griffin* (1809) Russ & Ry 151, *R v Gould* (1840) 9 C & P 364. This view formed the basis for section 27 of the Evidence Ordinance of Ceylon, allowing evidence to be given as to so much of the statement as "relates distinctly to the fact thereby discovered". In *R v Ramasamy* [1965] AC 1 at pp 14-15 Viscount Radcliffe noted that construction of the section "...has always raised several special difficulties" and said that the section "qualifies for admission any such statement...that might otherwise be suspect on the ground of a general objection to the reliability of evidence of that type". Wigmore argued that the whole of the confession should be admitted, because "...a confirmation in material parts produces ample persuasion of the trustworthiness of the whole" and "it can hardly be supposed that at certain parts the possible fiction stopped and the truth began..."; see J H Wigmore, *Treatise on the Law of Evidence*, (3rd ed 1940), sect. 857, and *R v Garbett* (1847) 2 C & K 474 at p 490.

12 See eg *R v Berriman* (1854) 6 Cox C C 388 at p 389 per Erle J.

13 [1941] 2 K.B. 381.

and the books and documents were admitted in evidence at first instance, but on appeal Tucker J held that these stood on precisely the same footing as an involuntary confession and were therefore inadmissible. It is difficult to reconcile *Barker* with earlier authority which universally regarded evidence of subsequently discovered facts to be admissible, notwithstanding different approaches to the issue of whether any part of the inadmissible confession should be admissible.<sup>14</sup>

Notwithstanding *Barker*, the Criminal Law Revision Committee in 1972 recommended preservation of the "present rule" that evidence of facts discovered as a result of an inadmissible confession should be admissible,<sup>15</sup> and this recommendation was enacted in section 76(4)(a) of the Police and Criminal Evidence Act 1984. Whether part or all of an inadmissible confession "confirmed" by subsequent facts should be admissible gave the Committee more difficulty. Notwithstanding an emphasis on reliability in the provisions of the 1984 Act which replaced the common law as to admissibility of confessions,<sup>16</sup> the Committee were opposed to any general provision for admissibility on a similar basis as this would require a judge to decide whether the confession, or the relevant part of it, seemed to be likely to be true and it would be difficult for the jury not to be impressed by this.<sup>17</sup> However, a majority recommended that evidence should be permitted that the discovery of the fact was made "as a result of" a statement made by the accused. For reasons which must lie in the realm of speculation this recommendation was not adopted, and section 76(5) of the 1984 Act provides that such evidence shall not be admissible "...unless evidence of how [the fact] was discovered is given by [the accused] or on his behalf". Questions as to who might be likely to give such evidence "on behalf of" an accused aside, it is difficult to see what advantage would accrue to an accused who elected to give such evidence.<sup>18</sup>

14 Tucker J affirmed that facts discovered as a consequence of an admissible confession are admissible evidence, and he clearly did not intend to qualify this in any way (*ibid.*, p 384), but he failed to discuss and therefore distinguish the earlier cases (*supra*, note 9). It has been suggested that there may be a distinction between documents (or other facts) discovered as a result of an inadmissible confession, and documents disclosed as a result of an inducement, the latter amounting to a confession in themselves - see Phipson on Evidence (13th ed, 1982), p 458. The difficulty with the latter view is that the documents were not *created* as a result of the inducement as a confession might be; they were merely *produced* as a consequence; thus considerations as to the trustworthiness of the evidence, the traditional basis for the distinction drawn above between admissibility of the subsequent facts and admissibility of the confession itself, were irrelevant - see Zelman Cohen and P B Carter, *Essays on the Law of Evidence*, London 1956, pp 67-68.

15 Criminal Law Revision Committee, Eleventh Report, *Evidence (General)*, Cmnd 4991, paragraphs 68-69.

16 Section 76(2) provides that a confession shall not be admissible if it is represented to the court that it was or may have been obtained by oppression of the person who made it (s 76(2)(a)) or in consequence of anything said or done which was likely, in the circumstances, to render unreliable any subsequent confession (s 76(2)(b)), unless the prosecution proves beyond reasonable doubt that the confession was not obtained by any of these means. Note that the latter refers to potential, not actual reliability. It follows that it is irrelevant that the confession is subsequently admitted to be true; see, for example, *McGovern* [1991] Crim LR 124, *Crampton* [1991] Crim LR 277.

17 *Op cit*, para 69. For a similar reason, at least in part, the Committee rejected an approach similar to that taken by New Zealand Courts in construing s 20 of the Evidence Act 1908 - see *R v Hammond* [1965] NZLR 257; *R v Fatu* [1989] 3 NZLR 419.

18 One possible scenario might be where the relevant statement forms part of a "mixed" confession, containing both inculpatory and exculpatory statements, and the accused wishes to introduce it in order to support an allegation that a co-accused was the primary offender.

## 2. United States

A comprehensive discussion of American authority is outside the scope of this paper. However, a brief review of the principles is useful as a prelude to consideration of the policy factors relevant to a decision to admit or exclude. The earliest cases in this area exhibit a similar degree of confusion to that which plagued the English courts. It is possible to find authority for the diverse propositions that where the subsequent discovery "confirms" the inadmissible confession in part then the whole of the confession becomes admissible,<sup>19</sup> that only that part to which the confirming fact "relates" becomes admissible,<sup>20</sup> and that no part of the confession thereby becomes admissible but it is permissible for the prosecution to lead evidence that the search for the subsequently discovered fact(s) was made as a result of a statement made by the accused.<sup>21</sup> These cases, to the extent that they rely on the reliability rationale for excluding involuntary confessions,<sup>22</sup> cannot be reconciled with the modern approach to the issue which emphasises the need to deter unconstitutional conduct by enforcement agencies.<sup>23</sup> In the post-*Miranda*<sup>24</sup> period it seems that there is little room for an argument that part or all of the "confirmed" inadmissible confession should be admitted, for the simple reason that whether or not the confession is true has no significance in determining voluntariness or admissibility.<sup>25</sup>

Of more interest is the courts' treatment of evidence discovered as a result of the inadmissible confession. In stark contrast to the English approach to this issue, the American courts have adapted the doctrine of the "fruits of the poisoned tree", developed in the context of evidence obtained in breach of the Fourth Amendment, to exclude evidence of facts discovered in consequence of an inadmissible confession.<sup>26</sup> The rationale advanced is that the increased deterrence accomplished by excluding the "fruit" is as necessary in this context as it is in the Fourth Amendment area.<sup>27</sup> It may be, however, that the "fruits" doctrine will not be rigorously applied where the "primary illegality" consists of a violation of *Miranda* or some other confession requirement arguably less important than the Fifth Amendment federal constitutional requirements.<sup>28</sup> Whatever the position on application of the doctrine, it is clear that the "fruit" will not be excluded where it merely follows the illegality but does not flow from it i.e. it is derived from sources factually unrelated to that illegality.<sup>29</sup> However, even if there is such a factual relationship, the "fruit" may nonetheless be admitted where the causal

19 Wigmore, op cit, p 552.

20 Ibid.

21 Ibid., p 553.

22 See, for example, *Lisbena v California* 314 US 219 (1941).

23 Cowen and Carter, op cit, pp 48-51; Wigmore, op cit, pp 551-553.

24 *Miranda v Arizona* 384 U.S. 436 (1966).

25 Hon Nathan R Sobel, *The New Confession Standards, Miranda v Arizona*, Criminal Law Bulletin Inc., New York 1966, p 21.

26 Wigmore, op cit, p 554 et seq; Edward W Cleary (ed.), *McCormick on Evidence*, 3rd ed, pp 417-422; Hon Nathan R Sobel, *ibid*, pp 102-111. An example of the application of the principle is *Wong Sun v U.S.* 371 U.S. 471 (1963) where a confession which was the "fruit" of an unlawful search was excluded.

27 Ibid., p 418. See, for example, *People v Ditson* 57 Cal 2d 415 at pp 436-440 per Schauer J.

28 The position appears to be unsettled. McCormick (*ibid*, p 418) argues against this on the basis that such picking and choosing among primary illegalities seems inappropriate. The relatively recent Supreme Court decision of *Oregon v Elstad* 470 US 298 (1985) strongly suggests, however, that other evidence (here a second confession) derived from a statement obtained in violation of *Miranda* should be admissible; see McCormick, *ibid*, 1987 Supplement, pp 39-41.

29 Wigmore, op cit, p 559; McCormick, op cit, p 499.

connection between the illegality and the evidence has become so attenuated as to dissipate the taint of that illegality,<sup>30</sup> where the prosecution establish "by a preponderance of the evidence" that the evidence would inevitably have been discovered without recourse to the unlawfully obtained evidence,<sup>31</sup> and possibly where the police prove that they acted in good faith and under the reasonable belief that their conduct was within legal requirements.<sup>32</sup> The scope of these exceptions and the degree of overlap between them has yet to be the subject of comprehensive judicial disquisition.

### 3. *Canada*

In a number of respects, not the least of which are the obvious similarities and differences between the Canadian Charter of Rights and Freedoms<sup>33</sup> and the New Zealand Bill of Rights Act 1990, Canadian jurisprudence in this area is of most significance for New Zealand courts. The earliest cases demonstrate a similarly diverse array of approaches to the issue.<sup>34</sup> Then, in *R v St Lawrence*,<sup>35</sup> McRuer CJ stated the law to be that:

Where the discovery of the fact confirms the confession - that is where the confession must be taken to be true by reason of the discovery of the fact - then that part of the confession that is confirmed by the discovery of the fact is admissible, but further than that no part of the confession is admissible.<sup>36</sup>

This was followed in a number of cases<sup>37</sup> and approved as a correct statement of the law by the Supreme Court of Canada in *R v Wray*.<sup>38</sup> As a result of certain admissions by the respondent the police went to a swamp and recovered the murder weapon. The respondent's statement was held to be involuntary and therefore inadmissible. However eight of the nine judges held, applying *St Lawrence*, that that part of the statement the truth of which was unequivocally confirmed by the finding was admissible. A rather fine distinction was made at this point. The majority held that the Crown was to be permitted to lead evidence that the respondent told the police where to look for the weapon, but not that he had told them that he had put it there, because this latter statement was not unequivocally confirmed by the finding. While the distinction can be logically justified, it is artificial to suggest that exclusion of the latter part of the statement would prevent the trier of fact from drawing an inference, from evidence that the respondent knew where the weapon was located, to the effect that the respondent possessed this knowledge because he put it there.

30 McCormick, *op cit*, pp 500-502 identifies several relevant factors including whether the obtaining of the challenged evidence involved a voluntary decision by the person whose rights were infringed, and whether the time period between the illegal conduct and obtaining the evidence indicates attenuation of the taint. Perhaps more controversially, McCormick also argues that the magnitude of police misconduct and the nature of the evidence at issue, in particular its apparent reliability, are also relevant in this context. The last-mentioned factor is considered in more detail below.

31 Peter Mirfield, *Confessions*, London 1985, pp 192-193 citing *Nix v Williams* (1984) 104 S Ct 2501; McCormick, *op cit*, pp 502-504.

32 McCormick, *op cit*, pp 506-508.

33 Constitution Act, 1982.

34 *R v McCafferty* (1885) 25 NBR 396 (no part of confession admissible); *R v Doyle* (1886) 12 OR 347 (confession itself not admissible but witness permitted to say that property found "upon the information of the prisoner"). See generally Hon F Kaufman, *The Admissibility of Confessions in Criminal Matters*, (2nd ed, 1974), pp 181-195.

35 (1949) 7 CR 464.

36 *Ibid*, p 478.

37 Kaufman, *op cit*, p 193.

38 (1970) 11 DLR (3d) 673; [1971] SCR 272. See also *R v John* (1971) 15 DLR (3d) 692.

The second issue before the court was the extent of the judicial discretion to exclude this (otherwise admissible) evidence on the grounds of unfairness, specifically trickery, duress and improper inducements by the police. The majority of the court took a narrow approach to the discretion, holding that the manner in which the evidence was obtained was irrelevant to the discretion to exclude, the latter only arising when admissibility of the evidence is “tenuous”, it is “gravely prejudicial to the accused” and its probative force is “trifling”.<sup>39</sup> This aspect of the case attracted considerable criticism and lent weight to submissions that the proposed Charter should empower the courts to exclude evidence in such a case.<sup>40</sup> Moreover, the courts tended to take a narrow view of the *St Lawrence* rule.<sup>41</sup>

Canadian jurisprudence following the enactment of the Charter in 1982 indicates that where there has been a breach of the provisions of the Charter both aspects of the *Wray* decision are redundant. Section 24(2) of the Charter provides that:

Where, in proceedings under subsection (1), 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 section adopts an intermediate position between the extremes of excluding all evidence obtained in violation of the rights guaranteed (the US approach), and that of admitting all relevant evidence no matter how it was obtained (the *Wray* approach).<sup>42</sup> It remains to consider the courts’ approach, in cases where there has been a Charter violation, to the issues of:

- (a) admissibility of “real” evidence discovered as a result of a statement obtained following<sup>43</sup> a violation of the Charter, and
- (b) whether there remains any residual role for the *St Lawrence* rule.

In relation to the first issue, it is clear that the Canadian courts are not inclined to go as far as the American courts in excluding the “fruits of the poisoned tree”. Although s24(2) applies to real evidence,<sup>44</sup> the upshot of the current approach is that real evidence which did not come into existence as a result of the violation will probably be admissible, at least where it can be said that the police would inevitably have discovered the evidence in any event without the accused’s assistance.<sup>45</sup> The result is that phrases such as “the

<sup>39</sup> *Ibid*, pp 689-690 per Martland J

<sup>40</sup> Bruce P Elman, “Returning to *Wray*: Some Recent Cases on Section 24 of the Charter”, (1988) 26 *Alta L Rev* 604, 606-607. The *Wray* view of the discretion was applied to a breach of section 2(c)(ii) (right to counsel) of the Canadian Bill of Rights 1960 in *Hogan v R* [1975] 2 SCR 574; (1975) 48 DLR (3d) 427 where a police officer refused to allow the accused to speak to his counsel (present in an adjoining room) before taking a breathalyser test. A majority of the Supreme Court of Canada refused to exclude the evidence.

<sup>41</sup> See, for example, *R v Coons* (1980) 51 CCC (2d) 388 (BCCA) - evidence of the confirmed confession not admissible where the discovery preceded the confession; *R v Griffin* (1981) 59 CCC (2d) 503 (Ont Hcj) - rule not applicable where the relevant statement would probably not have been made but for admissions contained in an earlier, involuntary statement, and there was independent evidence providing a link between the accused and the real evidence.

<sup>42</sup> See the comments of Lamer J in *Collins v R* (1987) 33 CCC (3d) 1 (SCC).

<sup>43</sup> The Charter refers to evidence “obtained in a manner that infringed” its provisions. It now seems clear that an accused need not demonstrate a causal link between the violation and the evidence; it will suffice if the violation occurred in the course of obtaining the evidence - see *R v Strachan* (1988) 46 CCC (3d) 479, *R v Brydges* (1990) 53 CCC (3d) 330 (SCC); *Black v R* (1989) 50 CCC (3d) 1.

<sup>44</sup> See, for example, *R v Woolley* (1988) 40 CCC (3d) 531.

<sup>45</sup> There is some doubt as to whether it *always* needs to be shown that the evidence would inevitably

product of” or “created by” are substituted for the plain wording of section 24(2) viz. “obtained in a manner”,<sup>46</sup> in sharp contradistinction to the courts’ broad approach to interpretation of the latter phrase.<sup>47</sup>

The second issue is a little more complex. Notwithstanding enactment of the Charter, the onus remains on the Crown to prove, beyond reasonable doubt, that the confession was voluntarily made;<sup>48</sup> failure to discharge this onus will result in its exclusion. The “*St Lawrence* rule”, as it came to be known, provided a limited exception to the exclusionary rule, based on the truth of that part of the confession confirmed by the subsequent finding. Where there has been a violation of the Charter in obtaining the statement however, the *St Lawrence* rule will not save a statement, or any part of it, if the admission of that statement would “bring the administration of justice into disrepute”. It follows that the rule is effectively redundant in this type of case. Moreover, the reliability or truth of the impugned confession is virtually irrelevant in the decision whether to admit or exclude the confession. In considering whether the defendant has satisfied the court, on the balance of probabilities, that admission of the confession would bring the administration of justice into disrepute<sup>49</sup> the Canadian courts have regard to whether admission of the evidence will affect the fairness of the trial, to the seriousness of the Charter violation and to the disrepute that may arise from *exclusion* of the evidence. One might be forgiven for supposing that the apparent reliability of the “confirmed” part of a confession would be highly relevant under the last-mentioned category, as the exclusion of relevant, highly probative and demonstrably reliable evidence would arguably bring the administration of justice into disrepute when considered from the viewpoint of the “reasonable person in the community”.<sup>50</sup> However, it is clear that the Canadian courts, in contrast to their treatment of real evidence considered above, will generally regard the admission of a confession obtained following a Charter violation as tending to render the trial process unfair, on the basis that such evidence did not exist prior to the violation and admission would infringe the accused’s right against self-incrimination.<sup>51</sup> Moreover, the apparent reliability of the “confirmed” part of the confession, even if relevant to the question whether exclusion of it would bring the administration of justice into disrepute,<sup>52</sup> seems

have been discovered. In *Collins v R* (1987) 33 CCC (3d) 1 at p 19 Lamer J said that “Real evidence that was obtained in a manner that violated the Charter will rarely operate unfairly for that reason alone. The real evidence existed irrespective of the violation of the Charter and its use does not render the trial process unfair”. However later cases have placed importance on the fact that the evidence would inevitably have been discovered; - see *Black v R* *ibid*, pp 20-21 per Wilson J; *R v Greig* (1990) 54 CCC 84 at pp 92-93 per Hetherington JA

46 Elman, *op cit*, p 616.

47 See note 43 above.

48 Peter K McWilliams, *Canadian Criminal Evidence*, Canada Law Book Ltd, 1974, p 255.

49 *Collins v R* (1987) 33 CCC (3d) 1 at p 16 per Lamer J; *R v Duguay* (1989) 46 CCC (3d) 1 at p 24 (SCC); *R v Debot* (1989) 52 CCC (3d) 193 at p 221 (SCC).

50 *Collins v R* *ibid*, p 18.

51 This “right”, considered in more detail below, is regarded as being infringed because the evidence could not have been obtained but for the participation of the accused - see *Collins v R* (1987) 33 CCC (3d) 1 at pp 19-20; *R v Ross* (1989) 46 CCC (3d) 129 at p 139 (SCC); *Black v R* (1989) 50 CCC (3d) 1 at p 17; *R v Greig* (1990) 54 CCC (3d) 84 at p 92 (Alb CA); *Evans v R* (1991) 63 CCC (3d) 289 at p 309 (SCC).

52 The reliability factor was not considered in the cases surveyed; see, for example, *Black v R*, *ibid*, where the Supreme Court confined its attention under the third class of factors to the seriousness of the offence. In *R v Duguay* (1989) 46 CCC (3d) 1 at p 36 however L’Heureux-Dubé J (dissenting) thought it was relevant that “the immediate effect of the exclusion on the trial was to withhold from it evidence of great reliability and probative value”. Considering that the Charter infringement was trivial but that the offence was serious her Honour decided that the trial judge

unlikely to be regarded as of sufficient importance to rebut the presumption of inadmissibility.

It remains possible for the *St Lawrence* rule to be applied in cases where real evidence is discovered as a consequence of an involuntary confession but no Charter violation has taken place.<sup>53</sup> There is, however, a degree of willingness on the part of the courts to find a Charter violation in the facts which give rise to the confession being regarded as involuntary at common law.<sup>54</sup> Although involuntary confessions will not, ipso facto, be obtained in violation of the Charter, it appears that there will be few cases where a confession is involuntary but there has been no Charter violation and it is suggested, therefore, that the *St Lawrence* rule is effectively, if not officially, moribund.

## II. NEW ZEALAND

### 1. Introduction

Until very recently, the matter under discussion was not directly in issue in any reported New Zealand case, and judges, perhaps understandably, have been reluctant to express an opinion on it.<sup>55</sup> All that could confidently be said was that the authorities seemed to favour admissibility of the fact discovered as a result of the inadmissible confession,<sup>56</sup> but whether any part of the confession thereby became admissible was in doubt. Two recent developments tend to confirm the view that the *St Lawrence* rule has no place in New Zealand law. First, in *R v Dally*<sup>57</sup> in the most comprehensive discussion of the issue by a New Zealand court to date, Eichelbaum CJ considered and firmly rejected the rule, stating:

I do not see that any good purpose would be served by adopting in this country a principle that where statements in an inadmissible confession are verified by evidence discovered subsequently, evidence may be given not only of the subsequently discovered facts but also of so much of the confession as strictly relates to them.<sup>58</sup>

Second, emerging jurisprudence on the New Zealand Bill of Rights Act 1990 indicates that it has the potential to revolutionise the law relating to admissibility of confessions, and that the reliability of the impugned confession is of little or no consequence in decisions as to its admissibility. Notwithstanding these developments, it seems appropriate to examine the

erred in excluding the evidence.

<sup>53</sup> See, generally, Anthony F Sheppard, *Evidence* (1988), pp 513-514.

<sup>54</sup> See, for example, *R v Woolley* (1988) 40 CCC (3d) 531 where the Ontario Court of Appeal held that a threat to hold the accused in custody until he disclosed where certain keys were located was a violation of section 7 of the Charter guaranteeing the right to "life, liberty and security of the person", but not of ss 11(c) or 13 which were held to apply only to the "testimonial aspect" of the right against self-incrimination. Section 11(c) has been regarded as merely protecting an accused from being compelled to enter a witness box, and no more; see *R v Altseimer* (1982) 1 CCC (3d) 7 at p 12 (Ont CA), discussed by David M Paciocco, *Charter Principles and Proof in Criminal Cases*, (1987), p 489.

<sup>55</sup> In *R v Wilson* [1981] 1 NZLR 316 at p 324 Cooke J discussing the issue by way of obiter dictum referred to this as "a difficult question" and said "we are not to be understood as encouraging the Crown to raise it". See also *R v Postlewaight* (1985) 1 CRNZ 468 at p 473 where Hillyer J expressed a similar view.

<sup>56</sup> *R v Postlewaight* *ibid*, p 473, *R v Dally* [1990] 2 NZLR 184 at p 191; but see *R v Wilson* *ibid*, p 324 where Cooke J seemed to regard this evidence as standing or falling with the part of the confession "confirmed".

<sup>57</sup> *Ibid*

<sup>58</sup> *Ibid*, p 192.



place of reliability in decisions as to the admissibility of confessions, in part to give the *St Lawrence* rule a decent burial but, more importantly, to assess the relative importance that is, or perhaps should be, accorded to this factor. To this end the basis of and rationale for exclusion will be discussed.

## 2. *The basis for exclusion*

### i. *Voluntariness*

It is trite law that no confession is admissible unless the prosecution proves, beyond reasonable doubt, that it was made voluntarily.<sup>59</sup> The rule excludes confessions obtained by violence, oppression or compulsion,<sup>60</sup> as well as those obtained by "fear of prejudice or hope of advantage exercised or held out by a person in authority".<sup>61</sup> The latter aspect is qualified by section 20 of the Evidence Act 1908, a provision which has the effect of avoiding the exclusionary rule in cases of relatively trivial promises, threats or other inducements which would not be likely to cause an innocent person in the position of the accused to confess.<sup>62</sup>

### ii. *Fairness*

New Zealand courts have an overriding discretion to exclude a voluntary confession if the method by which it was obtained was unfair to the accused.<sup>63</sup> There is therefore a clear and important difference in this regard between the common law of Canada, as exemplified by *R v Wray*, and that of New Zealand. The primary, but not exclusive,<sup>64</sup> guides to the meaning of fairness in this context are the Judges' Rules,<sup>65</sup> although it may be that these are now, to some extent, obsolescent<sup>66</sup> in view of the burgeoning jurisprudence under the New Zealand Bill of Rights Act 1990, considered below. The discretion remains exercisable notwithstanding that the circumstances fall within the terms of section 20 of the 1908 Act.<sup>67</sup>

### iii. *The New Zealand Bill of Rights Act 1990*

The Act differs from the Canadian Charter in a number of respects but for present purposes the most important of these is the lack of any equivalent to section 24(2) of the Charter. Remedies for breach of the provisions of the Act were intended to be the responsibility of the courts, unfettered by legislative prescription. The earliest cases dealing with admissibility of confessions

<sup>59</sup> *R v McCuin* [1982] 1 NZLR 13 (CA).

<sup>60</sup> See, for example, *R v Wilson* [1981] 1 NZLR 316.

<sup>61</sup> *Ibrahim v R* [1914] AC 599 at p 609 per Lord Sumner.

<sup>62</sup> This is the test applied by Wilson J in *R v Hammond* [1965] NZLR 257 at p 258 and approved by the Court of Appeal in *R v Fatu* [1989] 3 NZLR 419.

<sup>63</sup> See D L Mathieson, *Cross on Evidence*, 4th NZ ed, p 559. In *R v Dally* [1990] 2 NZLR 184 Eichelbaum CJ preferred the expression "unfairness" to "unfairness to the accused". His Honour also thought that the burden rests on the prosecution to prove, beyond reasonable doubt, that the confession was not unfairly obtained, but there are some dicta of the Court of Appeal contrary to this view - see Mathias [1991] NZLJ 159.

<sup>64</sup> See, for example, *R v Hapeta* (1988) 3 CRNZ 570 and *R v Webster* [1989] 2 NZLR 129 (denial of access to counsel); *R v Tihi* [1990] 1 NZLR 540 (intentional deception by interviewing detective as to the nature of the interview).

<sup>65</sup> The Rules which currently apply in New Zealand are the pre-1964 version - see *Cross on Evidence*, op cit, p 563.

<sup>66</sup> In *R v Crime Appeal 227 and 228/91* (1991) 7 CRNZ 407 (considered below) Cooke P (at p 417) saw the Rules as "largely obsolescent in New Zealand for practical purposes", while Holland J (at p 426) thought there was urgent need for consideration to be given, inter alia, to whether "there is any purpose in retaining, in their present state, the Judges' Rules as indicia of the sort of conduct the Courts will permit when considering the admissibility of confessions".

<sup>67</sup> See *R v Fatu* [1989] 3 NZLR 419, discussed (1990) 14 Crim LJ 113; *R v Cullen* 13 TCL 18/7.

obtained following a breach of the Act treated it as merely fortifying the discretion to exclude unfairly obtained confessions, paying due regard to breach of the fundamental rights laid down in the Act,<sup>68</sup> and to the “wider interests of the administration of justice”.<sup>69</sup> Then in *R v Kirifi*<sup>70</sup> the Court of Appeal was required to consider, for the first time, what remedy was appropriate for a breach of section 23(1)(b) which provides that persons who are arrested or detained under any enactment have the right to consult and instruct a lawyer without delay and to be informed of that right. Cooke P, delivering the judgment of the Court of Appeal, said:

...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.

but later qualified this by saying:

...once a breach of section 23(1)(b) has been established, the trial judge acts rightly in ruling out a consequent admission unless there are circumstances in the particular case satisfying him or her that it is fair and right to allow the admission into evidence.

Up to this point, the difference between this approach and that taken in the earlier cases appeared to be more one of degree than of kind. It seemed that breach of the Act was merely one factor, albeit an important one, in the courts' overall discretion to exclude unfairly obtained confessions. However in what must now be regarded as the leading case on the Act, *R v Crime Appeal 227 and 228/91*, Cooke P, with whom Holland J agreed on this point, laid down a presumption of inadmissibility of any confession obtained as a consequence of a breach of section 23(1)(b), and held that the prosecution bears the onus of satisfying the court that there is good reason for admitting the evidence despite the violation.<sup>71</sup>

A number of questions arise. First, it is difficult to see why the burden of proof should be placed on the prosecution. It is arguably more logical to require the person suggesting that relevant, probative evidence should not be admitted to provide some substantive ground(s) to support his or her argument. In Canada the accused bears the burden of proving, on the balance of probabilities, that admission of the evidence would bring the administration of justice into disrepute.<sup>72</sup> Although the provision of effective relief for violations of the Act clearly requires some expansion of existing remedies, if not development of new ones,<sup>73</sup> it is submitted that, in the absence of any express “remedies” provision such as section 24(2), the legislative intent was that breaches could be accommodated within the existing common law framework,<sup>74</sup> and that the majority approach goes too far in protecting the rights affirmed by the Act. Furthermore, there is no indication given of the appropriate standard of proof required to be met. Second, it is difficult to

68 See, for example, *R v Edwards* [1991] 3 NZLR 463, 469 (obiter dictum of Hillyer J); *R v Butcher and Burgess*, Unrep, HC Auckland T 2/91 (Henry J); *R v Spence*, Unrep, HC Auckland T 97/91 (Barker J).

69 *R v Butcher and Burgess*, *ibid*, pp 6-7.

70 (1991) 7 CRNZ 427.

71 (1991) 7 CRNZ 406, at pp 417, 425.

72 *Supra*, note 49.

73 D M Paciocco, *The New Zealand Bill of Rights Act 1990: Curial Cures for a Debilitated Bill*, [1990] NZ Rec Law Rev, 353 at p 377.

74 The Justice and Law Reform Select Committee on whose Report the Act was based thought that “In the great bulk of situations covered by the Bill, the courts will be able to provide a remedy from their present armoury”; see Paciocco, *ibid*, p 365. Whether presumptive inadmissibility following a breach was within the courts' “present armoury” is, with respect, highly questionable.

ascertain what might amount to a sufficiently "good reason" to satisfy this burden. Although *R v Crime Appeal 227 and 228/91* was a case where part of the impugned confession was "confirmed" by a subsequent discovery of real evidence, there is no indication in the judgments that the reliability of the confirmed part of the confession was a factor favouring admissibility. Cooke P stated, obiter, that:

...there may be circumstances in a particular case where, despite some degree of transgression of the rights, it is fair and right to admit a confession in evidence.<sup>75</sup>

However, little indication of what such circumstances might be was given, beyond a reference to section 5 (the "reasonable limits" provision), a further reference to "trivial or inconsequential breaches of the Act" and a reference to breaches occurring as a result of an emergency situation facing the police.

Cooke P also indicated that a confession may be admissible where it could be shown that the accused would still have confessed even if the Act had been complied with.<sup>76</sup> Neither the burden nor standard of proof of this hypothetical state of affairs is referred to but obviously the former would lie on the prosecution. This dictum suggests a transplantation of the "inevitable legitimate discovery" doctrine discussed above, but in this context it raises much more difficult questions. It is not difficult to conclude that the police, acting in accordance with standard investigatory techniques, would have inevitably discovered certain real evidence, for example weapons buried in a garden or concealed in a ceiling, but not other real evidence, for example clothing and a mask dropped by a roadside, as in *R v Crime Appeal 227 and 228/91*. The matter could be the subject of police evidence as to search procedures and techniques if necessary. To enquire, however, as to whether a suspect would have confessed even if his or her rights had not been violated is a much more difficult task, involving a hypothetical enquiry into the accused's state of mind at the time the confession was made. The prosecution's task of satisfying the court, to whatever standard, that the accused would have confessed in any event is formidable indeed.<sup>77</sup>

Finally, the court was unanimous in its treatment of real evidence discovered following the confession. Applying *Black v R*, it was held that evidence of the finding of items which would inevitably have been discovered by the police was admissible, but evidence of items found only as a result of the inadmissible confession was not. In the present context, this ruling is the strongest indication of the irrelevance of the reliability of that part of the confession confirmed by the subsequent finding in cases involving breaches of the Act. However, presumptive inadmissibility of such evidence goes considerably further than decisions under the Canadian Charter,<sup>78</sup> and is inconsistent with the discretionary approach to evidence illegally obtained.<sup>79</sup> Apart from these considerations, it is highly questionable whether such a dramatic change in the law furthers the intention of Parliament in enacting the Bill of Rights, in the absence of any provision expressly dealing with this issue.<sup>80</sup>

<sup>75</sup> Op cit, note 71, p 417.

<sup>76</sup> Op cit, note 71, pp 416-17.

<sup>77</sup> In fairness, it should be pointed out that a similar enquiry already takes place under s 20 of the Evidence Act 1908 - see note 62 (supra).

<sup>78</sup> See note 45. It remains unclear whether such evidence would be admissible if it would not inevitably have been discovered by the police - see Elman, op cit, note 48.

<sup>79</sup> See the comments of Gault J in *R v Crime Appeal 227 and 228/91*, op cit, p 424; see, for example, *R v Mann* [1991] 1 NZLR 488 (CA).

<sup>80</sup> Bernard Robertson, "Confessions and the Bill of Rights", [1991] NZLJ 398, 399.

### 3. The rationale for exclusion

#### i. Introduction

Hearsay evidence is generally inadmissible. It is often not the best evidence available, and there are dangers of impaired perception, bad memory, ambiguity and insincerity coupled with an inability to test these matters by way of cross-examination.<sup>81</sup> Confessions are admissible as an exception to the rule. Why is this so? In an old case<sup>82</sup> it was said that:

What a party himself admits to be true may reasonably be presumed to be so.

Similarly, in *R v Warwickshall*<sup>83</sup> it was said that:

A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers....

Arguably, the concept of necessity also plays a part in decisions as to the admissibility of confessions i.e. necessity to admit the evidence if it is to be available to the court at all.<sup>84</sup> The modern trend is, of course, to use the power to admit or exclude confessions as a means of ensuring that the police act properly in obtaining what is, for the most part, a particularly damning type of evidence. It remains, therefore, to examine the place of reliability in the rationales advanced for the three bases of exclusion.

#### ii. Voluntariness<sup>85</sup>

Reliability was initially seen as the main, if not the sole, reason for the voluntariness rule.<sup>86</sup> Then, following the establishment in England in the 19th century of an organised police force, the judges became increasingly concerned to ensure that persons were interrogated fairly<sup>87</sup> and the focus of attention moved towards ensuring this.<sup>88</sup>

In modern times the rule has come to conflate two distinct aspects: the rule requiring that confessions obtained by violence, oppression or compulsion be excluded, and that requiring that confessions obtained by "inducements" are inadmissible, unless saved by section 20 of the Evidence Act 1908. However, the broad issue in deciding whether a confession is "voluntary" is whether the will of the person confessing has been overborne by the will of another person.<sup>89</sup> Although this issue ostensibly directs attention to whether the

<sup>81</sup> D L Mathieson, *Cross on Evidence*, op cit, p 450.

<sup>82</sup> *Slatterie v Pooley* (1840) 6 M & W 664.

<sup>83</sup> (1783) 1 Leach 263.

<sup>84</sup> In Preliminary Paper No 15, *Evidence Law: Hearsay*, p 15 the Law Commission identifies necessity and reliability or trustworthiness as being "The two principles which underlie existing exceptions to the hearsay rule".

<sup>85</sup> Evidence Law Reform Committee, Report On Confessions, February 1987, pp 10-23.

<sup>86</sup> See, for example, *R v Warwickshall* (1783) 1 Leach 263. It has been pointed out however that the reliability or unreliability of a statement logically goes to its value or weight rather than its admissibility:- see *Ibrahim v R* [1914] AC 599 at p 610 per Lord Sumner, cited by Gotlieb, op cit, p 224. On the other hand, it has been suggested that a number of notorious instances of false confessions in the 16th and 17th centuries led the judges to invent [sic] the voluntariness rule in the first place:- see Pattenden, (1991) 107 LQR 317, 318.

<sup>87</sup> C B Cato, *The Privilege Against Self-Incrimination and Reform of the Law and Practice of Police Interrogation*, Legal Research Foundation Inc Seminar, November 1985, p 14.

<sup>88</sup> In *R v Ibrahim* [1914] AC 599 at p 611 Lord Sumner said:

"It is not that the law presumes such statements to be untrue but from the danger of receiving such evidence Judges have thought it better to reject it for the due administration of justice".

<sup>89</sup> *R v Nanisani* [1971] NZLR 269 at p 274 per Turner J; *R v Prager* [1972] 1 All ER 1114 at p 1119.

confession can be safely relied on, the trend in New Zealand, as elsewhere,<sup>90</sup> has been to accept three further rationales for the voluntariness rule as guiding principles; deterrence of improper police conduct, the need to achieve a just balance between the rights of the State to bring offenders to justice and the rights of the individual to be treated fairly and according to due process of law, and the privilege against self-incrimination.<sup>91</sup> In cases where a confession has been obtained through violence, oppression or compulsion it seems fair and in accordance with the will of Parliament as expressed in section 20 that it should be inadmissible, notwithstanding the reliability of any "confirmed" part of that confession.<sup>92</sup> It is submitted however that in cases where part or all of a confession is confirmed by a subsequent discovery there is a need for overt recognition that the reliability rationale is subservient to the need to deter misconduct and achieve the "just balance" referred to above. Invocation of the privilege against self-incrimination as the sole justification for inadmissibility, as occurred in *Lam Chi-Ming*, seems unsatisfactory for two reasons. First, there seems to be some doubt as to whether the privilege is appropriately invoked in this context, and as to its importance relative to the other rationales advanced for the exclusionary rule.<sup>93</sup> Second, the scope of the privilege itself is unclear as are the reason(s) for its exaltation in this case. It is submitted that the decision would rest on a more reasoned and rational basis had it been expressly recognised that cases involving confessions obtained by police brutality call for judicial condemnation of these methods even at the expense of excluding reliable evidence. Similar arguments apply where a confession has been obtained through oppression or compulsion or inducements not falling within the terms of section 20. In both of these classes of case, although the undisputed reliability of that part of the confession "confirmed" by a subsequent finding tends to allay fears concerning the potential unreliability of that confession as a whole, the need to deter such conduct by enforcement agencies and to attain a just balance between the rights of the individual and those of the State provide sufficient justification for relegation of the reliability factor and exclusion of the confession. The fundamental flaw in the *St Lawrence* rule is that it has the indirect effect of judicial condonation of these methods.

90 Evidence Law Reform Committee, *op cit*, pp 12-17.

91 *Ibid*, pp 12-13.

92 In *R v Postlewaigh* (1985) 1 CRNZ 468 at p 473 Hillyer J said that:

"...the principle that our police must behave fairly is such an important one, that *even at the expense of excluding a statement that may well be completely true*, it must be upheld." (emphasis added).

It may well be, as Robertson suggests, that exclusion of real evidence (the "fruit of the poisoned tree") discovered as a result of a confession obtained following a breach of the Bill of Rights Act 1990 would be "regarded as a very eccentric way of enforcing standards in nearly all signatory countries of the International Covenant of Civil and Political Rights" (*op cit*, p 399). This remedy however is well entrenched in the common law and has the twin advantages of efficacy and convenience.

93 Cato suggests that the development of the privilege and the development of the exclusionary rules relating to extra-judicial confessions were entirely separate but concedes that the Anglo-American courts have now acknowledged the importance of the privilege and its place in the law of confessions (*op cit*, pp 12, 21). In *R v Sang* [1980] AC 402 at p 436 Lord Diplock thought that the maxim *nemo debet prodere se ipsum* had replaced reliability as the underlying rationale of this branch of the law, but in *Rothman v R* [1981] 1 SCR 640 at p 690 Lamer J denied the contribution of the privilege against self-incrimination as an independent rationale for the confession rule. For a critique of the latter view see David M Pacciocco, *Charter Principles and Proof in Criminal Cases*, Carswell 1987, pp 580-581.

The foregoing discussion assumes a clear distinction between involuntary confessions falling within the terms of section 20 of the 1908 Act and those falling outside it. In practice however there may be some difficulty in deciding this question. Judges are required to put aside any view formed as to the truth or untruth of the confession, and to decide whether an innocent person in the circumstances of the accused would have confessed, notwithstanding the demonstrable truth of the part of that confession “confirmed”. The upshot of maintaining the fiction that the enquiry is purely hypothetical in this type of case may be admission of confessions which would otherwise have failed to satisfy the section 20 test.<sup>94</sup>

### iii Fairness

There is some difficulty involved in identification of both the underlying rationale(s) of the discretion to exclude unfairly obtained confessions, and the factors relevant in exercising the discretion. The tendency in New Zealand, at least in cases other than those involving breaches of the Judges’ Rules, is to avoid any attempt to lay down detailed guidelines for the exercise of the discretion, leaving the matter to be determined on a flexible case-by-case basis. The point has been made in many of the cases that because circumstances vary infinitely and the exercise of the discretion depends on so many variables it is neither possible nor desirable to define the requirements of fairness in a code.<sup>95</sup> Accepting this as a logical approach does not however preclude an attempt to identify the rationale(s) underlying the exclusionary discretion in order to assess the place and weight accorded to the reliability of part or all<sup>96</sup> of a confession “confirmed” by a subsequent finding. Bearing in mind that there is a considerable degree of interrelationship between them, and that the question is one of overall balance with the aim of preventing an abuse of process,<sup>97</sup> the following are suggested as a non-exhaustive list of rationales underlying the discretion:

#### **(a) The public interest in ensuring that a certain standard of conduct is adhered to by enforcement agencies.**

This is a factor which clearly underlies most of the Judges’ Rules and the discretion overall. It has been suggested that:

In exercising the discretion it may be helpful to endeavour to place the conduct in question along a spectrum or continuum, with technical breaches at one end followed by more than technical breaches of a suspect’s rights and of procedural requirements, and then wrongful invocation of obligations to provide evidence, finally reaching serious misconduct.<sup>98</sup>

#### **(b) The protection of legally recognised rights, privileges or freedoms.**

It has been suggested that the rationale of the discretion to exclude is the right to silence,<sup>99</sup> but this, with respect, is too simplistic an explanation. It is

<sup>94</sup> It is noteworthy that very few confessions are excluded as a result of satisfying this test; thus the point raised may not be of much significance. For one example see *R v Sant* [1989] 1 NZLR 502.

<sup>95</sup> See *R v Webster* [1989] 2 NZLR 129 at p 139; *R v Horsfall* [1981] 1 NZLR 116 at p 121; *King v R* [1969] 1 AC 304 at p 319; *R v Murphy* [1965] NILR 138 at p 149.

<sup>96</sup> New Zealand courts may be willing to perform “surgery” to exclude inadmissible parts of a confession and admit others; see, for example, *R v Dally* [1990] 2 NZLR 184 at pp 188 and 193. In the present context therefore, it may be possible to admit only that part of the confession which is confirmed by a subsequent finding, as occurred in *R v Wray*.

<sup>97</sup> *R v Dally* *ibid*, p 192.

<sup>98</sup> Per Eichelbaum CJ in *R v Dally* [1990] 2 NZLR 184 at p 193 acknowledging the assistance of Mathias, [1990] NZLJ 25.

<sup>99</sup> *R v Sang* [1980] AC 402 at p 436 (Lord Diplock).

beyond doubt, however, that the courts do have regard to this factor and that certain "rights", in particular the right of access to a solicitor, may be regarded as of such importance that breach will point strongly towards exclusion of any subsequently obtained confession.<sup>100</sup>

**(c) The public interest in the proper prosecution of crime.**

Recent cases demonstrate a trend towards increasing recognition of the relevance of this factor in the exercise of the discretion.<sup>101</sup> Of the three rationales suggested this last-mentioned alone draws attention to the reliability of the impugned evidence. That there is a public interest in having demonstrably reliable, probative evidence before the court is beyond doubt. It is submitted, therefore, that the "confirmation" by subsequently discovered facts of a confession allegedly unfairly obtained is a factor which should properly be considered as part of the matrix of factual circumstances in exercising the discretion. A mechanical, rule-based approach to this issue would be inimical to the nature of the discretion, but there seems to be no valid reason preventing consideration of the reliability factor when weighing the competing interests involved. Express recognition of the factors involved and their relative importance would ensure that the discretion is overtly exercised in a rational and disciplined way.<sup>102</sup>

**iv. The New Zealand Bill of Rights Act 1990**

As has been seen, the current judicial approach to the issue of evidence obtained following a violation of the Act is that, subject to the exceptions discussed above, the Act is to be given primacy<sup>103</sup> and 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.

The most obvious rationale for this approach is that the Act represents a "...Parliamentary declaration of human rights and individual freedoms, intended partly to affirm New Zealand's commitment to internationally proclaimed standards..."<sup>104</sup> and that exclusion is necessary to ensure that the statutory provisions are not treated as a "dead letter".<sup>105</sup> Essentially, this

<sup>100</sup> See the comments of Bisson J in *R v Webster* [1989] 2 NZLR 129 at p 140. It seems, however, that where other "rights" have been breached the courts may insist on demonstration of some causal connection between the breach and the confession:- see *R v Alexander* [1989] 3 NZLR 395 at p 403 (detention for longer than was reasonably necessary to enable the accused to be brought before a court "not a factor which stimulated her to confess"); *R v Dally*, [1990] 2 NZLR 184 at p 204 (technical breaches of the Judges' Rules but this not a factor in accused's decision to point out the body); *R v Fatu* [1989] 3 NZLR 419 at p 428 (incriminating admissions "not basically the result of cross-examination...the...meeting can ultimately be seen as the root and dominant cause of the limited confession").

<sup>101</sup> *R v Alexander* *ibid*, p 403; *R v Webster* *ibid*, p 140; *R v Dally* *ibid*, p 192. In Australia the "public interest" discretion is separate and distinct from the "fairness" discretion; see *R v Ireland* (1970) 126 CLR 321 and *Bunning v Cross* (1978) 141 CLR 54, discussed by Eichelbaum CJ in *R v Dally*, *ibid*, p 192.

<sup>102</sup> Dr Don Mathias, in "Discretionary Exclusion of Evidence" [1990] NZLJ 25, suggests that this is already so, but notes that the process of analysis of the circumstances connected with the illegality is usually unstated by the Court of Appeal. It is submitted that there is a need, in any case where reliable and probative evidence is excluded, to provide a reasoned justification including identification of policy factors bearing on the decision to exclude, so as to avoid any suggestion that the decision is based on a judge's subjective assessment of "fairness" in the abstract. See further the comments of Sir Robin Cooke, *op cit*, note 10.

<sup>103</sup> *R v Crime Appeal 227 and 228/91*, *op cit*, p 418 (Cooke P).

<sup>104</sup> *Ibid.*, p 415 (Cooke P).

<sup>105</sup> *R v Kirifi*, *op cit*, p 431 (Cooke P). It is apparent that the Bill has been "embraced" rather than

suggests that the Act does more than merely restate existing rights and freedoms, such that consideration of breach as part of an overall discretion to exclude would be inadequate.<sup>106</sup> It has been claimed, however, that the Act merely “affirms” the rights and freedoms contained in it,<sup>107</sup> and that “...there is a logical difficulty in imposing different remedies for the same breaches of the same rights as have long been protected by our law and are merely ‘affirmed’ by the Act ”.<sup>108</sup> With respect, the Act arguably does more than merely affirm existing rights. Although section 2 blandly states that the rights and freedoms contained in the Bill are affirmed, this adds nothing of substance to the Act as a whole and does not assist interpretation of it. The preamble<sup>109</sup> however, refers to the *protection* and *promotion* of human rights and fundamental freedoms, and these words provide some justification for the primacy accorded to the declared rights and freedoms in *R v Kirifi* and *R v Crime Appeal 227 and 228/91*. Furthermore, certain “rights” ostensibly “affirmed” by the Act, for example the right to consult and instruct a lawyer and to be informed of that right, arguably did not exist as substantive “rights” in themselves prior to the Act but were merely factors relevant to the discretion to exclude.<sup>110</sup> It follows that the Act may indeed create “rights” hitherto unrecognised or given limited recognition by the courts, and this provides some justification for the Court of Appeal’s approach to both confessions obtained following a breach of the Act, and evidence discovered as a consequence of such confessions.

Whatever the rationale of the current approach, it is abundantly clear from the approach taken to confessions confirmed in part by a subsequent discovery in *R v Crime Appeal 227 and 228/91* that, at least insofar as deliberate breaches of section 23(1)(b) are concerned,<sup>111</sup> reliability plays little or no part in decisions as to the admissibility of such confessions, and this is consistent with the approach of the Canadian and United States courts. The door has not been completely closed however, and it may well be that greater importance will be attached to the reliability of a “confirmed” confession in some future case involving a trivial or inconsequential breach of the Act, or a breach occurring as a result of an emergency situation facing the police. One of the merits of the alternative approach of treating breach of the Act as merely one factor, albeit an important one, in the discretion to admit or exclude, would be to permit consideration of the reliability factor and enable this to be weighed against the importance of the right breached and the nature of that breach, unfettered by a presumption based solely on the declaration of that right by Parliament. This, it is submitted, would result in more reasoned and rational decisions and foster greater respect for the law.

“embalmed” by the judiciary - see D M Paciocco, *The New Zealand Bill of Rights Act 1990: Curial Cures for a Debilitated Bill*, [1990] NZ Recent Law Review 353 at p 381.

<sup>106</sup> See the comments of Cooke P in *R v Crime Appeal 227 and 228/91*, op cit, p 418.

<sup>107</sup> New Zealand Bill of Rights Act 1990, s 2.

<sup>108</sup> *R v Crime Appeal 227 and 228/91*, op cit, p 424 (Gault J).

<sup>109</sup> Deemed to be part of the Act, intended to assist in explaining the purport and object of the Act; Acts Interpretation Act 1924, section 5(e).

<sup>110</sup> See, for example, *R v Webster* [1989] 2 NZLR 129.

<sup>111</sup> The detective concerned admitted, under cross-examination, intentionally delaying arresting, charging and advising the appellant of his rights under s 23(1)(b) in order to have a greater chance of securing a confession from the appellant.



### III. CONCLUSION

Reliability is generally relevant to weight rather than admissibility but in the area of confessions, as in other areas of the law of evidence,<sup>112</sup> the factor of reliability straddles both. Demonstrable reliability points towards, but cannot be permitted to dictate, admissibility. A rule-based approach cannot be appropriate when the task of the courts is not limited to ensuring that only reliable evidence is admitted but encompasses deterrence of police misconduct and protection of suspects' rights. The *St Lawrence* rule is an anachronism, born of a misconception as to the rationale for the exclusionary rules, which should be consigned to oblivion.

It has been suggested here that in New Zealand there is no need for such a rule in the case of involuntary confessions, but that there can and should be express recognition of the role of reliability and its importance relative to countervailing considerations when exercising the discretion to exclude unfairly obtained confessions. In relation to confessions obtained following a breach of the New Zealand Bill of Rights Act 1990, it has been argued that a more flexible approach would enable a similar weighing of competing considerations, according due weight to the importance of the right(s) breached. The real challenge for the New Zealand courts, however, will be to determine what causal relationship (if any) needs to be shown between the violation and the impugned evidence, what circumstances will serve to rebut the presumption of inadmissibility, and what are to be the metes and bounds of the "fruits of the poisoned tree" doctrine.

<sup>112</sup> See, for example, *R v Turnbull* [1977] QB 224 (evidence of identification); *R v Baker* [1989] 1 NZLR 738 (statements as evidence of the state of mind of an unavailable declarant).