544

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and
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MAPP REVISITED : AN AMERICAN TURN-ABOUT

Consider these facts. An anonymous informant tells a police officer that a number of people are selling large quantities of cocaine. The police investigate. They observe the named persons, some of whom have prior drug trafficking convictions. Although there is no clear evidence corroborating the anonymous tip off, a search warrant is obtained. Large quantities of drugs are discovered. At their trial the accused persons argue that the search was unlawful, because the relevant requirements for a police search had not been met. The court agrees. The ultimate issue before the court then becomes whether the evidence discovered as a result of the illegal search, namely evidence of the drugs found, should be excluded from the trial. If such evidence is excluded it will result in the collapse of the prosecution.

Briefly stated these are the facts of United States v Leon[1], a decision of the Supreme Court of the United States handed down on 5 July 1984. It is not too much to say that Leon is a landmark in American jurisprudence. It marks a turning point in the law relating to unlawfully obtained evidence. Before it, the Supreme Court had generally followed the rule that evidence obtained in violation of the Fourth Amendment, regulating search and seizure, must be excluded from any subsequent trial of the individual whose rights were infringed.[2] But six members of the Court held in Leon that the exclusionary rule should be modified so as not to bar admission of 'evidence obtained in the reasonable good-faith belief that a search or seizure was in accord with the Fourth Amendment'.[3]

In language that is now becoming familiar to students of the Burger Supreme Court, the majority Justices resolved the question of whether an exclusionary sanction was appropriate in the particular case 'by weighing the costs and benefits of preventing the use' of the evidence by the prosecution. In terms of this test the majority concluded that the exclusionary rule could be 'modified somewhat without jeopardising its ability to perform its intended functions'.[4]

THE ISSUE : A COMPETITION OF PUBLIC POLICIES

The basic issue which the United States Supreme Court confronted in Leon, and which any legal system confronts when evidence is illegally obtained, is a conflict of public interests. On the one hand, it is in the public interest that reliable evidence of an accused person's guilt be admitted into the trial and considered by the tribunal of fact. All trials should operate on an accurate assessment of material facts and, in the area of criminal law, criminals should be convicted and crime thereby punished and deterred. This public interest requires that relevant evidence of an accused person's guilt should be admitted into the trial to form the basis for the necessary factual determination and consequent conviction. If the evidence is excluded for reasons not associated with the fact finding process this interest is sacrificed.

On the other hand, there is also a public interest in minimising the extent to which law enforcement agencies of the state, themselves sworn to uphold and defend the law, act outside the scope of their lawful authority. This public interest may be seen from a number of different perspectives:

- Discipline Officer for Illegality. The courts are part of the criminal justice system and it may be argued that they should act to punish or discipline law enforcement officers who break the law. If evidence is obtained illegally, one powerful mechanism of 'discipline' available is the exclusion of the evidence. Such exclusion deprives the officer of the fruits of his unlawful conduct which, if overlooked, may condone the misconduct and even sanction it. Almost certainly the judicial exclusion and the reasons for such exclusion will come to the notice of the officer's superiors and may lead to appropriate discipline.

- Deter Future Illegality. An extension of the previous argument is that improperly obtained evidence can be excluded from trial in order to deter police misconduct generally. The rationale is that potential exclusion of any evidence produced by such means will eliminate the incentive to such conduct. Two distinct types of deterrence additional to the effect of the exclusion on the particular officer who acted improperly may operate:

.. general deterrence -- the effect of that exclusion on other officers;
.. systemic deterrence — the effect on individual officers of an agency's institutional compliance with judicially articulated standards.

. Protection of Individual Rights. The legal system should generally act to protect and vindicate a citizen's rights. In addition, it should vindicate the rights of other citizens by making it clear that infringement of a citizen's rights will not be ignored. It is arguable that a suspect whose rights have been infringed should not thereby be placed at any disadvantage — he should be placed in the same position he would have been in if the official misconduct had not occurred. To achieve this, evidence obtained improperly should be excluded.

. Executive and Judicial Legitimacy. If the courts permit the admission of evidence illegally obtained by an arm of the government, the public will perceive that government, and law enforcement agencies in particular, while purporting to maintain the law, actually claim the right to act without restraint. The government will lose respect and eventually be seen as illegitimate. The legitimacy of the judicial system is also at risk. United States Supreme Court Justice Brandeis, in Olmstead v United States[5], desired to 'preserve the judicial process from contamination by preventing courts from impliedly approving illegal conduct through admission of unlawfully [obtained] evidence'.

A DECADE OF AUSTRALIAN REFORM

Until the 1970's, Australian law, following English precedents, had taken the view that the courts, when deciding whether to admit evidence, should generally disregard illegality or impropriety in the methods used to obtain it. A court had a discretion to exclude such evidence if its admission would operate unfairly against the accused[6] but the general emphasis of the law was on evidentiary reliability.[7] Such an approach had the merit of minimising the complexity of a criminal trial, avoiding collateral issues, and maximising the amount of reliable evidence admitted for the consideration of the tribunal of fact. It reflected a view that the issue of improper conduct should not be ignored but dealt with in some forum other than the trial of a criminal defendant. This division of functions was justified both for efficiency and constitutional reasons. Nonetheless, it resulted sometimes in trial judges ignoring serious infringements of human rights by law enforcement authorities. It was inconsistent in its practice with the historical role of the courts in ensuring that the criminal process is just, to encourage them to disregard impropriety occurring during criminal investigation and before trial.

It ignored the public interests supporting exclusion of the evidence. Further, such an approach ignored the reality that, on occasion, there are no effective alternative methods available to an individual citizen whose rights have been infringed to obtain justice. Subsequent police discipline would be scant satisfaction to the accused convicted and imprisoned on the basis of illegally obtained evidence where, but for this official illegality, no conviction could have been secured.

The solution which has been adopted in Australia is to require the trial judge to balance the various public interests in the circumstances of the particular case. In R v Ireland[8] Chief Justice Barwick asserted that, whenever 'unlawfulness or unfairness appears, the judge has a discretion to reject the evidence' after balancing the 'public need to bring to conviction those who commit criminal offences' against 'the public interest in the protection of the individual from unlawful and unfair treatment'. In 1975, the Australian Law Reform Commission, in its Second (Interim) Report on Criminal Investigation[9] concluded 'that the most appropriate rule for the admissibility of evidence illegally obtained would be one' that such evidence 'should not be admissible in any criminal proceedings for any purpose unless the court decides, in the exercise of its discretion, that the admission of such evidence would specifically and substantially benefit the public interest without unduly derogating from the rights and liberties of any individual'.[10] Factors relevant to the exercise of this discretion were stated to include

(i) the seriousness of any crime being investigated, the urgency or difficulty of detection of it and the urgency of attempting to preserve real evidence of it;

(ii) the accidental or trivial quality of the contravention; and

(iii) the extent to which the illegally obtained evidence could have been lawfully obtained by means of an available common law or statutory procedure.[11]

In 1978, Justices Stephen and Aickin of the High Court, with whom the rest of the High Court were in general agreement, held in Bunning v Cross[12] that a trial judge has a discretion to exclude illegally (or improperly) obtained evidence after '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 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'.[13]

This formulation, perhaps better than that initially proposed by the Commission, well expressed the competing public policies involved in this area. But while the Australian Law Reform Commission had recommended a 'reverse onus exclusionary rule', whereby unlawfully obtained evidence would not be admitted unless the court was satisfied that the balance fell in favour of admission[14], Justices Stephen and Aickin took the view that no rule of inadmissibility existed, so that the burden lay on the party seeking to have the evidence excluded.[15] The Justices also expanded on the list of factors suggested by the Commission as relevant to exercise of the discretion. While not advancing an exclusive list, they noted several relevant considerations:[16]

- consideration of whether the law enforcement authorities consciously appreciated their use of unlawful or improper means to obtain evidence.
- consideration, where the illegality or impropriety in obtaining the evidence was neither deliberate nor reckless (and, in certain exceptional circumstances, even where it was deliberate or reckless), of the cogency of the evidence obtained.
- consideration of the ease with which the law might have been complied with in procuring the evidence in question.
- consideration of the comparative seriousness of the offence charged and of the improper conduct of the law enforcement authorities.
- consideration of the extent to which legislation relative to the evidence procured evinces an intention to restrict the power to procure it.
- consideration of the urgency in obtaining the evidence.
- consideration of the availability of alternative, equally cogent evidence.
- fairness to the accused.

Other factors have been suggested by subsequent State Supreme Court decisions:

- consideration of whether the impropriety has been otherwise dealt with.[17]
- difficulty of detection of the particular crime involved.[18]
- degree of infringement of rights.[19]

Most recently, the High Court of Australia held in Cleland v The Queen[20] that this discretion applies to improperly obtained confessions. In so doing, members of the Court agreed that a primary concern was to encourage observance of the law by law enforcement officers, or at least discourage illegal or improper conduct by them.

However, it is interesting to note that, while Chief Justice Gibbs and Justice Wilson emphasised that the burden lay on the accused to satisfy the court that illegally obtained evidence should be excluded[21], Justices Murphy, Dawson and Deane suggested that illegal custody should generally result in exclusion. Justice Murphy stated that 'where a confession was obtained by unlawful or improper conduct ... the evidence should generally be excluded ... . Evidence obtained by unlawful or improper conduct should be almost automatically excluded on trials of minor offences, but otherwise in trials for the most serious crimes'.[22] Justice Deane noted that the onus lay on the accused to persuade the trial judge to exclude the evidence, but expressed the view that where a confession has been procured while the accused was illegally detained, 'special circumstances, such as the illegality being slight, would commonly need to exist before the balancing of considerations of public policy would fail to favour the exclusion of evidence of the confession'.[23]

The latest published view on this matter offered by the Australian Law Reform Commission was contained in its 1983 Report on Privacy.[24] It retained the reverse onus exclusionary rule, to deal with evidence obtained illegally in breach of the proposed privacy standards. However the rule was reformulated so that the competing public policies are stated in general terms. As reformulated, the rule would provide that illegally obtained evidence was not admissible unless 'the desirability of having evidence relating to the offence before the court substantially outweighs the undesirability of admitting evidence that has been obtained in the manner in which the evidence was obtained'.[25] The Commission is preparing an interim report on the Federal Law of Evidence which will also canvass this issue. Without going into the detail of a report not yet delivered to the Federal Attorney-General it can be said that it is not likely to make any significant changes to the balancing approach enunciated in the Privacy report.

THE AMERICAN 'REVOLUTION'

American law relating to unlawfully obtained evidence, once so apparently absolutist to Australian eyes, seems to be moving in a direction similar to moves in Australia. The precise decision of the Supreme Court in United States v Leon was only that the 'exclusionary rule should be modified so as not to bar the use in the prosecutor's case-in-chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause'.[26] But the impact of the majority's judgment is likely to be much greater. Essentially, they resolved the question of admissibility in the particular case by weighing the costs and benefits of exclusion. In a number of recent cases the Supreme Court has been influenced by economic analysis of due process to express requirements of the Constitution in cost/benefit terms.[27]

On the one hand, the social costs of exclusion were seen to include interference with the criminal justice system's truth finding function and the collateral consequence that some guilty defendants may go free.[28] On the other hand, the majority Justices noted that exclusion may serve the public interest of deterring such illegal conduct and preserving the integrity of the judicial process.[29] They concluded that, where a Fourth Amendment violation has been 'substantial and deliberate', exclusion was appropriate in the 'absence of a more efficacious sanction'.[30] But 'when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on ... guilty defendants [by exclusion of the evidence] offends basic concepts of the criminal justice system'.[31] The Court did however emphasise that the good faith illegal conduct of the officer must have been objectively reasonable. This will require officers to have a reasonable knowledge of what the law prohibits.[32]

This rejection by the Supreme Court of the United States of a strict rule of automatic exclusion of evidence obtained in breach of the constitutional guarantees of the Fourth Amendment of the United States Constitution reflects the view that its benefits in protecting the rights of the citizen and deterring, to some extent, government illegality are outweighed in some cases by its associated costs in political hostility, manifest absurdity and injustice in the particular case and reduced crime control. While a strict exclusionary rule always resolves the public policy conflict in favour of one group of interests, thus taking the problem out of the hands of the individual [unrepresentative, unelected] judge, and thus produces relative certainty and predictability, it thereby lacks flexibility. It makes no allowance for different circumstances and different degrees of illegality. Unconscious, accidental or trivial irregularities are treated in the same manner as deliberate and serious irregularities. Evidence will be excluded even if the errant officer has also been punished in another forum. The court will not be able to take into account the fact that the evidence could not have been obtained at all but for the impropriety or could have been obtained quite readily and with perfect legality but for a momentary lapse.

Admittedly, any approach that is discretionary will tend to rely heavily on the judgment of the individual judge. It also, by definition, lacks certainty of result. It therefore sacrifices predictability to flexibility. Nevertheless, the conflicting concerns in this area, and the wide variety of circumstances, necessitate such an approach. The Law Reform Commission of Canada stated ten years ago that:

> ... there is an undeniable advantage in granting judges discretionary power, since it keeps the courts continually in touch with current social attitudes and may lead to the eventual evolution of the rules as the courts adapt them to changing social realities. It gives to the courts the role of guardians of the public's freedom.[33]

Canada itself, with enactment of the Charter of Rights and Freedoms ('the Charter') on April 17, 1982, is now moving down the path of discretionary exclusion. Sub-section 24(2) of the Charter provides:

> (2) 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.

RESIDUAL ISSUES IN THE DISCRETIONARY APPROACH

Nevertheless, allowing for this general movement in Australia, Canada and the United States towards judicial discretion in the admission of evidence unlawfully obtained, it would be a mistake to think that no problems remain with respect to illegally obtained evidence. The remainder of this paper will consider several difficult issues that must be addressed:

Weighting of Balance. The present Bunning v Cross discretion in Australia is an exclusionary one. The onus is upon the accused to satisfy the trial judge that illegally or improperly obtained evidence should be excluded. But the Australian Law Reform Commission continues to take the view that the onus should be reversed, ie, that the discretion should be inclusionary. The policy considerations supporting non-admission of the evidence suggest that, once the misconduct is established, the burden should rest on the prosecution to persuade the court that the evidence should be admitted. After all, the evidence has been procured in breach of the law or some established standard of conduct. 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 in Australian courts under the Bunning v Cross discretion. It does against the grain of trial judges brought up in the era of Kuruma to exclude probative evidence that is probably reliable and usually highly damaging to the accused. This suggests that the placing of the onus on the accused leans too heavily on the side of crime control considerations, to the extent that unfairly obtained evidence will rarely be rendered inadmissible.

As the Australian Law Reform Commission stated in its Interim Report on Criminal Investigation, 'things will change if the court has to find a positive reason for exercising its discretion in favour of admissibility'.[34] Further, factors relevant to exercise of the discretion include the mental state of the law enforcement officers involved and the urgency under which they acted. It would seem more appropriate that the prosecution have the primary responsibility of showing that the officers acted in good faith, rather than the accused having to show the reverse — the prosecution will have access to the relevant information and witnesses. Similar arguments would support the proposition that reasons for admission should 'substantially' outweigh exclusionary considerations.

Alternatives to Exclusion. The public interests supporting exclusion of illegally or improperly obtained evidence tend to diminish in force if other effective mechanisms are able to deal more directly with the illegality or misconduct. Thus, a trial of an accused person is not always, by any means, the best forum to discipline errant law enforcement officers. It is neither equipped to be, nor intended, as a full inquiry into an officer's conduct. More important, exclusion of the evidence may not penalise the officer in any meaningful way. The deterrence value of evidentiary exclusion also does not seem to compare well with more direct mechanisms. Empirical studies of the deterrent impact of the U.S. exclusionary rule have been inconclusive.[35] It is arguable that the behaviour of law enforcement agencies is little influenced by judicial decisions but conforms rather to the agencies' standards even if the conduct is 'technically' illegal. The conclusion of a recent United States study was that even in situations where the rule deters, it tends to do so in a negative fashion[36] — for example, officers fail to conduct a search or investigation at all for fear it may later lead to the exclusion of evidence and possible acquittal. As well, the exclusionary rule can apply only to a small proportion of cases of official misconduct. As the English Royal Commission on Criminal Procedure, in its 1981 Report, pointed out in terms equally applicable to the Australian scene:

> Only a minority of those who are, for example, stopped and searched by the police are arrested, and a sizeable minority of those whose property is searched are not charged. Of persons arrested a significant proportion is not subsequently prosecuted. The overwhelming majority of those prosecuted plead guilty. And only a proportion of those who contest their cases challenge the legality of the police exercise of their powers. Further, the point at which any such challenge occurs will be remote in time and effect from the incident giving rise to it.

> Accordingly an automatic exclusionary rule can operate to secure the rights only of a very small minority of those against whom a particular power has been exercised and this must cause doubt about its effectiveness as a deterrent of police misconduct.[37]

As a remedy for infringement of human rights, exclusion of evidence obtained is a haphazard approach. The benefit of exclusion may be wholly disproportionate to the wrong suffered. The optimal solution would be one whereby the individual's rights were vindicated without exclusion of the evidence. To the extent that alternative remedies are available and effective, they should be adopted. If they have been, and they constitute a satisfactory vindication of the individual's rights, exclusion would be unnecessary. Similarly, the argument that the public will perceive judicial failure to exclude improperly obtained evidence as indicating that law enforcement agencies are not subject to the law diminishes in force if effective alternative methods are available and used to discipline or control the police. Adoption of the extreme remedy of exclusion, however symbolically satisfying, would seem unnecessary except in cases of serious misconduct since exclusion carries with it the danger that people such as jurors, victims, witnesses and the general public through the media will lose respect for the law and the administration of justice when it appears to defeat a prosecution on 'technical' grounds. It follows, therefore, that every attempt should be made to develop effective remedies and fora of review for law enforcement misconduct and that the rules of evidence in this area should encourage the police themselves to take responsibility for ensuring that individual officers act consistently with legal requirements.

It has been argued that if it can be established that alternative remedies to exclusion are available and are effective (either because they had already satisfied the relevant public interests in the particular case or because they had proved effective in the past at satisfying such interests in similar cases) illegally or improperly obtained evidence should not normally be excluded at all. For example, if the prosecution failed to establish their existence, it has been suggested that the judge could consider exclusion of the evidence. Such an approach would require the trial judge to explicitly examine the question. It would certainly provide an incentive to the government to provide such alternatives, and make them effective. Where the prosecution satisfied the onus, the trial judge would not need to consider any other questions. As a corollary, the police and lawyers would benefit from the certainty that effective alternatives would automatically end the argument that evidence should be excluded in the public interest. This argument assumes, however, that the exclusion, with its disadvantages, is not justified if effective alternatives exist, since the public interests favouring exclusion have been satisfied.

It rejects the argument that importance must nevertheless be attached to the fact that the judicial system would still be tainted by the admission of the improperly obtained reliable evidence however effective were the alternatives available for discipline of errant officials. There may be cases where evidentiary exclusion would be warranted even though satisfactory disciplinary and compensatory procedures were clearly available. This conclusion depends on the scope of the concept of judicial and executive legitimacy. The misconduct may be so serious that the courts should have nothing to do with the evidence despite its probative value and the ready availability of such alternative procedures. The public interest may in some cases warrant the dual deterrent of punishment and exclusion of the evidence. In serious cases, the remedies should be seen as cumulative rather than alternative. Finally, the spectacle of the trial judge examining the collateral issue of available forms of punishment of official illegality in the midst of a busy criminal trial is not one that is instantly attractive to the average Australian judge.

For all this, it seems clear that the provision of alternatives to evidentiary exclusion is a necessary response to the problem of unlawfully obtained evidence and their availability should be considered in the exercise of the judicial discretion. These alternatives would include civil actions, criminal prosecutions, internal and external disciplinary procedures, and, possibly, direct disciplinary action taken by the trial judge. In the Commission's First Report, Complaints Against Police[38] it recommended that the Commonwealth should assume responsibility for tortious actions and ommissions by members of the Federal Police, proposed a draft disciplinary code and recommended the establishment of an independent tribunal to investigate and determine complaints against members of the Federal Police.[39] The Complaints (Australian Federal Police) Act 1981 which came into force on 1 May 1982, provides for:

- establishment of an Internal Investigation Division of police;
- the Commonwealth Ombudsman to be a neutral recipient and, in some cases, investigator of complaints with certain enhanced powers; and
- establishment of a Police Disciplinary Tribunal, presided over by a judge.

The accompanying amendment to the Australian Federal Police Act provided for liability in the Commonwealth for police wrongs in certain circumstances. These reforms have been copied, in substance or in part, in a number of Australian States.

Relevant Factors. What matters should a trial judge be expressly required to consider when balancing the competing public interests? One method of minimising the inherent difficulties in and potential idiosyncrasies of the exercise of discretionary power, and, to a certain extent, of avoiding the danger of too great a disparity between legal decisions, is to indicate precisely the nature of the conflicting interests which should be balanced and to list the factors which should be taken into account in the exercise of the discretion. There is general agreement that factors such as the seriousness of the misconduct, the mental state of the law enforcement officer, and the existence of circumstances that required urgent action should be taken into account. But uncertainty surrounds the relevance of other factors such as the probative value of the evidence improperly obtained, its importance in the trial[40] and the seriousness of the offence with which the accused is charged. An argument against taking these last-mentioned considerations into account is that the law enforcement agencies will modify their behaviour, depending on their presence. Thus, they may theoretically believe that they can get away with murder in a murder investigation. As Justices Stephen and Aickin stated in Bunning v Cross, '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'.[41] The question is whether this danger justifies a balancing test in which some, or all, of the factors supporting admission of the improperly obtained evidence are excluded from consideration by the trial judge. This seems too extreme an approach. One solution would be to exclude them from consideration only where officers have deliberately acted improperly — only then will consideration of these factors affect the misconduct.[42] But the converse view would be that to exclude them at all is inappropriate. The question for the judge is whether the balance of public interest favours admission. He should arguably consider all the factors on both sides of the equation. The officers themselves, while they should avoid improper conduct, will be faced with situations where the legal requirements are vague. It would seem legitimate for them to consider these factors and to have their attention drawn to them in police training. Safeguards might be provided by the uncertainty of any exercise of the discretion, by inclusion as a factor on the other side whether the impropriety was part of a wider pattern of misconduct, and the existence of other places of review.

Ranking of Factors. An issue connected to that of the elucidation of factors relevant to exercise of the discretion is whether some attempt should be made to rank them in order of importance. Although United States law appears to be moving towards something like the Australian position, it could be argued that the result of Leon is simply to introduce an element of discretion where the law enforcement authorities acted in reasonable good faith and to retain a general rule of exclusion in circumstances of intentional or reckless misconduct. It might be possible to structure a public interest discretion in such a way as to make the mental state of the law enforcement officers of central importance. This approach would serve the public interest in deterring such misconduct, since evidentiary exclusion is not likely to deter good faith illegality. But such an approach may also be too simplistic. Many factors are relevant to the balance of public interest. Even a deliberate illegality might not justify exclusion in a situation where the evidence could not have been obtained at all but for the impropriety, or the offending officer has been severely disciplined, or the evidence is crucial to the prosecution of a person charged with a very serious offence. Conversely, exclusion of evidence improperly obtained, even if in good faith, may be justified to encourage a law enforcement agency to educate its officers in legal requirements, or because there seems to be a wider pattern of such misconduct, or because the offence charged is minor. Good faith of officers seems an elusive concept upon which to base such an important discretion. It will be hard to evaluate. It will be difficult to disprove. It is subjective. And it may favour the ignorant and insensitive but well-meaning official who does not bother to familiarise himself with the requirements of the law. The introduction by the United States Supreme Court of the concept of reasonable good faith may not be sufficient to meet these objections.

Confessions. The High Court of Australia has held that the discretion to exclude illegally or improperly obtained evidence extends to evidence of confessions.[43] The Australian Law Reform Commission has always taken the view that the public interest discretion should apply to such evidence. The majority of the High Court further considered that the pre-existing law relating to the admission of confessions remained unaffected. But it may now be time for an attempt at rationalisation. Under existing law, a confession is inadmissible if it is not shown to be 'voluntary'.[44] Sub-categories of that test relate to the effect of 'inducements' and 'oppression'. Even if 'voluntary', a trial judge has a discretion to exclude a confession if, taking into account the circumstances in which it was made, it would be unfair to use it against the accused.[45] There is further general judicial discretion to exclude evidence whose prejudicial effect is likely to be greater than its probative value[46] and this may be used to exclude unsigned records of interview[47] or admissions made by individuals who are mentally underdeveloped or under the effect of drugs.[48]

The general public interest discretion is also applicable to confessions which have been illegally or improperly obtained. Although it is not appropriate in this paper to consider the question of confessions in detail, it may be time to separate clearly the two fundamental issues in this context — evidentiary reliability and public interest concerns. While the latter category covers, as described above, a number of different concerns, this separation may enable rationalisation of the law relating to confessions, with consequent improvements in terms of understanding, certainty and predictability.[49]

An additional problem is the scope of the concept of misconduct. The public interest discretion comes into operation whenever evidence is illegally or improperly obtained. Clearly, it is desirable to spell out with as much precision as possible what law enforcement officers should and should not do in performing their functions. That was one of the primary purposes of the Criminal Investigation Bill proposed by the Law Reform Commission in its report on Criminal Investigation. But there comes a point where particular methods used to obtain evidence, while not always acceptable in every circumstance, should not be defined as illegal. This is particularly true in the interrogation context. Intensive interrogation for several hours in an inhospitable and uncomfortable environment cannot be generally prohibited. However, there should be an opportunity for a court to find that a confession extracted in such circumstances should, in the particular facts of the case, be excluded on public interest grounds. Some attempt should be made to define as clearly as possible situations in which an exercise of the discretion may be considered.

Fruit of Confession. Yet another problem with improperly obtained confessional evidence, although not exclusive to it, concerns evidence discovered as a result of the confession. The traditional Anglo-Australian position has been that such evidence is admissible.[50] By contrast, under the American law's doctrine of the 'fruit of the poisoned tree', the exclusionary rule applied not only to the illegally obtained evidence itself, but also to other incriminating evidence derived from that primary evidence.[51] The basic justification for this doctrine was said to be the public interest in deterring law enforcement authorities from violation of constitutional and statutory protections. Interestingly enough, the Supreme Court of the United States has only recently also withdrawn from this strict rule. In Nix v Williams[52], decided on 11 June 1984, the Court held that evidence pertaining to the discovery of a body was properly admitted, notwithstanding the fact that the confession which led to it was obtained in breach of the Sixth Amendment, because it would inevitably have been discovered even if no violation of any constitutional provision had taken place. The High Court of Australia has not decided whether the public interest discretion should extend to such consequentially discovered evidence.

The Australian Law Reform Commission proposed in its report on Criminal Investigation that it should[53], and it may be that American law is moving closer to that position. The policy arguments which support discretionary exclusion of a confession obtained improperly equally support discretionary exclusion of consequentially discovered evidence. Clearly, a relevant consideration in balancing the competing public interests would be evidence that the 'fruit' would ultimately have been discovered or obtained without any illegality or impropriety.

Appellate Review. At present appeal courts in Australia accept limitations on variation of a trial judge's exercise of the Bunning v Cross discretion. The question on appeal is whether the discretion was reasonably exercised, taking into account all relevant factors and ignoring irrelevant ones.[54] The appeal court does not reconsider the question and exercise the discretion itself. This is in contrast to rules of admissibility, which are considered afresh. This judicial restraint has been justified many times. It is said to derive from a number of factors:

- the trial judge is usually said to be in a better position to decide how a discretion should be exercised because he sees and hears the witnesses and follows all aspects of the trial;
- equally reasonable men may hold differing views on the exercise of such a discretion; and
- there is a danger of large numbers of appeals if full review of discretion is permitted, with conseqential uncertainty and delay in criminal justice.

An issue that needs to be considered is whether the present rule is appropriate where a discretion involves consideration of matters of public interest, upon which the general guidance of appeal courts may be useful in diminishing judicial idiosyncrasy and in identifying and ranking competing aspects of the complex public policies involved.

CONCLUSIONS

This paper has not attempted to deal exhaustively with the subject of illegally obtained evidence. Many of issues remain to be addressed. They include the extent to which rules for the exclusion of unlawfully obtained evidence should apply in civil as well as criminal trials. Is the risk to liberty and reputation so special in the criminal trial that different and higher protections are needed? Another unexplored issue is raised by recent events in Australia.

If a situation is reached where the Prime Minister, the Federal Attorney-General, the State Shadow Attorney-General, Judges and numerous other officials allege illegal interception of their telephones, is society simply to shrug this off? If the evidence resulting from such interception is readily admitted in courts, Royal Commissions or other inquiries, will this fact — widely reported in the media — erode general public confidence in the important value of the privacy of telecommunications? In short, are there sometimes occasions or special circumstances where courts and tribunals must vigorously enforce the law and insist upon the exclusion of evidence in order to uphold perceived social values even more important than the elucidation of significant facts?

Enough has been said to show that what is at stake here is the balance that results from the competition between public policies. It is interesting to observe the extent to which recent United States, Canadian and Australian authorities seem to be moving towards a generally similar result. This result avoids the previous United States tendency absolutely to exclude unlawfully obtained evidence, in the name of keeping pure the temples of justice and discouraging illegality on the part of officials of the state whose very duty it is to uphold the state's laws. On the other hand, it also avoids the apathy and apparent indifference of the old English rule inherited in Australia which, whilst asserting a residual right to exclude evidence, rarely did anything to enforce that right, out of deference to the overwhelming attractiveness of probative and relevant evidence.

The result of the present approaches in the three English-speaking federations mentioned is that a judicial discretion must be relied upon to strike the balance. Judges (whether in the United States, Canada or Australia) brought up in old ways will need to be nurtured to an understanding of the competing public policies that are at stake here. That is why law reforming bodies may do a public service by identifying more clearly the judicial checklist. It is why legislatures may do a service by enacting such a checklist for all to see. It is why appeal courts will perform their role in scrutinising more closely the exercise of the discretion committed to trial judges and magistrates in order to ensure the reduction of idiosyncrasy and the maximisation of the consistent application of the declared public policy.

FOOTNOTES

* Chairman of the Australian Law Reform Commission. Judge of the Federal Court of Australia. The views expressed are personal views only.

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1. 52 US Law Week 5155 (1984).

2. Weeks v United States 232 US 383 (1914); Mapp v Ohio 367 US 643 (1961) The Supreme Court has, on some previous occasions, however, found it necessary to withdraw to a limited extent from an absolute exclusionary rule : Brown v US 411 US 223 (1973) (limited standing to complain); Wong Sun v US 371 US 471 (1963) (attenuation of taint); Walder v US 347 US 62 (1954) (admissible re credibility).

3. Per White J at 5158, delivering the opinion of the majority, quoting from his judgment in Illinois v Gates (1983) unreported.

4. At 5157.

5. 277 US 438, 484 (1928).

6. Kuruma v The Queen [1955] AC 197; Wendo v The Queen (1963) 109 CLR 559.

7. This point has been made clear by the decision of the House of Lords in R v Sang [1979] 2 All ER 1222.

8. (1970) 126 CLR 321.

9. Australian Law Reform Commission, Interim Report No 2, Criminal Investigation (AGPS, Canberra, 1975).

10. id, para 298. The burden of satisfying the court that any illegally obtained evidence should be admitted would rest on the party seeking to have it admitted, ie normally the prosecution.

11. Ibid.

12. (1978) 141 CLR 54.

13. id, 74.

14. See above.

15. But note that Murphy J stated at 84 that 'when a person is unlawfully required to incriminate himself, the evidence should be rejected in other than exceptional cases'.

16. id, 78—80.

17. French v Scarman (1979) 20 SASR 333, 341 — absence of statutory sanction made the South Australian Supreme Court more willing to exercise its discretion.

18. R v Warneminde [1978] Qd R 371 where evidence of drug trafficking obtained by police entrapment was admitted.

19. R v Byczko (1982) 7 A Crim R 263, 275 (SA CCA).

20. (1982) 57 ALJR 15.

21. id, 18.

22. id, 22.

23. id, 23, 26. See also Justice Dawson at 30.

24. Australian Law Reform Commission, Report No 22, Privacy (AGPS, Canberra, 1983).

25. id, para 1170.

26. 52 Law Week 5155 (1984).

27. Cf Mathews v Eldridge 424 US 319 (1976). See HP Green, 'Cost-Risk-Benefit Assessment and the Law : Introduction and Perspective' 45 G Washington UL Rev 901, 910 (1977).

28. id, 5157.

29. The majority took the view that the latter issue is essentially the same as the former -- exclusion which has no deterrent effect is unlikely to encourage illegal conduct or damage the integrity of the judicial process. (id, 5161, fn 22).

30. id, 5158.

31. ibid.

32. id, 5161.

33. Law Reform Commission of Canada, Study Paper No 5 Compellability of the Accused and the Admissibility of his Statements (Ottawa, 1973) 27.

34. ALRC 2, para 298.

35. BC Canon, 'Ideology and Reality in the Debate over the Exclusionary Rule: A Conservative Argument for its Retention' 23 S Tex LJ 559, 572 (1982).

36. J Hirschel, Fourth Amendment Rights (New York, 1979) 99—100.

37. Royal Commission on Criminal Procedure, Report, Cmnd 8092 (HMSO, London, 1981) para 4.125.

38. Australian Law Reform Commission, Report No 1, Complaints against Police (AGPS, Canberra, 1975).

39. id, para 264—7.

40. ie the extent to which other equally cogent evidence is available.

41. (1978) 141 CLR 54, 79.

42. ibid.

43. Cleland v The Queen (1982) 57 ALJR 15.

44. McDermott v The King (1948) 76 CLR 501; R v Lee (1950) 82 CLR 133; Cleland v The Queen (1982) 57 ALJR 15.

45. R v Lee (1950) 82 CLR 133, 154.

46. Cleland v The Queen (1982) 57 ALJR 15, 29.

47. Driscoll v The Queen (1977) 137 CLR 517.

48. R v Buchanan [1966] VR 9, 14—15.

49. See Australian Law Reform Commission, Evidence Reference, Research Paper No 15, Admissions (S Odgers).

50. R v Warrickshall (1783) 1 Leach 263; 168 ER 234; R v Beere [1965] Qd R 370, 372.

51. Silverthorne Lumber Co v United States 251 US 385 (1920); Wong Sun v United States 371 US 471 (1963).

52. 52 US Law Week 4732 (1984).

53. ALRC 2, para 298.

54. House v The King (1936) 55 CLR 499, 504—5; Rodgers v Rodgers (1964) 114 CLR 608, 619—20. See also R Pattenden, The Judge, Discretion and the Criminal Trial (Oxford, 1982) 33—4.