

# Improperly obtained evidence

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## Synopsis

To assess the appropriateness of exclusion of improperly obtained evidence it is necessary to place both the impropriety and the public interest in admitting the evidence in the context of decided cases. A rational organisation of precedents is offered here in the form of diagrammatic representation of the weighing exercise that is required by s 30 Evidence Act 2006. The analysis provides reasons for criticising some decisions, and it should assist in predicting results and preparing arguments.

## Introduction: the acceptance of a discretionary approach

Section 30 of the Evidence Act 2006 enacts what has been known at common law as the discretion in *R v Shaheed*.<sup>1</sup> That common law discretion replaced a rule that had been introduced shortly after the New Zealand Bill of Rights Act 1990 came into force. The rule, known as the prima facie exclusion rule, was designed to give appropriate recognition to the status of the rights contained in the Bill. Once the fact of a breach of a right was established, the rule required exclusion of evidence that had been obtained through that breach, unless the prosecution could convince the court that there were exceptional circumstances justifying admission of the evidence.

A discretion is much more interesting than a rule. It presents a challenge to devise a method of analysing how it works in practice, and of identifying when it has been exercised wrongly. There is a risk that my hope of demonstrating that such analysis is possible will cause this paper to be overly optimistic about the utility of the method set out here. During the life of the exclusionary rule, most commentators viewed it favourably. However, I have always supported the common law discretion, rather than the exclusionary rule, to determine the admissibility of wrongfully obtained evidence.<sup>2</sup> It

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<sup>1</sup> [2002] 2 NZLR 377, (2002) 19 CRNZ 165 (CA). The Act does not describe the admissibility decision as discretionary, but s 30(2)(b) refers to a “balancing process” and s 30(4) describes this as a determination. Accordingly, I use the word discretion in that sense, explained in more detail below. The decision method at common law as it culminated in *Shaheed* is described as the exercise of a discretion, eg in *R v Murphey* (2003) 20 CRNZ 278 (CA), and in the currently leading interpretation of *Shaheed*: *R v Williams* [2007] 3 NZLR 207, (2007) 23 CRNZ 1 (CA) at para 150 per William Young P and Glazebrook J, and at para 292 per Hammond J.

<sup>2</sup> Before the Bill of Rights was enacted, the common law was developing the jurisdiction to prevent an abuse of process, and this development continues. With apologies for the self-citation, my discussion of the exclusion of wrongfully obtained evidence pursuant to this jurisdiction prior to the Bill of Rights, is in “Discretionary Exclusion of Evidence” [1990] NZLJ 25. After the enactment of the Bill of Rights and the formulation of the prima facie exclusion rule, I criticised that rule in a series of articles in the 1990s, the last being “Evaluating rights” [1998] NZLJ 105.

will come as no surprise, in the light of my long held views on this subject, that I support the enactment of the *Shaheed* balancing method.

With the abolition of the prima facie exclusion rule, some commentators, no doubt echoing the views of many practitioners at the defence bar, thought that the wrong step had been taken. They felt that there was now too much uncertainty and that there would be a lack of consistency in rulings on admissibility. It is true that the *Shaheed* discretion had not always been applied correctly, and that even the Court of Appeal was not faithfully adhering to the requirements of that case.<sup>3</sup>

There was some hope that there would be a return to the prima facie exclusion rule. One academic writer continued to refer to the decision on admissibility as a rule, even after *Shaheed*. That description could obscure the difference between rules and discretions. A rule operates in an appropriate factual environment, here, where evidence has been obtained wrongfully. In contrast, discretion operates not on facts, but on values that are raised by the facts, and it works by requiring a balancing of those values. For example, the wrongful obtaining of evidence, say through an unreasonable search, raises values on each side: the right of every citizen not to be subjected to unreasonable search, and the right of every citizen to have officials obey the law, as against the right of every citizen to have those suspected of crime put on trial. Notice, incidentally, that these rights are those of every citizen. Putting them this way prevents the fallacy of saying that the accused's rights are less important than other people's because the accused was committing an offence. In some cases the offending that was detected will be so serious that the value of putting the suspect on trial outweighs the value of the privacy interest that everyone enjoys. In other cases the reverse will be true. The critical judgment required of the court is whether exclusion of the evidence would be a proportionate response to the wrongful obtaining of the evidence.

### **The enactment of the balancing exercise**

Section 30 of the Evidence Act 2006 is as follows:

#### **30 Improperly obtained evidence**

- (1) This section applies to a criminal proceeding in which the prosecution offers or proposes to offer evidence if---
  - (a) the defendant against whom the evidence is offered raises, on the basis of an evidential foundation, the issue of whether the evidence was improperly obtained and informs the prosecution of the grounds for raising the issue; or
  - (b) the Judge raises the issue of whether the evidence was improperly obtained and informs the prosecution of the grounds for raising the issue.
- (2) The Judge must---
  - (a) find, on the balance of probabilities, whether or not the evidence was improperly obtained; and
  - (b) if the Judge finds that the evidence has been improperly obtained, determine whether or not the exclusion of the evidence is proportionate to the

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<sup>3</sup> In "*Shaheed* balancing: three propositions" [2004] NZLJ 475 I examined some common errors.

impropriety by means of a balancing process that gives appropriate weight to the impropriety but also takes proper account of the need for an effective and credible system of justice.

- (3) For the purposes of subsection (2), the court may, among any other matters, have regard to the following:
  - (a) the importance of any right breached by the impropriety and the seriousness of the intrusion on it;
  - (b) the nature of the impropriety, in particular, whether it was deliberate, reckless, or done in bad faith;
  - (c) the nature and quality of the improperly obtained evidence;
  - (d) the seriousness of the offence with which the defendant is charged;
  - (e) whether there were any other investigatory techniques not involving any breach of the rights that were known to be available but were not used;
  - (f) whether there are alternative remedies to exclusion of the evidence which can adequately provide redress to the defendant;
  - (g) whether the impropriety was necessary to avoid apprehended physical danger to the police or others;
  - (h) whether there was any urgency in obtaining the improperly obtained evidence.
- (4) The Judge must exclude any improperly obtained evidence if, in accordance with subsection (2), the Judge determines that its exclusion is proportionate to the impropriety.
- (5) For the purposes of this section, evidence is improperly obtained if it is obtained--
  - (a) in consequence of a breach of any enactment or rule of law by a person to whom section 3 of the New Zealand Bill of Rights Act 1990 applies; or
  - (b) in consequence of a statement made by a defendant that is or would be inadmissible if it were offered in evidence by the prosecution; or
  - (c) unfairly.
- (6) Without limiting subsection 5(c), in deciding whether a statement obtained by a member of the police has been obtained unfairly for the purposes of that provision, the Judge must take into account guidelines set out in practice notes on that subject issued by the Chief Justice.

### **Application of the weighing exercise**

The first point to note is that the proportionality determination in s 30(2)(b) covers more than merely breaches of the Bill of Rights.<sup>4</sup> This is in keeping with its common law

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<sup>4</sup> Subsection (5). In *R v Bain* [2008] NZCA 585 the appellant argued that a statement by the defendant in the form of evidence at an earlier trial could be excluded under this section if the decision to give evidence had been influenced by the course the trial had taken and which had subsequently been held to have been unfair. This argument was rejected on the facts, and the Court observed at para 44: "Section 30 of 2006 Act is addressed to the admission of improperly obtained evidence. It was plainly drafted with a primary focus on unfair police interviews and unreasonable search and seizure and is not easily applicable to evidence given voluntarily at a properly conducted criminal trial."

origins as a manifestation of the prevention of abuse of process.<sup>5</sup> Consistent with this is the power of the judge to raise the issue on his or her own initiative: s 30(1)(b). Next, several of the expressions in this section are lifted from the judgments in *Shaheed*, and were not in the Law Commission's Draft Evidence Code.<sup>6</sup> The criterion for the decision on admissibility, expressed partly in s 30(2)(b) as "the need for an effective and credible system of justice", and partly in s 30(4) as whether "exclusion is proportionate to the impropriety", echoes the language of *Shaheed*.<sup>7</sup> The factors listed in subsection (3) also reflect phrases from *Shaheed*.<sup>8</sup> There is some difference, however, in the reference to possible alternative remedies, other than exclusion of the wrongfully obtained evidence: (3)(f); in *Shaheed*, alternative remedies were not thought appropriate, at least where a conviction ought to lead to a sentence of imprisonment.<sup>9</sup>

### **Role of the common law**

Section 30 does not say anything about the comparative weight to be given to the various factors relevant to the balancing exercise, so that is a matter to be determined in decisions interpreting the Act. The common law as it has been developed in applications of *Shaheed* should remain relevant subject to such interpretation.<sup>10</sup> It will be seen that the common law prior to the introduction of the prima facie exclusion rule could have similar relevance.

### **Standards of proof or persuasion**

Section 30(2)(a) applies the "balance of probabilities" to the finding of whether or not the evidence was improperly obtained. This is the threshold for the activation of the discretion. As such, it has a position of importance, as a reflection of the sensitivity of the courts to official impropriety. The Privy Council has taken a more rigorous approach, at least as far as breaches of a Bill of Rights are concerned: *Mohammed v The State*,<sup>11</sup> this is that, once the issue is raised, the prosecution has to prove beyond reasonable doubt that there had been no breach. Is this difference in standards likely to be significant in this context? In *Sharma v DPP and others (Trinidad and Tobago)*<sup>12</sup> Lords Bingham and Walker cited with approval an English Court of Appeal case, *R(N) v Mental Health Review Tribunal (Northern Region)*:<sup>13</sup>

"... the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more

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<sup>5</sup> I discuss this in "The Duty to Prevent an Abuse of Process by Staying Criminal Proceedings" in *Essays on Criminal Law – a Tribute to Professor Gerald Orchard* (2004).

<sup>6</sup> NZLC – R55, vol 2, pp 84-87.

<sup>7</sup> [2002] 2 NZLR 377, (2002) 19 CRNZ 165 (CA) at paras 26, 140, 156.

<sup>8</sup> Ibid, paras 147 to 152.

<sup>9</sup> Ibid, para 155.

<sup>10</sup> *R v Leonard* [2007] NZCA 452 at para 77-78, quoted in *Adams on Criminal Law – Evidence* at EA30.01.

<sup>11</sup> [1999] 2 AC 111, 123-124.

<sup>12</sup> [2006] UKPC 57 (30 November 2006), para 14.

<sup>13</sup> [2005] EWCA Civ 1605, [2006] QB 468, para 62.

serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.”

This could suggest in the present context, that where there is a risk that evidence had been obtained by serious official impropriety, the defence should be able to establish that impropriety by evidence of a lesser degree of cogency than might be required if the alleged impropriety was less serious. Conversely, the prosecution should be required to adduce particularly cogent evidence to establish absence of impropriety. But this is not beyond dispute. It is also arguable that allegations of serious impropriety should be backed by evidence that is more cogent than would be necessary to support a lesser allegation. The consequences of the allegation could be seen as the breach of rights, or as the potential exclusion of the impugned evidence. Linking cogency to consequences is potentially ambiguous.

The Supreme Court has held that the balance of probabilities is a fixed standard, although where the consequences of a decision are serious a court will be particularly careful in assessing whether the standard has been met: *Z v Dental Complaints Assessment Committee*.<sup>14</sup> In that case, which concerned professional disciplinary proceedings, there was no ambiguity in what were the relevant consequences. The dissent of Elias CJ, denying any difference between a flexible and an inflexible approach to the standard of proof, has some support in the House of Lords, in Strasbourg jurisprudence, and in Canada.<sup>15</sup>

### **Onus of proof or persuasion**

A related matter is which side bears the burden of proving, on the balance of probabilities, the issue of impropriety. Section 30(2)(a) does not clarify this, as it simply uses the expression “whether or not”. One answer to this problem emerges from the need to avoid the triggering provision in s 30(1)(a) from being redundant. If the issue is triggered by the defence pointing to “an evidential foundation”, it could be said that that requirement would be otiose if the defence also had to establish impropriety on the balance of probabilities. So, on this view, the preferable interpretation of s 30(2)(a) would be that, once the evidential foundation for the raising of the issue is established, the prosecution should have to satisfy the judge, on the balance of probabilities, that the evidence was not improperly obtained. The difficulty with this view, however, is that if the prosecution did not meet its burden, the judge would be left with neither side having established anything to the standard of the balance of probabilities, yet s 30(2)(a) requires a decision. In reality this is unlikely to be problematic, because each side will inevitably endeavour to establish its case to the required standard. Since the balancing process is only required, pursuant to s 30(2)(b), when the judge is satisfied that the evidence was improperly obtained, the defendant will have to persuade the judge to that effect. It

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<sup>14</sup> [2008] NZSC 55.

<sup>15</sup> *In re Doherty* [2008] UKHL 33; *Saadi v Italy* [2008] ECHR 179; *FH v McDougall* [2008] SCC 53.

seems, therefore, that the defendant has to raise the issue, and also establish impropriety on the balance of probabilities.<sup>16</sup>

### **Difficulties at common law**

The common law discretion, formulated in *Shaheed*, to exclude improperly obtained evidence, especially where the impropriety involves a breach of the New Zealand Bill of Rights Act 1990, has been criticised as being unpredictable. Whereas the determination of facts is based on assessment of evidence, and therefore is – comparatively – predictable, the application of judgment involves assessing the appropriateness of a given result, and is therefore guided by the ends at stake.<sup>17</sup> It would be absurd to claim that such evaluation can be reduced to narrow formulae akin to rules. Yet, at the same time, judgment must be rational and not arbitrary. Some predictability is essential. The use of the metaphor of a spectrum of degrees of seriousness of official misconduct, against which a balance point between admission and exclusion of the evidence moves, is an effort to reflect the absence of arbitrariness in this exercise of judgment. The model could also be presented pictorially, but again, without claiming an inappropriate rigidity for the exercise.

### **Pictorial representation of the weighing exercise**

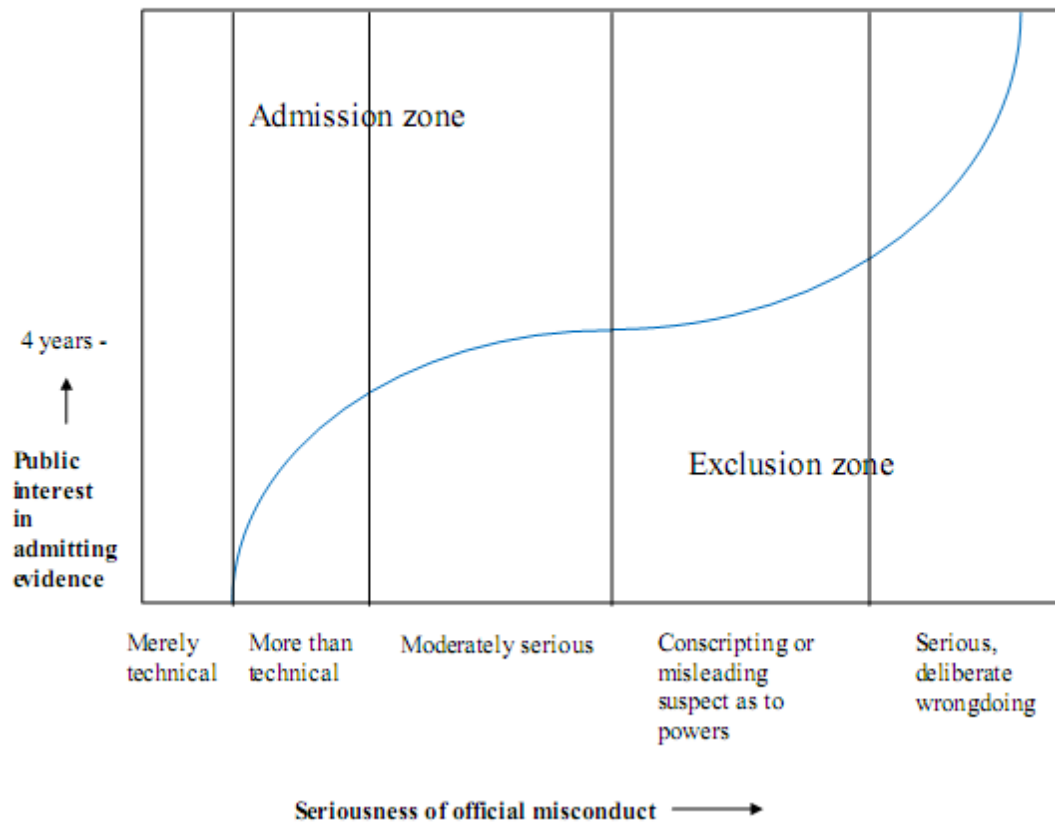
Here, in [figure 1](#), is a way of doing this.

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<sup>16</sup> There is nothing unusual in one party having the evidential burden of raising an issue, and the legal burden, as Professor Rosemary Pattenden points out in “The Proof Rules of Pre-Verdict Judicial Fact-Finding in Criminal Trials by Jury” LQR 2009, 125 (Jan) 79, 82. Of course there are statutory exceptions, eg ss 28, 29. Evidence Act 2006, as Professor Pattenden recognises.

<sup>17</sup> In *Shaheed* [2002] 2 NZLR 377, (2002) 19 CRNZ 165 (CA) at para 19, Elias CJ, dissenting, referred to ends-justified reasoning in criminal law as a pernicious spectre.

Fig 1: The discretion to exclude improperly obtained evidence: the field of balance points



The border of the diagram is a rectangle, enclosing a field of balance points. These may be imagined as all the possible results of the weighing exercise. The vertical lines inside the boundary are merely guides to indicate the various degrees of impropriety, and they should not be thought of as marking sharp divisions. The curve divides the field of balance points into two zones: where the evidence is admitted, and where it is excluded. On the curve the balance is equally poised. The shape of the curve will be determined by the results in particular cases: the curve in the diagram is probably a bit too flat in the middle, but experience should reveal a division between these zones which is something of that sort of shape. Moving from left to right across the diagram takes us from the less serious sort of official misconduct to the most serious. The lower margin of the rectangle, which may be likened to the x axis of a graph, indicates the “weight to be given to the impropriety” mentioned in s 30(2)(b). Broadly, moving across the diagram from left to right, the exclusion zone increases in area. This reflects the observation in *Williams*<sup>18</sup> that “[t]he more fundamental the right and the more serious the breach, the less likely it is that the balancing test will result in the evidence being admitted.”

<sup>18</sup> [2007] NZCA 52; [2007] 3 NZLR 207; (2007) 23 CRNZ 1 (CA) at para 106 per William Young P and Glazebrook J. They added at para 109 that the nature of the right is part of the assessment of the seriousness of the breach.



Towards the far left, where misconduct is merely technical, and therefore is excused, the exclusion zone has ended. The evidence so obtained is admitted - or more accurately, not excluded on the grounds of official impropriety of the kinds considered here - no matter how minor the offence.

I should emphasise that in setting out this explanation I may give the wrong impression that the curve comes first, then the cases that have already been decided are made to fit it: that of course would be absurd. The model requires there to be a boundary between the admission and the exclusion zones, and the shape of the boundary becomes apparent as cases are decided. Precedent requires earlier evaluations of the competing interests to be respected and the shape of the curve becomes clearer as subsequent decisions acknowledge that.

The public interest in admitting the evidence is, I will suggest, equivalent to the seriousness of the relevant offence. This is indicated by the scale on the left side of the rectangle, which is akin to the y axis of a graph. This gravity is measured by the starting point<sup>19</sup> appropriate to the circumstances of a given case. The four year point is referred to in *Williams*<sup>20</sup> as an indication of serious offending. The vertical axis follows *Williams* by using the seriousness of the offence as a measure of the public interest in admitting the prosecution evidence. This axis reflects “the need for an effective and credible system of justice” mentioned in s 30(2)(b). Two considerations may reduce the level of public interest in admitting the evidence, as I will discuss later: lack of centrality of the challenged evidence, and the availability of a remedy for the impropriety other than exclusion.

The division of the horizontal axis into zones<sup>21</sup> is comparable to the approach referred to in *Williams* at para 133:

“It might be helpful to consider each step against a scale that ranges from extremely serious through very serious, serious, moderately serious, moderate to minor. For example, there might be a very serious illegality but it might be reduced to serious because the search was of open fields. It might be further reduced to moderately serious because it was only remotely causative of the obtaining of the evidence and reduced still further to moderate because the particular accused had a minimal connection to the property at issue. We are not, however, intending to suggest that the approach is linear or that the scale can be anything other than a rough tool. The exercise in assessing seriousness is evaluative and the level of seriousness must depend on the particular combination of features in the specific case.”

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<sup>19</sup> The starting point is the sentence appropriate when aggravating and mitigating circumstances relating to the offending are taken into account, but excluding aggravating and mitigating features personal to the offender: *R v Taueki* [2005] 3 NZLR 372 at para 8.

<sup>20</sup> [2007] NZCA 52; [2007] 3 NZLR 207; (2007) 23 CRNZ 1 (CA).

<sup>21</sup> This naming of the colours of the spectrum of impropriety is from my analysis of the common law in “Discretionary Exclusion of Evidence” [1990] NZLJ 25.



Why does the line curve? The left part of the curve represents an apparently greater tendency to exclude than to admit evidence in relation to less serious offending. This, I suggest, reflects the need to recognise the significance of a breach of a right.<sup>22</sup> Similarly, for more serious offending the right side of the curve makes the admission zone greater than the exclusion zone to reflect a tendency to favour admission of evidence where the sentence starting point is over four years.<sup>23</sup>

The upper end of the curve does not meet the right-hand boundary of the diagram. In cases of extreme misconduct exclusion of evidence may be replaced by an order staying the proceedings, regardless of the seriousness of the alleged offending; exclusion of the evidence does cover the entire range of degrees of seriousness of official misconduct, but there is also room for the alternative remedy of the stay.<sup>24</sup>

It is possible to place in this diagram the names of cases in their appropriate positions reflecting the degree of official misconduct involved, and whether the challenged evidence was excluded. For cases involving the wrongful exercise of powers of search the following distribution of cases occurs in the exclusion zone: [Fig 2](#).

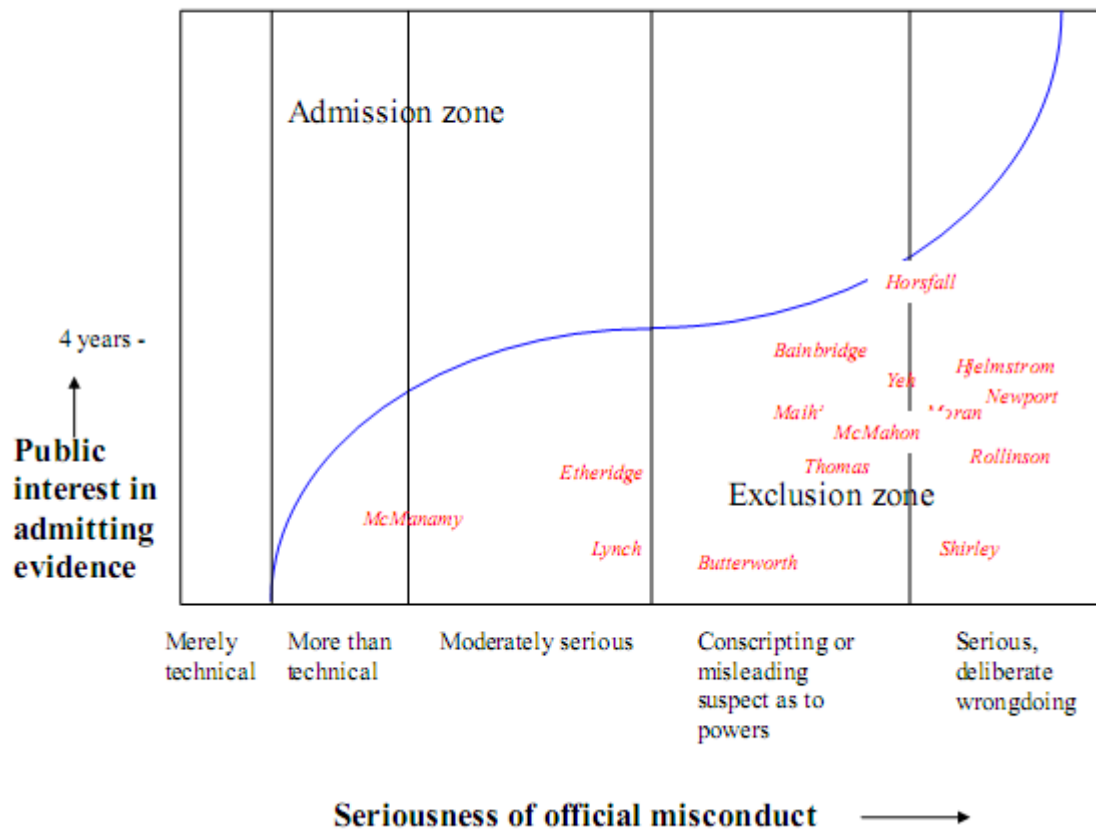
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<sup>22</sup> This expands the point that the fact “[t]hat there has been a breach is given considerable weight as a very important but not necessarily determinative factor”: *Williams* [2007] NZCA 52; [2007] 3 NZLR 207; (2007) 23 CRNZ 1 (CA) at para 104.

<sup>23</sup> This curve of the right hand side of the line is “in recognition of the enhanced public interest in convicting and confining those who have committed serious crimes”: *ibid* at para 138.

<sup>24</sup> See *ibid* at para 146 where it is recognised the integrity and moral authority of the law may require exclusion of evidence of very serious crimes.

**Fig 2: Exclusion of evidence following unreasonable search**



These cases<sup>25</sup> are selected from those decided using the *Shaheed* balancing method, cases that were approved in *Williams*, and cases decided under s 30. *Horsfall* is, at time of

<sup>25</sup> *R v Bainbridge* (1999) 5 HRNZ 317 (CA), 157 tabs LSD, car stopped on pretext of road safety inspection; *Butterworth v Police* (2000) 18 CRNZ 489, cannabis in trousers pocket, search at police station during alcohol testing procedure; *R v Etheridge* (1992) 9 CRNZ 268 (CA) handwriting samples improperly obtained before legal advice given, evidence of these samples excluded; *R v Hjelmstrom* (2003) 20 CRNZ 208 (CA) 90 mature cannabis plants at residence, misrepresentation of power to search; *R v Horsfall* [2008] NZCA 449 manufacturing and supply of methamphetamine, sentence starting point 5 years imprisonment, search in breach of terms of warrant issued under Resource Management Act 1991 as police officers were not “accompanying” the council officer when they were conducting this search; *Lynch*, a defendant in *R v McMillan* (HC Wellington, CRI-2005-085-5104, 23/6/06, Ronald Young J, see especially para 121 - 124) methamphetamine in handbag, search without grounds, improper delay in advising of right to legal advice, relatively minor offence, drug and statement excluded; *R v Maihi* (2002) 19 CRNZ 453 (CA), methamphetamine in small bag in wallet, 1 lb cannabis in car, stopped without lawful grounds; *R v McMahon* [2007] NZCA 71, hydroponic equipment, 14 plants, 49 tinnies, \$1100 cash proceeds of cultivation, serious deficiencies in application for search warrant, called very poor police practice, private dwelling; *R v McManamy* (2002) 19 CRNZ 669 (CA), small importation of ecstasy for personal use or to share with friend, insufficient grounds for search warrant, search had occurred of defendant’s house, letters and emails; *R v Moran* 25/3/03, CA412/02, 14 mature cannabis plants, 43 oz dried, search dwellinghouse without grounds; *R v Newport* (HC Auckland, CRI-2003-004-35502, 18/3/04, Rodney Hansen J) methamphetamine in plastic bags in shoe, for supply, police evidence of grounds rejected as fabrication; *R*

writing, the only example in a search case of exclusion of evidence where the starting point for sentencing would be over four years. Obviously, in considering whether my assignment of cases to areas in the diagram is accurate, one would have regard to my tendency to support the balancing exercise.

### **Consistency and/or predictability**

To say that the cases excluding evidence appear to have been rationally decided, in the sense that they fall into appropriate areas in the diagram, is not to say that the balancing exercise has been applied consistently. One would have to look at the cases where evidence improperly obtained was ruled admissible to determine that matter. If those cases can be assigned to the appropriate areas of the diagram (on the other side of the curve), then one could say that to that extent the balancing exercise has been carried out consistently. That would be an academic inquiry and its results would be interesting, but what practitioners want to know is whether particular evidence in a case at hand, being otherwise admissible, is likely to be excluded. For practitioners, the only relevance of erroneous rulings admitting evidence is that they should not be given precedent value. Wrong decisions can be identified, by their inconsistency with the distribution of cases in the diagram, if and when they are offered as precedents. Later in this paper I attempt to identify some such decisions.

Wrongful searches are not the only kinds of misconduct: there is room in the diagram for all the manifestations of impropriety that fall within s 30. For the sake of clarity I use separate diagrams for various groups of cases.

### **The horizontal axis**

The process of determining where the circumstances of a particular case fall on the horizontal axis of the diagram is one of assessing the seriousness of the official misconduct. This was summarised in *Williams*;<sup>26</sup> the factors referred to are consistent with those in s 30(3). First, what is the extent of the misconduct, the nature of the violation of the defendant's legitimate interests, and are there aggravating factors – such as statutory breach, unreasonableness, or police misconduct – or mitigating factors – such as urgency, weak connection between the defendant and the evidence, weak connection between the misconduct and the obtaining of the evidence (especially where discovery of the evidence was inevitable). These matters, once identified individually, are all to be assessed together. Police good faith, courtesy, and the need to investigate serious crime are neutral matters.

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*v Rollinson* 25/3/03, CA434/02, room adapted for cultivation but not at most serious level of offending, warrant application deficient and the warrant influenced defendant's acquiescence in search; *Shirley v Police* (HC Wellington, CRI-2004-485-93, 22/9/04, MacKenzie J), possession of cannabis oil, serious misstatement in application for search warrant; *R v Thomas* (2001) 19 CRNZ 392; 6 HRNZ 684 (CA), possession of 70.5g cannabis for supply, car stopped without lawful grounds; *R v Yeh* [2007] NZCA 580 possession of methamphetamine for supply, low level offending not serious in the *Williams* sense, unlawful use of swipe card to enter apartment building without reasonable grounds, held to be moderately serious breach, escalating as proximity to apartment increased.

<sup>26</sup> [2007] 3 NZLR 207, (2007) 23 CRNZ 1 (CA) at para 245-249.

An illustration is *R v Green and Thomas*,<sup>27</sup> where the police obtained what they thought was a warrant to search an occupied apartment for evidence of drug dealing. The warrant was held to be a nullity. Evidence of methamphetamine dealing was seized when the police carried out the search, and no one was aware of the defects in the warrant. Sufficient grounds had existed for the issuing of a warrant to search for evidence of the kind that was seized. The balancing exercise involved assessment of the seriousness of the impropriety by starting with recognition of the importance of the right that was breached. To put the reasoning in terms used here, the impropriety would be placed in the right hand part of the “misleading suspects as to powers” zone. Factors tending to draw the impropriety back to the less serious zone were the fact that the police were entitled to a warrant for the kind of search that actually occurred, that the search was confined to what the police believed was authorised, that by the time the search occurred there was a degree of urgency, and that there was no alternative means of obtaining evidence of the offending. This combination of factors brought the impropriety into the “more than technical” zone, and as the public interest in admission of the evidence was reflected in a likely starting point for sentence of around four years imprisonment<sup>28</sup> the balance point was in the admissible zone.<sup>29</sup>

### **The vertical axis**

Once the assessment of the position of the case on the horizontal axis is made, attention turns to where it lies on the vertical axis. This axis, dominated by the seriousness of the offence, is also concerned with the nature and quality of the evidence. In *Williams*<sup>30</sup> these are described, and a serious crime is said to be one where the starting point for sentencing “is likely to be in the vicinity of four years or more.” Also serious are crimes where “there are elements of a threat to public safety, such as the carrying of a loaded weapon in public.” Where the evidence is unreliable, that will bring down the placing of the case on this axis. I will suggest at the end of this paper that the availability of alternative remedies is also a matter relevant to placement of a case on the vertical axis, but that this point is obscured by the way s 30 has been drafted.

### **In defence of diagrams**

While there is no need to resort to pictorial representation of the exercise of the discretion pursuant to s 30, such depiction follows from the logic of the decision process. Many

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<sup>27</sup> HC Auckland, CRI-2006-4-16031, 23/11/07, Rodney Hansen J. The Supreme Court refused leave to appeal against the Court of Appeal’s dismissal of an appeal against this ruling, noting that “the High Court’s application of the balancing exercise mandated by s 30 was plainly correct”: *Thomas v R* [2009] NZSC 34.

<sup>28</sup> Mr Green was eventually sentenced to 12 months home detention, a sentence considered to be equivalent to two years imprisonment: *R v Green* (HC Auckland, CRI-2006-4-16031, 13/2/09, Stevens J). The starting point was three years imprisonment, with an uplift of six months for other offending. Here the relevant drug offending was possession of 1.7 g methamphetamine for supply, and the firearm was a shotgun and ammunition.

<sup>29</sup> Although, as noted above, the Supreme Court considered this application of the balancing exercise to have been plainly correct, there is one point that may be questioned. It was a matter used to assist in lessening the impropriety, namely that the impropriety was not deliberate, reckless, or a product of bad faith: s 30(3)(b). Presence of deliberation, recklessness or bad faith would of course increase the impropriety, but, as the police are expected to act in good faith, can their absence reduce impropriety?

<sup>30</sup> [2007] 3 NZLR 207, (2007) 23 CRNZ 1 (CA), at para 250.

lawyers have highly developed verbal skills, and it might be too much to expect that these should be matched by skills at visual imagination. A deficit of the latter could result in diagrammatic aids being deprecated by those who forget that rationality and respect for precedent, in the interests of avoiding arbitrariness, require logical rigor. To avoid the “high degree of indeterminacy and unpredictability with respect to the judicial decision to exclude”<sup>31</sup> feared by critics of *Shaheed*, one must not ignore aids to determinacy and predictability.

The Supreme Court of Canada has revised the decision method for determining the admissibility of evidence obtained in breach of Charter-protected interests: *R v Grant*.<sup>32</sup> Overall, the relevant considerations are remarkably similar to those discussed in this paper. McLachlin CJ and Charron J, delivering the majority judgment, described the analysis as creating a “decision tree”.<sup>33</sup> This was not presented as a diagram, and its usefulness remains to be established. Deschamps J dissented, preferring to see the nature of the impropriety and its effect on the accused as part of the same continuum rather than as separate branches. The *Grant* model appears defective on another point too: no effort was made to indicate when an offence would be sufficiently serious to support a dominant public interest in admission of the evidence. A potentially controversial application of *Grant* was delivered by the Court the same day: *R v Harrison*.<sup>34</sup> Here a car

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<sup>31</sup> Optican, “*R v Shaheed*: the demise of the prima facie exclusion rule” [2003] NZLJ 103. The formalist approach taken there (p 105: “rights are typically trumps”), which echoes a Dworkinian understanding (Ronald Dworkin, “Taking Rights Seriously” (1977)) of what rights are and criticises the Court of Appeal’s inability or unwillingness “to confront the jurisprudential challenges associated with the elaboration of a lucid, principled and coherent exclusionary rule”, fails to appreciate the development of the idea of rights that has accompanied the international acceptance of pragmatism. Recognition of that development is a consistent theme, evident for example in *R v Te Kira* [1993] 3 NZLR 257, (1993) 9 CRNZ 649, 1 HRNZ 230 (CA) per Richardson J (Casey J agreeing) and *Hardie Boys J*; *R v A* [1994] 1 NZLR 429, also reported as *R v Davis* (1993) 10 CRNZ 327 (CA); and *Brooker v R* [2007] NZSC 30. Furthermore, such jurisprudential sophistication as was involved in the exclusionary rule case law had focused on the scope of rights, not on the decision concerning admissibility of improperly obtained evidence. Decisions will still have to be made on the scope of rights, and so the jurisprudential elaboration that Optican considers was rejected by the Court will still be necessary. The real effect of *Shaheed* was to introduce, on top of the jurisprudence relating to breach, a new jurisprudence of exclusion. Not that balancing or weighing is new to the law: see Barak, *The Judge in a Democracy* (2006), chapter 7 footnote 1, citing T. Alexander Aleinikoff, “Constitutional Law in the Age of Balancing” 96 Yale LJ 943, 946-47 (1987); Frank M Coffin, “Judicial Balancing: The Protean Scales of Justice” 63 NYU L Rev 16, 23 (1988); Louis Henkin, “Infallibility Under Law: Constitutional Balancing” 78 Colum L Rev 1022, 1025 (1978); Gerard V La Forest, “The Balancing of Interests Under the Charter” 2 Nat’l J Const Law 133, 134 (1992); Robert F Nagel, “Liberals and Balancing” 63 U Colo L Rev 319, 321 (1992); and Kathleen M Sullivan, “Post-Liberal Judging: The Roles of Categorization and Balancing” 63 U Colo L Rev 293, 293-94 (1992). Balancing is part of the decision whether to exclude evidence obtained by unreasonable search in the United States, as is illustrated in *Herring v United States* [2009] USSC (14 January 2009), where the basis for exclusion was held to be deterrence of official misconduct, and the exclusion decision involved weighing the benefits of deterrence against the price paid by the justice system when the offender is not convicted. Despite its different basis in deterrence, this weighing exercise is comparable to the balancing process required by s 30(2)(b) Evidence Act 2006. In *Kansas v Ventris* (2009) USSC No 07-1356, 29 April 2009 Scalia J for the Court noted that inadmissibility has not been automatic in cases of unreasonable search, citing *Walder v. United States*, 347 U. S. 62, 65 (1954).

<sup>32</sup> [2009] SCC 32 (17 July 2009).

<sup>33</sup> [2009] SCC 32 at para 86.

<sup>34</sup> [2009] SCC 34. Deschamps J dissented because of the seriousness of the offence.

was stopped on a highway and searched without sufficient grounds, revealing 35 kg of cocaine. The majority held evidence of the discovery of the drug was inadmissible. Without a more elaborate decision method than the Court offered it is difficult to see why *Harrison* was so different from *Grant*, where evidence of the finding of a firearm on a pedestrian near a school was admissible, although there were insufficient grounds for this personal search. Perhaps if the Supreme Court of Canada had given more thought to aids to determinacy and predictability this apparent arbitrariness would have been avoided.

### **Pre-*Shaheed* decisions excluding evidence**

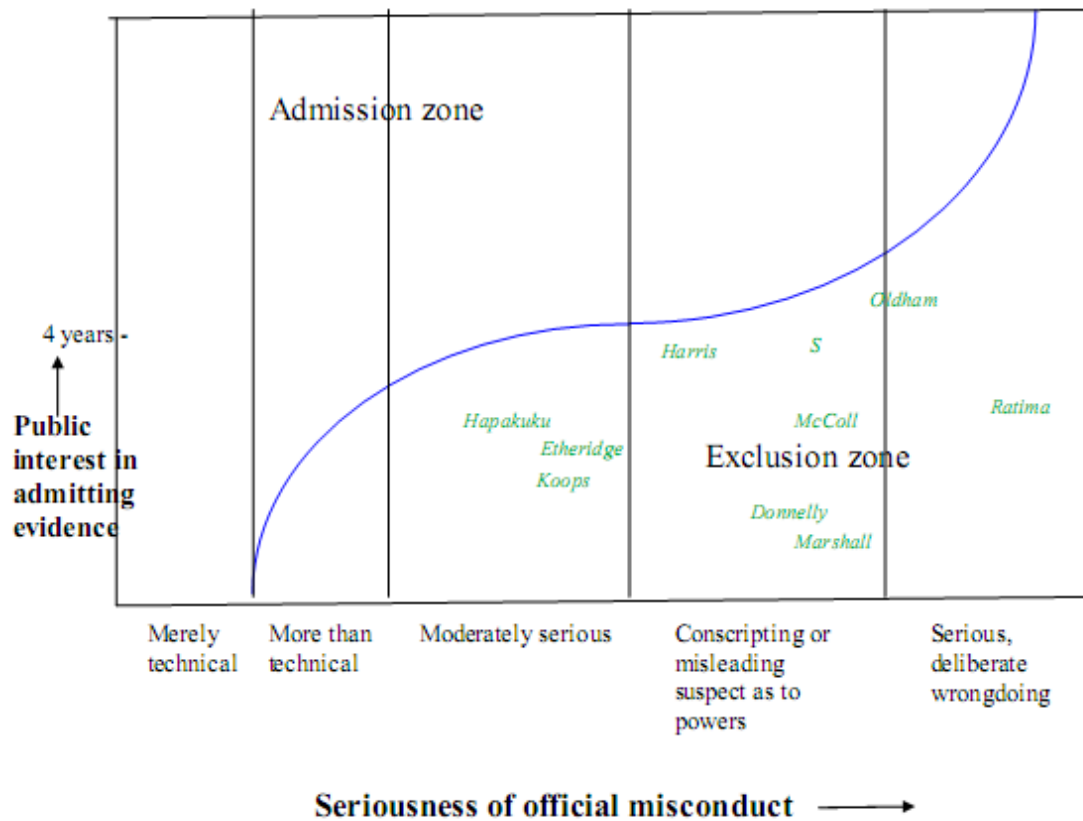
Some testing of the utility of the diagram may be done by reference to pre-*Shaheed* decisions, because in *Shaheed* there were indications that previous decisions would not be different if they had utilised the balancing method.<sup>35</sup> Since these cases did not involve assessment of the relative degree of seriousness of breach of rights, the position for them on the horizontal axis is made by reference to post-*Shaheed* cases. In this respect, consistency is imposed on them, and the critical question becomes whether their position on the vertical axis brings them into the exclusion zone under the curve. If it does, it can be said that the diagram is useful in illustrating how the balancing exercise in s 30 would have applied to them. To make this easier I will start with drug cases: [Fig 3](#).

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<sup>35</sup> *R v Shaheed* [2002] 2 NZLR 377, (2002) 19 CRNZ 165 (CA) at para 156 (Richardson P, Blanchard and Tipping JJ), and at 202 (Anderson J).



**Fig 3: Pre-Shaheed drug cases where evidence was excluded**



These cases<sup>36</sup> are appropriately placed within the exclusion zone of the diagram; none involve a potential sentence where the starting point – as far as it can be ascertained –

<sup>36</sup> *R v Donnelly* (HC Rotorua, T001499, 13/10/00, Anderson J), possession cocaine for supply, gang member stopped because of driving, pursuit, pockets searched without grounds, plastic bag containing cocaine, wrongly required to accompany for weapons search, more cocaine found, amounts small as is inferred from the alternative charge of possession simpliciter; *R v Etheridge* (1992) 9 CRNZ 268 (CA), no opportunity to consult lawyer, handwriting sample excluded, cultivation, possession (oil?); *R v Hapakuku* (1999) 16 CRNZ 520, 5 HRNZ 127 (CA) unreasonable execution of search warrant at occupied dwelling late at night, door forced, evidence of cultivation found in garage; *R v Harris* (HC Whangarei, T011540, 25/2/02, Elias CJ), delay in arrest, failure to caution, failure to tell defendant lawyer had rung station, 18 charges under the Misuse of Drugs Act 1975 but seriousness not disclosed in judgment, interview inadmissible; *R v Koops* (2002) 19 CRNZ 309 (CA) detention, breach of right to lawyer, balance of interview excluded, selling class B methamphetamine and methylsulphate, low level commercial dealing; *Marshall v R* (1998) 15 CRNZ 472, police executing search warrant invited defendant onto premises then searched him, tinfoil packages of cannabis found in his pocket; *R v McColl* (1999) 17 CRNZ 136, 5 HRNZ 256 (CA), misleading application for search warrant, 3.5 kg cannabis, cultivation, possession for supply; *R v Oldham* (1994) 11 CRNZ 658, misleading defendant as to right to search his car, lysergide found, “a very lengthy sentence of imprisonment” would have been inevitable; *R v Ratima* (1999) 17 CRNZ 227, 5 HRNZ 495 (CA), police ignored sign forbidding entry at dwellinghouse, climbed gate and searched rear, saw seedlings then got warrant, cultivation in shed, “serious invasion of privacy”; *R v S* (HC Auckland,



would be higher than four years. It can therefore confidently be claimed that these pre-*Shaheed* decisions would be decided the same way under *Shaheed* and under s 30.

### Breaches of other rights in non-drug cases

Outside the drug field, there are pre-*Shaheed* cases where the alleged offending was serious and the improperly obtained evidence was excluded. Breach of the (then, common law) right to legal advice during an interview led to exclusion of the defendant's statement on a charge of rape in *R v Hapeta*.<sup>37</sup> This case could fit in the diagram above *Oldham* and in the exclusion zone. In *R v Narayan*,<sup>38</sup> where the charge was murder, the foreign-language speaking defendant was questioned through a police officer who acted as interpreter, and was not cautioned; the circumstances may have suggested to him that he was obliged to answer questions. This case would go in the top right hand area of the diagram, but whether in the exclusion zone or the admission zone may well be a matter for debate.<sup>39</sup> Evidence of admissions to a rape was excluded in *R v Mairia*,<sup>40</sup> where the defendant had been arbitrarily detained awaiting an interpreter, and he may have subsequently gained the impression he had to tell the truth. This case could be placed in the diagram about half way between *Ratima* and the top margin, in the exclusion zone. And, just above that, would fit *Shaheed* itself, where the breach of a statutory code for the procedures for taking a DNA sample led to the exclusion of that evidence in relation to charges of abduction and rape of a schoolgirl. There was, of course, disagreement among the judges in *Shaheed* over whether the breach was really that serious, and a differently constituted bench may well have admitted the evidence, so it is, to say the least, very close to the line.

### Exclusion is relatively rare

What is striking, when one endeavours to survey the cases where exclusion was ordered, is that these form a small proportion of the total number of cases where it was necessary to decide the issues of whether evidence was obtained improperly, and, if it was, whether it should be excluded.<sup>41</sup> It can hardly be claimed that the discretionary approach introduces great uncertainty into the law, when exclusion is a realistic possibility in only a few cases. Obviously there will be more cases of exclusion than the number indicated by written decisions; exclusions of evidence in summary proceedings are unlikely to be reduced to writing.

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T001794, 10/5/01, Paterson J), strip search in lobby, would have been visible to passers by, 20 capsules ecstasy, 5 bags methamphetamine, 1 bag containing lysergide found in defendant's underwear.

<sup>37</sup> (1988) 3 CRNZ 570 (Robertson J).

<sup>38</sup> [1992] NZLR 145, (1992) 8 CRNZ 235 (CA).

<sup>39</sup> In the post-*Shaheed* murder case *R v Ji* (2003) 20 CRNZ 479 (CA) a statement was excluded in circumstances that have some similarity to those in *Narayan*, in that an interpreter was required and the defendant did not have the right to legal advice properly explained to him. The Chief Justice's Practice Note issued under s 30(6) of the Evidence Act 2006 is in similar terms to the requirement in *Ji* of informing the suspect of the existence of free legal advice under the statutory PDLA scheme.

<sup>40</sup> [1995] 1 NZLR 242, also reported as *R v M (T151/94)* (1994) 12 CRNZ 268, 3 HRNZ 393 (Blanchard J).

<sup>41</sup> I disclose that I was counsel in two: *Hapakuku* and *Mairia*, so I am not inclined to be critical of those decisions. You might not be so complacent.

### **The curve reflects an underlying consistency**

The shape and position of the curve dividing the zones in the diagram is currently only discernible intuitively. Nevertheless, the cases provide precedents on which to base informed guesswork. As applications of s 30 increase in number, the division between the zones of admission and exclusion should become clearer, and bad precedents should be identifiable by their tendency to distort the curve. An erratic curve would indicate arbitrariness and irrationality, whereas a smooth curve that tends in one direction<sup>42</sup> would reflect an underlying logic.

Use of the diagram is not a substitute for the reasoning process described in *Shaheed* and *Williams*; it is merely a method of predicting what the result of such reasoning should be. For cases that fall in the middle part of the horizontal axis, where the curve is flatter, the critical determinant of admissibility will be the starting point for sentence if the particular offending is proved.

### **The “merely technical” part of the spectrum**

The great majority of arrests are for offending of the less serious kind, where the starting point for sentence would be well below four years imprisonment, if indeed imprisonment is considered at all. It will therefore be important to be able to distinguish impropriety that is merely technical, from that which is, for want of a better expression, more than merely technical. In the following discussion of the merely technical impropriety category it must be remembered that the nature of an impropriety must be assessed in the circumstances of a given case.

In the zone of merely technical impropriety there will be no exclusion under s 30 regardless of how minor is the alleged offending. This gives significance to the distinction between this zone and its neighbour. There are occasions when conduct amounting to a merely technical breach is described as reasonable. This could be confusing, as reasonable conduct is not an impropriety at all.<sup>43</sup> Perhaps this usage originated in the “unlawful but reasonable” classification of improprieties that was

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<sup>42</sup> A curve that could be expressed mathematically would reflect the logic of mathematics, although many mathematical curves would not reflect the logic of the law. For an appropriate curve – one that tends in the same direction, not looped back on itself, and one that has a tendency to slope up to the right, the mathematical formula does not need to be known. The weighing exercise does not need to be carried out with mathematical precision. It so happens that I have used a cubic parabola of general form  $y = ax^3 + bx^2 + cx + d$ , where  $b^2 = 3ac$  and  $a > 0$ ; and the sort of shape I have drawn can be obtained by  $y = 0.01x^3$ , (with the point (0,0) being the midpoint of the curve not the intersection of the axes; smaller values of  $a$  produce a flatter curve), but the only relevance of that is that the uniformity of the relationship between  $x$  and  $y$  reflects a logical relationship between seriousness of impropriety and seriousness of offending. Nothing more can be gained from simple algebra.

<sup>43</sup> An illustration is *Ngan v R* [2007] NZSC 105; [2008] 2 NZLR 48; (2007) CRNZ 754 (SC). Here the majority assessment was that a police search in the course of making an inventory of property left at an accident scene was “prima facie unlawful” but was reasonable and therefore not illegal. Tipping and McGrath JJ in separate judgments did not regard the making of the inventory as even prima facie unlawful, and on that view *Ngan* would not qualify for inclusion in even the “merely technical” part of the spectrum. In *Horne v Police* (1997) 14 CRNZ 687, 3 HRNZ 510 (Doogue J) inspection of an abandoned vehicle was held to have been reasonable.

advanced when the prima facie exclusion rule was extant.<sup>44</sup> In any event, the infelicity is inconsequential for present purposes: the important task is to distinguish merely technical improprieties from those which are more than merely technical.

A feature that is applicable to any part of the spectrum of impropriety, as depicted on the horizontal axis, is the difference between impropriety which falls into a given position on that axis without reference to other circumstances, and impropriety which arrives at that position after it is aggravated or mitigated by its context. The former may be termed “pure” instances of that type of impropriety, and the latter “contextual” instances. The difference is useful to bear in mind, as the appropriateness of a contextual assessment of an impropriety will be gauged by reference to pure instances of it. Plainly this is a highly qualitative exercise in which a sense of appropriateness must be applied.

The following are examples of cases where an impropriety is merely technical.

- Stopping a vehicle without having grounds for doing so, but then looking in a window and obtaining adequate grounds for search: *R v Loh*.<sup>45</sup> Other factors here were urgency in searching for offensive weapons and preventing violence. It seems that, without that urgency to mitigate the impropriety, absence of grounds for stopping the vehicle would have been a more serious breach.<sup>46</sup> *Loh* is therefore an example of contextually technical impropriety.
- Video surveillance from outside premises: *R v Gardiner*,<sup>47</sup> contextual factors were the absence of alternative means of investigation, and the less than complete expectation of privacy held by the occupants in respect of the relevant part of the property, especially where the area under observation could be seen by passers-by. Similarly *R v Fraser*<sup>48</sup> where the Court noted that no warrant was available to authorise this sort of surveillance, and there was nothing illegal in it, nor was it unreasonable.<sup>49</sup> Both cases are examples of contextually technical impropriety.
- Aerial surveillance from an aircraft: *R v Peita*.<sup>50</sup> The Court observed that in principle aerial surveillance of rural areas known to be locations for cannabis cultivation was capable of being described as reasonable, but each case must be considered on its own facts. Here reasonableness arose from the brief duration of the surveillance and

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<sup>44</sup> *Adams on Criminal Law* Ch10.8.05 mentions the move away from this usage: “There are numerous older cases where courts have held that an unlawful search was nonetheless reasonable. More recent decisions, culminating in *R v Williams* [2007] 3 NZLR 207; (2007) 23 CRNZ 1 (CA), have limited the occasions when an unlawful search will be characterised as reasonable.”

<sup>45</sup> (1997) 14 CRNZ 649, 3 HRNZ 504 (CA).

<sup>46</sup> For examples of the power to stop vehicles, see s 114 Land Transport Act 1998, and ss 317A, 202B, 314B, 317A and 317B Crimes Act 1961.

<sup>47</sup> (1997) 15 CRNZ 131, 4 HRNZ 7 (CA).

<sup>48</sup> [1997] 2 NZLR 442, (1997) 15 CRNZ 44, 3 HRNZ 731 (CA).

<sup>49</sup> *Fraser* is another example of a case that arguably does not involve any impropriety, including that which is merely technical.

<sup>50</sup> (1999) 17 CRNZ 407, 5 HRNZ 250 (CA).

the absence of any intimate intrusion on privacy. Again, this is contextually technical impropriety.

- Search pursuant to a warrant, where a curable defect in the application for it had occurred inadvertently: *R v Hooker*.<sup>51</sup> Caution must be exercised in classifying defects in applications for warrants as merely technical improprieties. Here, the police would have been able to have supplied more information in support of the application if the issuing officer had sought it. That circumstance provides the context for this impropriety to be classified as merely technical.
- An incorrect address on a search warrant where the correct address was searched: *Brazendale v Police*;<sup>52</sup> *R v O'Neill*.<sup>53</sup> It seems reasonable to classify typing mistakes as merely technical improprieties, where the search that occurred was intended to be authorised and no one was misled. Improprieties that do not mislead anyone could be appropriately termed merely technical in the pure sense.
- Error as to registration number of vehicle but make correctly specified in search warrant: *R v Te Whatu*.<sup>54</sup> The search pursuant to this warrant would be improper in a purely technical sense.
- A temporary check on liberty during a lawful search is not detention (and arguably is another example of absence of impropriety or wrongfulness): *R v Fowler*.<sup>55</sup> If it is impropriety at all, it is so in a purely technical sense. Obviously, had the search not been lawful, the detention would have been a factor aggravating the impropriety. The extent of the aggravation would depend on the circumstances, and the classification of the impropriety would then be contextual.
- Reasonable belief that the defendant consented to seizure of material outside scope of search warrant: *R v Taito*.<sup>56</sup> Use of the test of reasonableness indicates that the classification is contextual.<sup>57</sup>

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<sup>51</sup> (1997) 4 HRNZ 1 (CA).

<sup>52</sup> (1993) 11 CRNZ 129 (Anderson J).

<sup>53</sup> CA542/99 2 February 2000.

<sup>54</sup> CA400/01, 7 March 2002.

<sup>55</sup> [2007] NZCA 1.

<sup>56</sup> CA155/95 & 161-163/95, 2 June 1995.

<sup>57</sup> Care must be taken in this sort of case to ensure consent is fully informed and freely given; these conditions may be difficult to satisfy with any credibility, as people are not likely to freely consent to a procedure knowing it will incriminate themselves. In *R v Davies*, also called *R v Gillespie* 12/10/04, Baragwanath J, HC Auckland CRI 2004-004-000158, it was held that there might be an issue as to whether consent is possible where an official has sought to dispense with legal constraints: s 1 Bill of Rights 1688 (RS 30), although of course that was enacted in the context of dispensations which favoured particular citizens in their relations with those in authority. In *R v Gray* [2007] NZCA 227 the Court expressed a tentative view that these concerns have been met by *Williams*.

### The scope of “improperly obtained”

Subsection (5) of s 30 defines “improperly obtained” for the purposes of this section. Paragraphs (a) and (b) involve the concept of consequentiality, and this invokes considerations of causation and attenuation. Those matters are discussed in *Williams*.<sup>58</sup>

Improprieties may arise from the conduct of people to whom the New Zealand Bill of Rights Act 1990 does not apply.<sup>59</sup> Paragraph (a) of s 30(5) catches improprieties by people to whom the Bill of Rights does apply. It seems that improprieties by other people are caught if they come within s 30(5)(c).

The scope of “unfairly” obtained evidence is potentially wide.<sup>60</sup> Unfairly seems to be a reference to the kinds of ways of obtaining evidence that give rise to exclusion on grounds of public policy.<sup>61</sup> It is reasonable to anticipate, with Professor Mahoney, that s 30(5)(c) “will likely be interpreted in a way that will fill in gaps which appear to exist in the other provisions of this subpart of the Act.”<sup>62</sup>

It is too early to say whether the decisions that will be made in relation to the kind of improperly obtained evidence referred to in s 30(5)(c) will take the same shape as those where impropriety arises under s 30(5)(a) or (b). Since avoidance of abuse of process is the fundamental concern common to all exclusion of improperly obtained evidence, it is arguable that one curve fits all, and any need to give enhanced sensitivity to breaches of the Bill of Rights can be met by appropriate placement of such instances on the

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<sup>58</sup> [2007] 3 NZLR 207, (2007) 23 CRNZ 1 (CA), they are summarised at para 241-243. An illustration of the difficulties of causation and attenuation analysis is *R v Hsu* (HC Auckland, CRI-2006-004-26378, 4/7/08, Heath J); on appeal the Court was able to avoid those issues: *R v Hsu* [2008] NZCA 468.

<sup>59</sup> As noted in *R v Karalus* (2005) 21 CRNZ 728 (CA) at para 52, giving the example of an *agent provocateur* who is not a police officer.

<sup>60</sup> Contrast trial unfairness, which has a narrow, technical meaning applicable to the effect of procedural irregularity on the partiality of the fact finder. The defendant has an absolute right to a fair trial: *Condon v R* [2006] NZSC 62; [2007] 1 NZLR 300; (2006) 22 CRNZ 755 (SC) at para 77, and it follows that limiting trial fairness by balancing is inappropriate. See Mathias, “The Accused’s Right to a Fair Trial: Absolute or Limitable?” [2005] New Zealand Law Review 217. Section 30(5)(c) applies to the way the evidence is obtained, not to the effect admitting it would have on the fairness of the trial.

<sup>61</sup> For common characteristics of cases involving abuse of process, see *PNJ v R* [2009] HCA 6 (10 February 2009) at para 3. The origins of the public policy discretion are summarised, in brief obiter remarks, in *R v Swaffield* [1998] HCA 1, (1998) 192 CLR 159 (para 29-30; 62-66). The Australian approach under *Swaffield* is potentially confusing. Three common law discretions are recognized: the fairness discretion, the public policy discretion, and the balancing of probative value against illegitimately prejudicial effect. The first two were said to overlap, but whether they are really distinct was subsequently left open in *Tofilau v R* [2007] HCA 39. The fairness discretion may include trial fairness and may overlap with the third discretion (*Swaffield* at para 54). The rather questionable implications of the discussions of the discretions in *Swaffield* seem to be that it would be appropriate to merge the fairness discretion into the probative value/prejudicial effect weighing, as both concern trial fairness, and to reserve the public policy discretion for dealing with fairness in the sense of “higher” matters of policy, usually arising from official misconduct, and not involving trial fairness. That is quite a different treatment of the discretions from that which applies in New Zealand. Here, trial fairness does not appear to be a discretionary matter: *Condon v R* above, at para 77, citing, and we see the irony, *Jago v DC (NSW)* (1989) 168 CLR 23; (1989) 87 ALR 577, at pp 56-57; pp 600-601 (HCA). The public policy discretion is now in s 30, and the probative value/prejudicial effect weighing is in s 8 Evidence Act 2006, the former being subject to the latter.

<sup>62</sup> *Adams on Criminal Law – Evidence*, EA30.10.



horizontal axis. There is at present no convincing evidence of inconsistency between cases where exclusion occurred because of common law unfairness and cases where exclusion occurred because of improprieties arising under s 30(5)(a) and (b).

### **Is the centrality of the evidence relevant?**

What relevance is the centrality of challenged evidence to the prosecution case? Centrality reflects the result of excluding the evidence: if the evidence is central, exclusion would lead to prosecution failure; if the evidence is not central the prosecution may succeed without it. This factor, identified in *Shaheed*,<sup>63</sup> was deleted from s 30(3)(c) by the Select Committee. It was also mentioned in *Williams*, which of course was decided with the enacted legislation in mind, but William Young P and Glazebrook J<sup>64</sup> simply asserted that “the centrality of the evidence to the prosecution may still be of some relevance when assessing the nature and quality of the evidence.”

The reasons given by the Committee for deletion of this reference to centrality of the evidence have been doubted: see *R v Boon*.<sup>65</sup> Indeed, the Committee’s point is not clear. It said, “We consider that this [reference to centrality of the evidence] should be deleted ... as we find it difficult to envisage a circumstance where it would be relevant, given the seriousness test in [now s 30(3)(d)].”

In *Boon*, Asher J endorsed criticism by Professor Mahoney<sup>66</sup> of the Select Committee’s reason for deletion of the reference, on the basis that the seriousness of the offence is a matter distinct from the centrality - probative value - of the evidence and both are relevant.

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<sup>63</sup> [2002] 2 NZLR 377, (2002) 19 CRNZ 165 (CA) at para 152: “It is also a matter which must be given weight in favour of admission if the disputed evidence is not only reliable but also central to the prosecution’s case — that the admission of the evidence will not lead to an unfair trial and the case is likely to fail without it. The more probative and crucial the evidence, the stronger the case for inclusion, although this factor ought not by itself to lead to automatic admission. Of course, if the evidence is less significant there is less reason to admit it in the face of a more than a trivial breach of rights. If, however, the crime was very serious, particularly if public safety is a concern, that factor coupled with the importance of the evidence in question may outweigh even a substantial breach. It may require the view to be taken that exclusion of the evidence, leading to failure of the Crown case, is a remedy out of proportion to the circumstances of the breach. The example of the serial murderer given in *A-G’s Reference* [ (No 3 of 1999) [2001] 2 AC 91, referred to in *Shaheed* at para 107] is compelling. Public confidence in the justice system would obviously be severely shaken were probative evidence to be excluded in such circumstances unless perhaps the breach was both fundamental and deliberate. Weight is given to the seriousness of the crime not because the infringed right is less valuable to an accused murderer than it would be to, say, an accused burglar, but in recognition of the enhanced public interest in convicting and confining the murderer. In contrast, where the crime with which the accused is charged is comparatively minor, it is unlikely that evidence improperly obtained will be admitted in the face of a more than minor breach of the accused’s rights.” It is respectfully suggested that the real point here is not the centrality of the evidence, but the seriousness of the offence.

<sup>64</sup> [2007] 3 NZLR 207, (2007) 23 CRNZ 1 (CA) at para 141.

<sup>65</sup> *R v Boon* (HC Auckland, CRI 2006-004-21763, 13/8/07, Asher J).

<sup>66</sup> “Evidence” [2006] NZ Law Rev 717, 733; cited at para 73 of *Boon*.

It may be noted, however, that while the terms “centrality of the evidence” and “seriousness of the offence” are obviously distinct in meaning, the question is whether they are distinct in their relevance to the public interest in excluding the evidence.

If the offence is serious, attracting a starting point of, say 8 years’ imprisonment, does the fact that the challenged evidence is central to the prosecution case *increase* the public interest in admitting it, or is the sentence starting point a sufficient indicator of the public interest? It is difficult to see how the centrality of the evidence could increase the public interest, over and above that expressed in the sentence starting point, in admitting it. Perhaps, if the evidence was only of peripheral importance to the prosecution case, one could say that the public interest in admitting it might be somewhat less than the public interest as indicated by the sentence starting point: that, at least, is arguable. But in *Boon* the centrality of the evidence was used, in relation to evidence of serious offending, to increase the public interest in admitting the evidence.<sup>67</sup>

This is not to say that the result in *Boon* was necessarily wrong, although further criticism may be made of its reasoning. This criticism is that the fact that alternative and lawful means of discovering the evidence were available to the police was used to weigh in favour of admitting the evidence, on the grounds that the police, although careless, were not cynically and deliberately ignoring the law. Asher J here reasoned<sup>68</sup> that the mention in s 30(3)(e) of other investigatory techniques was in fact an aspect of inevitability. This is in contrast to the use of this factor in *Shaheed* and *Williams*, where it was held to weigh in favour of excluding improperly obtained evidence because the police should be encouraged to obey the law. And, in *Williams*<sup>69</sup> it was concluded that inevitability is a matter to be treated with care, and may only be relevant in relation to “downstream” evidence. It is respectfully suggested that what makes the decision in *Boon* correct is the fact that the accused did not own the car that was improperly searched while it was under secure control at the police station, and his privacy interest was of relatively low level.<sup>70</sup> This would mitigate the impropriety, bringing the case into the admissible zone.

An illustration of how lack of centrality of a statement can result in reduction of the public interest in its admission is *R v Witoko*.<sup>71</sup> Here the accused waived his right to legal advice before an interview but, because the police had innocently failed to inform him of the nature of his jeopardy of being charged with murder, this waiver was ineffective and a breach of the right had occurred. However the statement consisted of denial of contact with the victim on the day he was killed, but admissions of recent contact were supportive of other prosecution evidence. The statement was thus not of central importance to the prosecution case, being “helpful but not critical”.<sup>72</sup> The right breached

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<sup>67</sup> In *R v Horsfall* (HC Auckland, CRI 2006-090-2930, 3/9/07, Stevens J), at para 102-104, Asher J’s approach was followed: the centrality of the evidence was part of the assessment of its quality. *Williams* at para 141 was also followed.

<sup>68</sup> *Boon*, above, at para 71.

<sup>69</sup> [2007] 3 NZLR 207, (2007) 23 CRNZ 1 (CA) at para 247(d) per William Young P and Glazebrook J.

<sup>70</sup> *Boon*, above, at para 55.

<sup>71</sup> HC Rotorua, CRI-2007-063-5128, 3/3/09, Rodney Hansen J.

<sup>72</sup> *Ibid*, para 27. Prosecuting counsel described the probative value of the statement as “moderate”: *ibid*, para 25(c).



was important, and exclusion of the statement was a proportionate response to the breach. In terms of the model suggested here, this case would fit in the position indicated in Fig 4. To secure that placement, the public interest in admitting the evidence must be significantly reduced from that indicated by the starting point for sentence. The only justification for that reduction can be the lack of importance of the improperly obtained evidence to the prosecution case.

### **Misconduct unrelated to searches, post-*Shaheed***

Exclusion of evidence may be necessary because of improprieties unrelated to searches. Typical examples concern police questioning of suspects. Failure properly to inform a suspect of the reason for questioning, of the right to silence, the right to legal assistance, or to create a situation in which the suspect is wrongfully detained, can give rise to challenges to the admissibility of statements consequently obtained. Such challenges are likely to succeed where the improprieties reduced the reliability of consequent admissions. In *Williams*<sup>73</sup> it was held that

“While the *Shaheed* balancing exercise still applies, to admit confessional evidence obtained in breach of an accused’s rights risks eroding procedural safeguards that pre-date the Bill of Rights and that are fundamental to our society. Particularly where there are doubts as to reliability of confessional evidence, the admission of that evidence could potentially detract from the credibility of the justice system. ... This is likely to mean that the admission of confessional evidence obtained in breach of an accused’s rights under the Bill of Rights would be rare.”

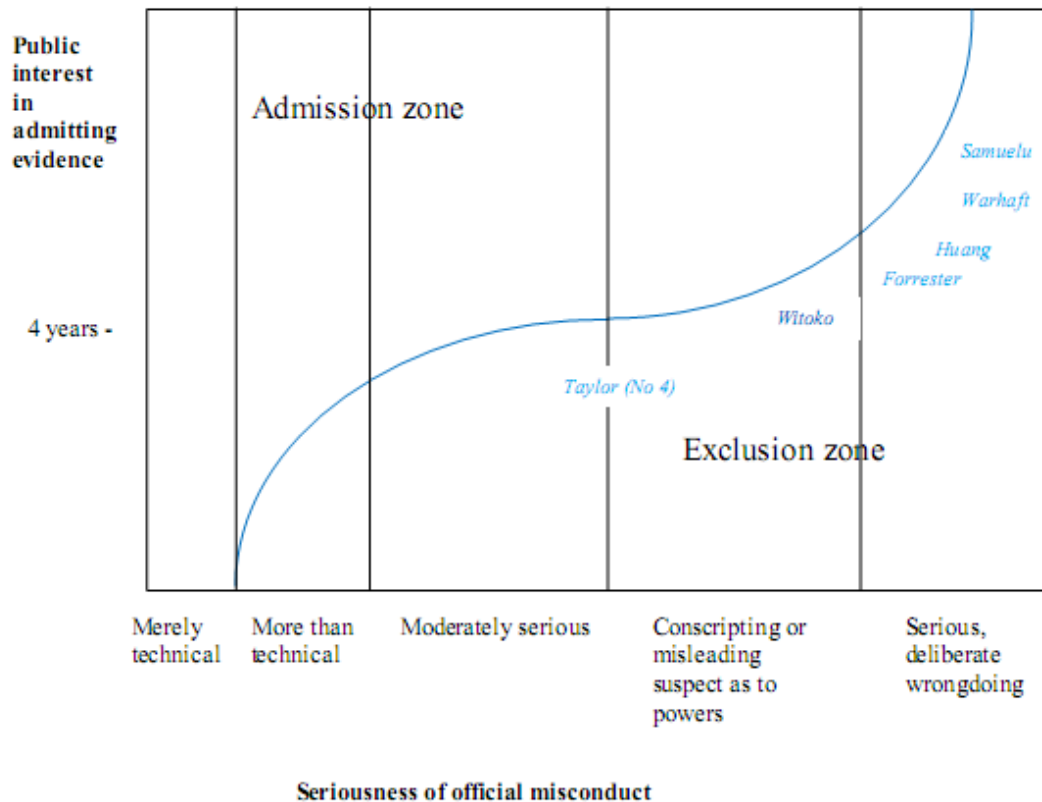
Cases<sup>74</sup> of exclusion of evidence in this category are placed in the next diagram – [Fig 4](#).

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<sup>73</sup> [2007] 3 NZLR 207, (2007) 23 CRNZ 1 (CA) at para 136 per William Young P and Glazebrook J.

<sup>74</sup> *R v Forrester* (HC Hamilton, CRI 2006 079 459, 4/5/07, Andrews J), possession of methamphetamine for supply, supply methamphetamine, possession and sale of cannabis, possession of utensils, breach of right to legal advice, improprieties eroded reliability of admissions; *R v Huang* (HC Auckland, CRI 2005-004-21953, 19/9/07, Rodney Hansen J), possession of methamphetamine for supply, 27.6g, arbitrary detention, deliberate serious intrusion on fundamental right compounded by search at police station, most serious kind of breach not excused by strong police suspicions; *R v Samuelu* (2005) 21 CRNZ 902 (Frater J), homicide interview excluded where police inadequately informed the suspect, who was mentally disordered, of his right to legal advice and of the nature of the charge he faced, gross police carelessness verging on recklessness, statement of limited probative value as of questionable reliability; *R v Taylor (No 4)* (HC Wellington, CRI 2004-09-4321, 25/7/06, Miller J), interview began concerning assault on wife, then changed, without informing the suspect, to possession of firearms and explosives, breach of right to counsel in that decision needs to be informed; *R v Warhaft* (HC Auckland, CRI 2006 057 1581, 7/6/07, Baragwanath J), manufacturing methamphetamine, possession of equipment and chemicals for manufacturing, failure properly to warn the suspect of his jeopardy under questioning while in custody, leading to unreliability of admissions; *R v Witoko* (HC Rotorua, CRI-2007-063-5128, 3/3/09, Rodney Hansen J) waiver of right to lawyer before interview ineffective because not properly informed, statement helpful to Crown but not critical, public interest in securing conviction for murder not undermined by exclusion of the statement (see under the heading “Is the centrality of the evidence relevant?” for discussion of placement of this case on the vertical scale).

Fig 4: Non-search cases of exclusion, post *Shaheed*



It is likely that *Shaheed* itself would appropriately be placed in the diagram between *Warhaft* and *Samuelu* in the exclusion zone, if the case itself – involving the wrongful taking of a blood sample for DNA analysis – is not classified as one of improper search (if it was a search, it would go in the corresponding position in [Fig 2](#)).

In *R v Samuelu*<sup>75</sup> Frater J considered the differing views of commentators on whether evidence that is important to the prosecution case will be likely to be excluded in cases of serious breach and serious offending, and she summarised the position at para 109, “Generally, but not invariably, the nature of the breach will be the critical factor in determining admissibility.” This is consistent with the shape of the curve in the area corresponding to the upper part of the vertical axis: horizontal movement representing varying degrees of seriousness of impropriety can move the balance point between the admission and the exclusion zones. As the seriousness of the offending lessens, represented by movement down the vertical axis, the curve becomes flatter and the starting point for sentencing takes on a more significant role.

### Generalisations

In addition to that just mentioned, the following generalisations are evident:

<sup>75</sup> (2005) 21 CRNZ 902 at paras 106-110.

- Impropriety will have to be grave to exclude evidence when a case is in the upper range of seriousness of offending, but where the impropriety reaches a sufficiently serious level, evidence will be excluded regardless of the seriousness of the offence, and a more drastic measure, the stay of proceedings, may be used.
- For offending in the mid-range of seriousness, where the starting point would be around four years, the seriousness of the breach is not as critical as the starting point for sentencing: the curve is flatter here and the position on the horizontal axis can change without a shift of balance point from the admission zone to the exclusion zone or vice versa.
- At the lower end of the range of seriousness of offending, where the starting point would be less than four years, the nature of the breach will be of more influence than the seriousness of the offending: anything more than a merely technical breach is more likely than not to result in exclusion, although this is less so as the starting point approaches four years.
- Where the impropriety in obtaining the evidence is of the kind that the law has recognised as being merely technical, it will not be grounds for the exclusion of evidence under s 30.

### Identifying “wrong” decisions

Care should be taken to avoid treating the approach to analysing s 30 decisions that I have outlined here as if it were a bed of Procrustes<sup>76</sup> – where the cases are adjusted to fit the theory – and it is appropriate to acknowledge that not all decisions are a comfortable fit. Of course, cases can be wrongly decided, and not all of those are tested on appeal. The method of analysis of the decision process that I have set out here has both predictive and diagnostic value. It can predict what the result should be in the circumstances of a given case, and it can be used to reveal valid criticisms of decisions that do not fit with the expected pattern of precedents. Because it is natural to give considerable weight to the reasoning of judges of the High Court who decide these matters at first instance, it is necessary to explain why criticism is offered in particular cases.

The detailed reasoning required by s 30 should make errors reasonably apparent, to the reader if not to the court giving the decision. It is particularly important to identify errors at an early stage, before they gain precedent value through their application in courts that are bound by them. As may be expected from the diagrammatic model advanced here, errors tend to involve incorrect placement of cases on the two axes. The following analysis of “wrong” decisions illustrates this by the use of comparable decisions as precedents.

#### A. *Misidentifying the seriousness of the impropriety*

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<sup>76</sup> Lawyers were reminded of the Greek legend of Procrustes by Lord Hailsham LC in *London & Clydeside Estates Ltd v Aberdeen District Council* [1980] 1 WLR 182, [1979] UKHL 7.

An apparently erroneous decision, at least in the terms used by the Court to describe the relevant impropriety, is *R v McGaughey*.<sup>77</sup> Here, on a charge involving the supply of methamphetamine, the appropriate starting point for sentencing was stated by the Crown to be between 2 and four years imprisonment. In terms of the analysis in *Williams*, therefore, this would not be classified as serious offending.<sup>78</sup> Accordingly, on the basis of the cases discussed in this paper, one would expect a serious impropriety to result in exclusion of the evidence. In *McGaughey* the divisional Court described the impropriety as “moderately serious to serious”: a search warrant to retrieve copies of text messages was issued on insufficient grounds due to a carelessly (less euphemistically, incompetently<sup>79</sup>) prepared application. It is possible, by focusing on the facts of *McGaughey* rather than on the Court’s assessment of those facts, to accept that admission of the evidence was the correct result. The impropriety was less than that concerning the relevant comparable search in *Williams* insofar as there was not the embellishing of the grounds in the application that had occurred there, nor were there compounding factors such as entry by numerous officers into an occupied dwelling, and pat-down searches. Thus while the impropriety in *Williams* was described by that Court as “moderately serious”, the impropriety in *McGaughey* was of a lesser degree: it should not have been called “moderately serious to serious.” This would permit the placing of this case in the “more than technical” breach area and in the admission zone of [Fig 2](#), while still accepting that the starting point for sentencing would not be over four years imprisonment. The Court’s categorisation of the impropriety as “moderately serious” illustrates that what is really involved is slippage in the meaning of that term; the Court could have reached the same conclusion by describing the impropriety as more than merely technical, and comparing it with that in *R v McManamy*.<sup>80</sup>

Interestingly, and a point not adverted to in *McGaughey*, if this case had concerned not a search warrant but instead (and in appropriate circumstances) an application to intercept the text messages while they were in transmission, and if the application had been similarly deficient, the evidence would have been inadmissible by virtue of s 25 of the Misuse of Drugs Amendment Act 1978; there is in reality little difference between

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<sup>77</sup> [2007] NZCA 411.

<sup>78</sup> *R v Williams* [2007] 3 NZLR 207, (2007) 23 CRNZ 1 (CA) at para 250 per William Young P and Glazebrook J: “A crime is considered serious if the starting point of any sentence is likely to be in the vicinity of four years or more or where there are elements of a threat to public safety involved, such as the carrying of a loaded weapon in public. The more serious the crime the more weight this factor is accorded. Crimes involving a serious incursion into the personal bodily integrity of the victim, particularly where there is a significant risk of there being further victims, are regarded as particularly serious ...” and at para 135 the Court noted “we do not see drug offences as victimless crimes. Even where no specific victim can be identified in relation to the specific offending, potential individual victims exist and society at large suffers.” It is therefore possible to argue that drug dealing where the starting point would be something under four years’ imprisonment could still be regarded as serious offending, although against that it could be said that the starting point for sentencing will naturally take into account the dangers posed to society by the offending. In *Williams*, a breach arising from a search warrant application containing insufficient grounds was held to be moderately serious (para 197), although that was on the basis that other improprieties were combined with this: exaggeration in the application, intrusion by numerous officers into an occupied dwelling, pat-down searches; evidence of serious offending, albeit not evidence that was essential to the prosecution case, was excluded (para 198).

<sup>79</sup> This is the Court’s expression [2007] NZCA 411 at para 25.

<sup>80</sup> Above, Fig 2 and accompanying note.

intercepting a text message while it is in transit, and retrieving a copy of it after it has been transmitted to its intended recipient. On that basis, an unlawful search warrant should have similar consequences for admissibility as an unlawful interception warrant. Furthermore, it was inappropriate to regard the privacy interest as somewhat diminished merely because the search did not involve a physical intrusion into the defendant's home, or a search of his person, as the comparison is not apposite; the statutory policy against admission of evidence of improperly intercepted private communications is the relevant benchmark.

At least in *McGaughey* the Court did try to identify the seriousness of the police misconduct. In *R v Tweeddale*<sup>81</sup> this was not done at all. The accused, the respondent in this Crown appeal against the District Court ruling that the evidence in question was inadmissible, was approached at a hotel by a police officer who, it was assumed for the purposes of the appeal, did not have reasonable grounds to carry out a search of a small belt bag (a "bum bag") that he had with him. The officer said she intended to carry out a search of him and the bag under s 18(3) of the Misuse of Drugs Act 1975. The accused did not co-operate; he got up to leave and pushed the officer but not hard enough to make her fall over. He was then overpowered and in the bag was found a loaded pen gun, capsicum spray, and a plastic bag containing cannabis.

The divisional Court in *Tweeddale* did not assess the likely starting point for sentencing for the offending, but it would seem to be well under four years imprisonment. If so, to admit the evidence it would be necessary to conclude that the impropriety of the police conduct was in the merely technical area. It was an illegal search of a person and, as the illegality arose from absence of proper grounds, it could not be regarded as less than that in the *Bainbridge*, *Thomas*, and *Maihi* cases mentioned in [Fig 2](#). The Court makes no attempt, in *Tweeddale*, to put the breach on the assumed facts in the context of improprieties in any other case. Nevertheless, the Court proceeded to carry out a balancing exercise, but this is vulnerable to further criticism: it treats police good faith as a factor favouring admission of the evidence instead of as a neutral factor, and it uses resistance to an unlawful search as grounds for persisting with the search. Furthermore, in suggesting that the accused may have assaulted the officer by resisting the illegal search, the Court improperly introduces an idea of inevitable discovery, which would have occurred when he was searched pursuant to the arrest. Since this inevitability arose from the original police misconduct, the impropriety could not be said to have attenuated. In the absence of a more fully reasoned judgment, it seems necessary to conclude that the Court's decision to allow the Crown appeal and rule the evidence admissible was plainly wrong.<sup>82</sup>

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<sup>81</sup> CA38/06, 7 September 2006.

<sup>82</sup> See also *R v Moreton* [2009] NZCA 121, where an improper stopping of a car by a constable was followed by a search conducted by a sergeant who was unaware of the impropriety; this good faith search was held not to be tainted by the impropriety.

*B. Exaggerating the seriousness of the offending and minimising the impropriety*

This combination of errors appears, with respect, to have occurred in *R v Climie*<sup>83</sup>. Here, the police invoked statutory powers of warrantless search of an occupied dwelling, in order to retrieve a bag they had seen, through a kitchen window, being hidden. The Crown conceded that the search was unreasonable, because the necessary grounds did not exist. The police had arrived at the property in answer to an unrelated emergency call, and the search was confined to what was necessary to seize the bag. The bag contained 85.5 g of cannabis oil which was worth between \$3420 and \$6840, and the appellant was charged with possession of that class B drug for supply.

The Court of Appeal accepted<sup>84</sup> the lower court's assessment of the likely starting point for sentence "at its highest" as up to four years imprisonment.<sup>85</sup> This, on the authorities, would be an overestimate. The error is compounded by the Court's endorsement<sup>86</sup> of the treatment of the nature and quality of the evidence and the importance of the evidence to the Crown case as factors that bolstered the public interest in its admission. I have suggested above that these should only be able to derogate from the public interest as reflected in the starting point for sentence. The starting point assumes a conviction, which subsumes matters such as quality and importance of the evidence.

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<sup>83</sup> [2007] NZCA 490 (9 November 2007).

<sup>84</sup> *Ibid* at para 19.

<sup>85</sup> Compare the rather more serious case of *R v Rameka* CA18/99, 13 May 1999, as summarised in the schedule of authorities presented by the Crown, and referred to, in the leading case on sentencing for class B dealing offences, *R v Wallace and Christie* [1999] 3 NZLR 159, (1999) 16 CRNZ 443 (CA): "One representative count of manufacturing, one count of selling, and one representative count of possession for supply, all relating to cannabis oil, and one count of possession of cannabis plant for the purpose of sale. Police discovered 10 cannabis bullets, 57 capsules of cannabis oil valued at \$1,710, and a further 14 capsules worth \$420. Estimated supply of 160 capsules per week valued at \$4,800 over approximately five weeks. Starting point five years' imprisonment, reduction of six months for delayed guilty plea. Previous cannabis and other convictions. Upheld effective sentence of four years six months imprisonment, though Court said sentence high. Guilty plea." But see also *R v Harding* CA308/92, 11 December 1992: 93 g of oil, valued at \$3500, one year imprisonment on Solicitor-General's appeal; and *R v Rakatau* [2007] NZCA 21: one year 11 months imprisonment upheld for possession of cannabis for supply, cultivating cannabis, possession of cannabis oil and possession of utensils; found with 4.8 kg cannabis drying in house, worth \$27,000-\$51,000, along with scales and 72 snaplock bags: two year 10 month starting point appropriate. In *R v Greer* CA163/03, 20 May 2004 at para 16 the Court referred to decisions on dealing in cannabis oil, as follows: "[16] In the course of dismissing the appeal in *Rameka*, this Court referred to a number of cases involving possession for supply of cannabis oil. They included *R v Stott* CA98/78, 10 April 1979 (S found guilty at trial, 232 grams of cannabis resin, three years upheld); *R v Leydon* CA136/79, 10 December 1979 (guilty plea, 6.96 grams of resin, two and a half years upheld though termed "severe"); *R v Traber* CA73/92, 13 May 1992 (pleas of guilty to manufacture and possession for supply of \$4,000 worth of cannabis oil, three years upheld); *R v Kemp* CA172/95, 26 June 1995 (pleaded guilty on arraignment to possession of equipment for manufacture and 71 capsules, two and a half years upheld though "towards the top end of the range")", and added, para 17: "In *R v Burke* CA373/98, 19 April 1999 this Court indicated, obiter, that a sentence of four years imprisonment after a contested hearing for offences involving \$40,000 worth of cannabis oil, could not be seen as excessive." In *Greer* itself, a four year starting point was considered appropriate where drug counts involved 26 g cannabis oil, equipment for manufacture of oil, and possession of 16 kg cannabis plant, valued in excess of \$50,000, for supply. In *R v Rosevear* CA238/05, 29 August 2005 a sentence of 12 months imprisonment was upheld for six counts involving cannabis plant and cannabis oil, where there was evidence of sales totaling \$4445.

<sup>86</sup> [2007] NZCA 490 at para 21,



The other error in *Climie* was the minimising of the impropriety. This amounted to glossing over the statutory limitations in s 18(2) of the Misuse of Drugs Act 1975 on the power to search. That provision permits a search for only some of the scheduled substances and it requires reasonable grounds for belief that evidence of an offence against the Act in relation to substances of that limited range is being committed. The Crown conceded here that there was no such belief, and that the search was therefore unreasonable. It is quite understandable that the police would feel frustrated by the requirement for this level of precision, and it may be doubted that this legislation is practical. Nevertheless, the propriety of the Crown's concession was not questioned by the Court. Having, then, accepted that this was a search of an occupied dwelling without proper grounds, it must have been at least a moderately serious breach. Once the impropriety is established, its seriousness depends on its effect on the accused's reasonable expectation of privacy. To hold otherwise is to fail to acknowledge the importance of the statutory restrictions on the power of warrantless search.

In [Fig 2](#) *Climie* would go above *Lynch* (ie vertically in the diagram) in terms of seriousness of impropriety, and on a level with *Maihi* in terms of public interest. In *Climie* the Court distinguished *Maihi* on the difference in seriousness of the impropriety,<sup>87</sup> which is beside the point as this case is relevant for its comparable level of public interest. Counsel for the appellant in *Climie* also cited *Hjelmstrom*, which would be relevant on the issue of public interest, but again the Court distinguished it on the basis that the breach there was more serious.<sup>88</sup> *McMahon* was also referred to, presumably for its relevance to the assessment of the public interest factor in *Climie*, but the Court did not address it in any detail, merely saying that each case turns on its own facts.<sup>89</sup> The lesson is that, in order to discourage the Court from distinguishing cases on irrelevant grounds, it will be appropriate to specify whether a case is being used as a precedent for assessment of the public interest in admission of the evidence, or for assessment of the magnitude of the impropriety.

### *C. Obscuring the Williams approach to starting point for sentencing*

The reference in *Williams* to cases where the starting point for sentence would be “in the vicinity of four years’ imprisonment and over”<sup>90</sup> is a potentially useful guide to the application of the discretion. It is unfortunate that the Court linked that sentencing level with the idea of a serious offence. The Court had to decide where to place the critical level of sentence, and the notion of what should be regarded as a serious offence was part of that decision, but once the decision as to level was made, separate reference to seriousness was superfluous and it became a potential source of vagueness. Whether or not drug offending is victimless, and whether it should necessarily be regarded as serious, are separate discussions which have preceded the determination of the sentence starting point, and which do not need to be repeated in each case. There are sufficient

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<sup>87</sup> Ibid at para 14.

<sup>88</sup> Ibid at para 15-17.

<sup>89</sup> Ibid at para 18.

<sup>90</sup> *R v Williams* [2007] 3 NZLR 207, (2007) 23 CRNZ 1 (CA) at para 135 per William Young P and Glazebrook J, quoted below.



sentencing precedents for the starting point for drug offending to be identified from alleged facts, without a broad examination of policy. It seems that the joint judgment in *Williams* anticipated a departure from the four year level for instances of offending involving a threat to public safety, and the example was given of carrying a loaded weapon in public. But again, the public interests are represented in the sentence starting point.

It is convenient here to quote para 135 of *Williams*:

“As a guideline, an offence can be considered serious if the sentencing starting point (in the sense the term is used in *R v Taueki* [2005] 3 NZLR 372 at para [8])[<sup>91</sup>] for the relevant accused is likely to be in the vicinity of four years' imprisonment and over. This would have to be assessed on the basis of the Crown case. An offence could also be seen as serious, even if the likely penalty was less, if the offence involved a threat to public safety, such as the carrying of a loaded weapon in public. The more serious the offence, the more weight it has. It has been suggested that there has been a more benign attitude in the Courts to drug offences because they are "victimless" crimes. We consider that any benign attitude to drug offences has usually been where there has been low-level cannabis cultivation (see, for example, *R v Hjelmstrom* (2003) 20 CRNZ 208 (CA) at para [20]). We make it clear, however, that we do not see drug offences as victimless crimes. Even where no specific victim can be identified in relation to the specific offending, potential individual victims exist and society at large suffers.” [footnote inserted]

The use of the term “serious” in the first sentence is, in terms I have used here, a reference to an offence for which the public interest in admission of the evidence would be greater than the public interest in its exclusion, given the impropriety by which it had been obtained. The suffering of society, referred to in the last sentence of this para, is a matter that is taken into account when the starting point for sentence is ascertained; it does not add to the public interest in admission of the evidence beyond the level indicated by the starting point, because that would involve double counting.

Taking up this reference in *Williams* to the seriousness of the alleged offending, the Court has subsequently, in a divisional manifestation, suggested that seriousness may be grounds for departure from the four year guideline: *R v Yeh*.<sup>92</sup> After quoting para 135 of *Williams*, the Court in *Yeh* added, obiter:

“[55] There is a suggestion in the decision of Courtney J [in the Court below in *Yeh*] and in the submissions on behalf of the respondent, that any

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<sup>91</sup> The *Taueki* starting point is, as previously mentioned, the sentence appropriate when aggravating and mitigating circumstances relating to the offending are taken into account, but excluding aggravating and mitigating features personal to the offender.

<sup>92</sup> [2007] NZCA 580 (14 December 2007). The judgment of the Court (Hammond, John Hansen and Miller JJ) was delivered by John Hansen J.

offence likely to attract a sentence of imprisonment of less than four years is not serious. That is to overstate the effect of *Williams*. A lengthy term of imprisonment for the offending is a proper element to take into account in ascertaining seriousness of offending. But there are other factors to be considered. As can be noted from [135] of *Williams*, any thought that there should be a benign attitude to drug offences is incorrect. *It is proper for a Court, in carrying out the balancing act and determining the seriousness of the offence, to take into account the pernicious nature of certain types of offending and the consequences arising from that.* In relation to methamphetamine dealing that has frequently been commented upon. While the four-year period mentioned in *Williams* is a useful guideline, it should not be applied as a mathematical formula. The ascertainment of the level of seriousness of the offending requires a consideration of all surrounding circumstances, as *Williams* makes clear.” [emphasis added]

The sentence I have emphasised here is correct on its own terms, but the method by which the pernicious nature of the offending is taken into account is through the ascertaining of the starting point. Pernicious offending is not grounds for increasing the public interest in admission of the improperly obtained evidence beyond the level indicated by the sentencing starting point, because that would be double counting. It is wrong to use double counting to introduce vagueness over the four-year level.

A counter-balance to those obiter remarks in *Yeh* is *R v Horsfall*,<sup>93</sup> where the seriousness of the manufacturing and supplying of methamphetamine was indicated by the sentences of four and a half years imprisonment that had been imposed. The Court of Appeal held, on grounds that had not been advanced in the High Court, that the dwellinghouse search, which led to the discovery of grounds to carry out a wider search under s 18(2) Misuse of Drugs Act 1975, was unlawful and amounted to a serious intrusion on the accused’s rights, so that exclusion of all the evidence of offending was a proportionate response.

The intention of the Court in *Williams* seems to have been to avoid any suggestion that, while a particular drug offence may not be called serious in the context of the exercise of the discretion concerning the admissibility of improperly obtained evidence, that is not to say that it will not be described as serious in other contexts, such as sentencing. Its classification as less than serious in the law of evidence should not be taken to mean that a benign attitude is henceforth to be taken on the question of punishment. On the other hand, where the offence is one involving a threat to public safety, the public interest in admission of evidence of it may be greater than that indicated by the sentencing starting

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<sup>93</sup> [2008] NZCA 449 (30 October 2008). In Fig 2 both *Yeh* and *Horsfall* are placed at similar positions on the horizontal axis, because the breach in each case was of similar seriousness, and the vertical difference reflects the relatively less serious alleged offending in *Yeh*. *Horsfall* is a good indication of the shape of the curve, because after unsuccessful pretrial challenges to the admissibility of the evidence it proceeded to trial and sentencing which enables accurate placement on the vertical axis. The five year starting point reflected, on the particular facts, lack of significant commerciality in a methamphetamine manufacturing enterprise that yielded an estimated 150 g over a 12 month period – a quantity that otherwise would have made 7 years 6 months an appropriate starting point: see *R v Horsfall* (HC Auckland, CRI-2006-090-2930, 7/12/07, Woodhouse J) at paras 10, 18, 19.

point. This arises where the maximum sentence available is four years' imprisonment or less, or where guidelines for sentencing indicate a sentence in that range. The example given in *Williams*, the carrying of a loaded weapon in public, has a maximum sentence of four years' imprisonment,<sup>94</sup> but the Court clearly contemplates that improperly obtained evidence of it may more readily be admissible than for an offence not involving public safety. One can imagine, for example, that an impropriety might occur in relation to the firearms offence because of exigent circumstances. It is less easy to see the rationale for the inclusion of low-level drug dealing offences<sup>95</sup> in the group where the public interest in admission of the evidence might not be reflected adequately in the sentencing starting point, especially as the maximum penalty is life imprisonment for class A drug dealing and 14 years for dealing in class B drugs.<sup>96</sup> There is plenty of room, within those maxima, for assigning ranges of sentences for different levels of dealing taking into account all relevant public interest considerations.

### **The relevance of alternative remedies**

One of the balancing factors, required to be considered by s 30(3)(f), is

“whether there are alternative remedies to exclusion of the evidence which can adequately provide redress to the defendant”.

At common law there was some vacillation over the role of alternative remedies – other than exclusion of the improperly obtained evidence – in the balancing exercise. In *R v Grayson and Taylor*<sup>97</sup> there was some obiter discussion of alternatives to exclusion of evidence obtained through unreasonable searches:

“The remedies might, in the first place, relate to the trial itself. For example ... the penalty imposed might be reduced or there might be an appropriate order for costs. There is the possibility of police disciplinary proceedings, criminal prosecution, and civil proceedings. Proceedings brought by an aggrieved person might lead to damages or compensation, a declaration, or future-looking relief.

“...The formulation of appropriate remedies should be approached broadly. To settle upon a single remedy to be applied in all cases rather than keeping open the full range of possible remedies risks inflexibility and the rejection of possibly more appropriate remedies in particular cases. Similarly the response to any particular breach arguably should be at the appropriate level. It should be no less an effective remedy because it is fashioned to bear some relationship to the nature and seriousness of the breach. Whether there should be the same response to breaches of rights in the course of activities resulting

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<sup>94</sup> Arms Act 1983, s 45. And possession of an offensive weapon carries up to two years' imprisonment: Crimes Act 1961, s 202A(4).

<sup>95</sup> *R v Fatu* [2006] 22 NZLR 72; (2005) 22 CRNZ 638 (CA), holding that for low level supply – less than 5 g - of methamphetamine (a class A drug) the sentence starting point should be between two and four years imprisonment.

<sup>96</sup> Misuse of Drugs Act 1975, s 6(2).

<sup>97</sup> [1997] 1 NZLR 399, (1996) 14 CRNZ 426 (CA).

in the discovery of real evidence as to breaches of rights in the course of obtaining, for example, confessional evidence also requires careful consideration.”

A retreat from this recognition of alternatives to exclusion is evident in *R v Shaheed*.<sup>98</sup>

“[153] We turn to the question of alternative remedies. The broad question is whether, as a matter of course, it is necessary to consider whether the breach of an accused’s rights can adequately be marked out and redressed in whole or in part by a remedy (if one is needed) which does not involve exclusion of vital and reliable evidence; and whether the answer to that inquiry may also be taken into account in the balancing exercise. The obvious difficulty is that other remedies are unlikely to be found satisfactory to provide vindication of the right in a criminal case involving a serious breach of a right whereby the police have obtained important evidence against the accused. In such circumstances, if the evidence were to be admitted and were to lead to the conviction of the accused, only the most cynical observer could take the view that a declaration by the Court that the right had been breached or reference to the Police Complaints Authority, possibly leading to a disciplinary proceeding against the transgressing police officer, could provide a form of redress which truly vindicated the right.

“[154] An award of *Baigent* damages to a convicted criminal serving a long sentence as a means of recompensing him or her for the use at trial of evidence which the police had obtained improperly might look strange. It would appear to have no precedent elsewhere in the jurisdictions we have surveyed. So too, perhaps, would the imposition of a reduced sentence. The apparent advantage to society of convicting and locking up a particular criminal in a particular case would be outweighed by the general public perception that the police could now breach the rules and still secure such a result. Unless the crime were especially serious or involved an ongoing risk to public safety, such an outcome would be regarded by a dispassionate observer as bringing the administration of justice into disrepute.

“[155] It is therefore preferable where a conviction ought to lead to a sentence of imprisonment, to put out of consideration the possibility of a means of redress other than exclusion of the disputed evidence and to make a decision on its admissibility by an appropriate balancing of other relevant factors.”

Section 30(3)(f) makes it clear that the possibility of an alternative remedy is a matter to which the court “may, among any other matters, have regard”. The problem it raises is

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<sup>98</sup> [2002] 2 NZLR 377; (2002) 19 CRNZ 165 (CA) para 153-155 per Richardson P, Blanchard and Tipping JJ. Gault J agreed at 173, McGrath J and Anderson J did not express disagreement on this point. Elias CJ would have retained the prima facie exclusion rule, which means that she would not have considered alternative remedies appropriate.

how the possibility of a remedy other than exclusion of the improperly obtained evidence should be taken into account as part of the balancing exercise.

Two obvious alternatives to exclusion are recognition of the breach of rights as a mitigation factor in sentencing,<sup>99</sup> or – where the impropriety was very serious – a stay of the proceedings. The appropriateness of a stay arising from impropriety in the obtaining of evidence can be assessed, in relation to the seriousness of the impropriety, from the diagrammatic analysis used here. But when the impropriety should be used as a mitigating factor instead of as grounds for exclusion of evidence is not as clear.

The position would be clearer if s 30(3)(f) were to be incorporated into a s 30(2)(b). This would add alternative remedies to the need for an effective and credible system of justice as matters to which appropriate weight had to be given in the balance against the impropriety. The result would be that alternative remedies would become part of the positioning of the case relative to the vertical axis in the model used here. That makes sense, because the public interest in admitting improperly obtained evidence could arguably be less if there were no alternatives to exclusion of the evidence, as long as vindicating the impropriety was in the public interest. It would follow that there could also be a role for the existence of alternative remedies as a matter increasing the public interest in admitting the evidence, but that would be counter to my suggestion<sup>100</sup> that the sentence starting point reflects all aggravating public interest considerations. These matters have not yet been explored in the cases. Current placement of alternative remedies in subs (3) gives this factor a conceptually difficult role in the assessment of the seriousness of the impropriety by which the challenged evidence was obtained.

Would many cases get the alternative remedy instead of exclusion? The possibility of an alternative remedy has received little attention.<sup>101</sup> The inappropriate location of the paragraph in subs (3) has perhaps discouraged a rethinking of the public interest side of the balance. The best that can be said of it is that the matters listed in subs (3) are not mandatory considerations, and courts are right not to have regard, at the balancing stage, to alternative remedies when assessing the weight to give to the impropriety. However if

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<sup>99</sup> Cases involving delay illustrate this compensatory use of the breach, where the delay was insufficient to justify a stay of proceedings: *R v Williams* (HC Auckland, CRI-2007-404-6, 6/12/07, Asher J), *Mills v HM Advocate* [2004] 1 AC 441 (PC), *Spiers v Ruddy* [2008] 1 A.C. 873; [2007] UKPC D2 (PC (Sc)). The Supreme Court has upheld Asher J's approach, holding that delay can be grounds for mitigating sentence where a stay of proceedings is not appropriate: *Williams v R* [2009] NZSC 41.

<sup>100</sup> Above, under the heading "Is the centrality of the evidence relevant?"

<sup>101</sup> In *R v Huang* (HC Auckland, CRI 2005-004-21953, 19/9/07, Rodney Hansen J) an early application of s 30 mentioned in Fig 4 above, there was no reference to the availability of alternative remedies. In *R v Yeh* [2007] NZCA 580 and above, Fig 2, there was no reference to alternative remedies and at para 53 the Court referred to its "application of the necessary balancing factors". In *R v Horsfall* [2008] NZCA 449, above Fig 2, it was simply stated, in half a sentence at para 49 that there were no alternative remedies. Nor are alternative remedies discussed in cases, other than that mentioned in note 94, where there has been impropriety but the evidence has held to be admissible: eg *R v McGaughey* [2007] NZCA 411 and above under the heading "A. Misidentifying the seriousness of the impropriety", *R v T* [2008] NZCA 99, and *R v Adams* [2008] NZCA 259 although here, at para 18, the absence of alternative remedies receives bare mention. In *R v Ngo* (HC Auckland, CRI 2007-004-18264, 19/3/09, Lang J) it was noted at para 41 that the impropriety of this car search could not be remedied by some form of civil redress.

the relevance of alternative remedies is, as I have suggested, that their absence can be reason for reducing the public interest in admitting the evidence, the effect on the pattern of decisions would be minimal. This is because the cases to date have proceeded on the basis of absence of alternative remedy.

### **Concluding comments**

As precedents increase in number so will the clarity of the line between admissible and inadmissible evidence. Evaluation of the two sides of the balance, the seriousness of the impropriety and the strength of the public interest in admitting the evidence, is not a subjective exercise dependent on who the judge is. It is not an impenetrable mystery. A judge cannot determine how important a factor is without comparing it with precedents.

Misuse of precedents can readily be identified using the model. Sometimes, cases cited on one point are wrongly distinguished on another. The importance of identifying the starting point for sentencing might be overlooked. These ways of misusing precedent undermine the exercise of ascertaining the appropriate weights of the factors in the balancing exercise.

A tendency to sanitize official impropriety by diminishing the importance of statutory requirements must be resisted. This is particularly a danger in relation to the granting of search warrants. It is also wrong to sanitize impropriety by reference to the defendant's attitude to it at the time it occurred.

Happily, most cases avoid such errors. They reveal, as the model shows, a rational distribution of balance points in the exclusion zone. The number of cases is at this stage relatively few, but they form a strong foundation. It will be particularly useful for judges to say when they think a case is close to being evenly poised, as in such cases the shape of the line between the zones becomes clearer. The need to avoid distortions of the line, which would reflect an underlying irrationality, is important. When the process is rational, counsel can predict the prospects of exclusion when considering whether a proposed objection to admissibility would have merit. Futile objections should be reduced when the outcome of a challenge to admissibility is clearly indicated by precedent.