Chapter 3
Scotland: A Plea for Consistency

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3.1 The General Theory of Admissibility of Illegally Gathered Evidence

3.1.1 Introduction

The Scottish courts have taken an unsatisfactory approach to the question of whether illegally obtained evidence should be admitted in or excluded from criminal proceedings. The first part of this chapter discusses the incoherent development of the doctrine of illegally obtained evidence by the Scottish courts in criminal cases.[1] It should be noted from the outset that the judicial development of the criminal law and the attendant procedure is usual in Scotland. The substantive criminal law is not codified[2] and, although much of Scots criminal procedure has been legislated upon,[3] the law on illegally obtained evidence is one example of the courts' proactive approach.

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[1] The approach of the Scottish courts with regard to illegally obtained evidence in civil cases is even less coherent than that adopted in criminal cases. For discussion, see Ross and Chalmers (2009, para. 1.7.8); and the cases cited there.

[2] A group of Scottish academics has created a draft criminal code, but this is unlikely to be adopted as the law: Clive et al. (2003).

[3] The most comprehensive piece of legislation is the Criminal Procedure (Scotland) Act 1995 (subsequently CP(S)A).

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S.C. Thaman (ed.), *Exclusionary Rules in Comparative Law*, Ius Gentium: Comparative Perspectives on Law and Justice 20, DOI 10.1007/978-94-007-5348-8_3,
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The second part of the chapter then explores the relationship between privacy concerns (which have taken on renewed importance following the human rights legislation of the late 1990s)[4] and the doctrine of illegally obtained evidence in Scotland. The chapter concludes by discussing the need for reform of the law which has gone largely unaddressed for over 50 years.

It is sensible to begin by examining the leading case on illegally obtained evidence, before considering the law's later, inconsistent, refinement.

3.1.2 Balancing Competing Concerns

Historically, the Scottish courts adopted a similar approach to their English counterparts: in practice, it appears that illegally obtained evidence was usually (though not always)[5] admitted.[6] This changed, however, with the "watershed"[7] decision by a "Full Bench" of seven judges of the Court of Criminal Appeal (more commonly, "the Appeal Court") in *Lawrie v. Muir*[8] – the current leading case.[9] *Lawrie* removed the certainty of (what appeared, in the main, to be) a mandatory inclusionary rule and, in doing so, introduced an apparently principled balance of concerns of both due process and truth. In this respect, *Lawrie* was fairly revolutionary: Scots law is traditionally adversarial in nature, so ascertaining the "truth" is not mandated.[10]

In *Lawrie*, the Lord Justice-General (Cooper) opined that the court, in considering whether or not to admit illegally obtained evidence, must balance two competing interests:

> a) the interest of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities, and b) the interest of the State to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from Courts of law on any merely formal or technical ground.[11]

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[4] See the discussion of the Human Rights Act 1998 and the Scotland Act 1998 below in Sect. 3.2.

[5] See, for example, HM Advocate v. Mahler (1857) 2 Irv 634, where a promise by the police not to prosecute the accused if he gave the police information about his cohorts (which was later broken) led to the exclusion of that evidence at trial.

[6] Gray (1966, 92), Macdonald (1948, 326), and Lewis (1925, 292).

[7] Davidson (2007, 349).

[8] 1950 JC 19.

[9] The doctrine of precedent means that consideration of an earlier decision is only possible by a larger court. Most appeals are heard by three judges, so a Full Bench is generally comprised of five judges. In *Lawrie*, the court had to consider a decision of five judges (Adair v. McGarry, 1933 JC 72), necessitating the formation of a larger court.

[10] It is widely recognised, however, that inquisitorial aspects are creeping into the Scots trial. See, for example: Duff (2004a, 29–50) and Gane (1999, 56–73).

[11] Lawrie v. Muir 1950 JC 19, at 26.

He continued that:

> Irregularities require to be excused, and infringements of the formalities of the law in relation to these matters are not lightly to be condoned. Whether any given irregularity ought to be excused depends upon the nature of the irregularity and the circumstances under which it was committed. In particular, the case may bring into play the discretionary principle of fairness to the accused.[12]

These two statements of the law make it clear that the Crown bears the burden of excusing any irregularity which is found to exist. Furthermore, the court must act to both vindicate the accused's right to a fair trial and to ensure that the State's interest in bringing criminals to justice is not thwarted.[13] This is the *only* approach taken towards illegally obtained evidence in criminal trials: no distinction is made in Scotland between different *types* of irregularity.[14] Furthermore, if an irregularity is excused, it is unusual for a civil action to be brought.[15] The court's discretion is thus, usually, absolute.

The position following *Lawrie* has been considered approvingly by English commentators[16] and Glanville Williams argued that the Appeal Court's decision had "much to commend it".[17] Despite this, the position is far from satisfactory. This is because *Lawrie* is unclear on exactly how the court is to assess "fairness". As Chalmers notes, the concept of fairness is "conspicuously malleable".[18] Regrettably, subsequent decisions served to obfuscate, rather than clarify, the issues at the core of the illegally obtained evidence doctrine in *Lawrie*. As Duff laments, "we are in a position where the leading text on evidence simply lists, without further explanation, a series of factors which the court may take into account in determining whether to excuse an irregularity and admit improperly obtained evidence".[19] In the following sections, these factors are examined.

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[12] Ibid, 27.

[13] On the importance of representing both of these interests fairly, see Miln v. Cullen 1967 JC 21, 29–30, *per* Lord Wheatley.

[14] A distinction is, however, made between oral statements by the accused and real and documentary evidence, although the ultimate test (one of fairness) remains the same. See the discussion of interrogations below in Sect. 3.3.

[15] The Crown has, nevertheless, accepted that a civil action against the police is proper where there has been an irregularity: Lawrie v. Muir 1950 JC 19, 23.

[16] See, for example, Yeo (1982, 395) (arguing that adopting the Scottish approach in an English context would "go a long way to enhancing the proper administration of criminal justice"). Cross used to open his discussion of irregularly obtained evidence by citing extensively from *Lawrie*: Cross (1958, 259–68). More recent editions of Cross's text (now authored solely by Colin Tapper) argue that the Scottish approach could fall victim to an imagined "crude popular reaction": Tapper (2007, 562).

[17] Williams (1955, 349).

[18] Chalmers (2007, 102).

[19] Duff (2004b, 98), referring to Walker and Walker. Ross and Chalmers (2000, para. 1.7.5). The same approach is taken in the most recent edition: Ross and Chalmers (2009, para. 1.7.5).

3.1.3 Factors (Possibly) Bearing Upon the Admissibility/ Exclusion of Evidence

The most recent edition of Walker and Walker – the leading text on the Scots law of evidence – lists the following factors which *must* have a bearing upon the court's decision as to whether or not to admit illegally obtained evidence[20]: (1) the "gravity of the crime with which the accused is charged"; (2) the "seriousness or triviality of the irregularity"; (3) the "urgency of the investigation in the course of which the evidence was obtained … the likelihood of the evidence disappearing if time is taken to seek a warrant"; (4) the "authority and good faith of those who obtained the evidence"; and (5) the "fairness to the accused". It is useful to explore each of these points individually to demonstrate that the courts have not been consistent in their application.

3.1.3.1 Gravity of the Crime Charged

The first thing to note is that Walker and Walker's assertion that the court *must* take the above factors into account is misleading.[21] In fact, the considerations are rarely discussed expressly and the courts certainly do not consider *all* of them in each case.[22] A good example of this is consideration of the gravity of the offense, which has only been mentioned explicitly in a few reported cases.

It is clear that the courts are more willing to allow illegally obtained evidence to be admitted in particularly grave crimes, such as rape[23] and murder.[24] At the other extreme, the courts have been less willing to excuse irregularities (i.e. to admit evidence) in "trivial" crimes, such as selling milk in stolen bottles.[25] This position may appear perverse: the more serious the offense, the more likely it is that illegally obtained evidence will be admitted.[26] Nevertheless, as Gray explains, this is a tenable approach:

[20] The following points are all taken from Ross and Chalmers (2009, para. 1.7.5). Footnotes are omitted.

[21] Ibid.

[22] It is nevertheless *possible* that the court will consider a number of factors. For instance, in Edgley v. Barbour, 1995 SLT 711, the good faith of the police, the urgency of the situation and the public interest in prosecution were all expressly relied upon (see the Lord Justice-General (Hope)'s opinion at 715).

[23] HM Advocate v. Milford 1973 SLT 12, 13 *per* Temporary Sheriff Macphail. Milford had refused to give a blood sample for the purposes of finding out his blood group, so the case concerned whether or not the Crown could obtain one without consent. It is not, therefore, a case where a past irregularity had to be excused.

[24] HM Advocate v. Megrahi *(No 3)* 2000 SLT 1401 [13], *per* Lord Coulsfield.

[25] See Lawrie v. Muir, 1950 JC 19, 28 *per* the Lord Justice-General (Cooper).

[26] Gray (1966, 96).

> [S]ociety has nothing much to lose when people accused of trivialities are acquitted and can accordingly afford to take a more sporting attitude. Society is, however, not prepared to be quite so sporting to those accused of murder; a viewpoint which is understandable, though whether society is under any obligation to adopt such an attitude towards petty criminals and those charged with technical offences is extremely doubtful.[27]

Gray then notes that the relative "seriousness" or "triviality" of an offense is, nevertheless, an inherently subjective matter.[28] Between the two polarized positions (serious and trivial) there is, of course, significant middle ground. It is therefore unclear just *how* serious a crime must be before the courts will be minded to admit illegally obtained evidence.[29] In one case, for example, it was held that the public interest in prosecuting a driver who had radar detection equipment fitted to his car was great enough to excuse an illegal search of the car.[30] In another case, an armed robber was acquitted on the basis that the police had "tricked" him into making incriminating statements.[31] The severity of the offense did not sway the court in favor of admitting the evidence.[32] Admittedly, the irregularity was different in these two cases. In one, the police officer simply reached into an unlocked car; in the other, he manufactured a situation where the accused made self-incriminating statements. The question remains, however: just *how* serious must an irregularity or the crime charged be before the court will lean in a particular direction?

3.1.3.2 Seriousness or Triviality of the Irregularity

The seriousness or triviality of the irregularity is, then, a further factor that the courts may take into account. Nine months after the decision in *Lawrie*, the Appeal Court delivered its judgment in another illegally obtained evidence case: *McGovern v. HM Advocate*.[33] There, the police had taken scrapings from under a suspect's fingernails *before* he was arrested. The court held that this had, technically, been an assault and, in consequence, the irregularity was not to be excused.

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[27] Ibid. Although see Ashworth (1977), for an argument that it is more important to exclude illegally obtained evidence in relation to serious crimes, as the need to protect the accused's rights is greater the more serious the potential consequences for him of a conviction. See, similarly, Ashworth (2003) and Choo (2008, 94).

[28] Gray (1966, 99). For an attempt at crafting a more objective account of offense seriousness, see Ashworth (2005, 102–50).

[29] Gray (1966, 103).

[30] Edgley v. Barbour 1995 SLT 711.

[31] HM Advocate v. Higgins 2006 SLT 946, discussed in more detail below.

[32] Ibid, [26] *per* Lord MacPhail.

[33] 1950 JC 33.

In Scots criminal procedure, the police may not search a person without her consent[34] before she is arrested.[35] Accordingly, the taking of scrapings from the suspect in *McGovern* was a flagrant breach of protocol. Had the police arrested McGovern before taking the scrapings, there would have been no irregularity. It is unclear, however, whether it was the ease with which the police *could* have followed the proper procedure that swayed the court, or rather that McGovern's rights had been infringed. This makes it difficult to discern what principle underlies the courts' concern with the seriousness or triviality of any irregularity. As Duff explains:

> Lord Cooper's initial comments about the 'prejudice' caused to the accused by the use of the evidence at trial suggest he was influenced by the need to protect the accused's rights because there was no question over its reliability. Thus, this comment seems to be founded in a vindicatory rationale but Lord Cooper concluded his opinion, with what appears to be a reference to a disciplinary rationale, by stating that the appeal had to be upheld because 'unless the principles under which police investigations are carried out are adhered to with reasonable strictness, the anchor of the entire system for the protection of the public will very soon begin to drag'.[36]

This lack of clarity is not limited to the discussion of whether the illegality was serious or trivial: the very basis of the discretion in *Lawrie* is, as noted above, rather abstract. This has meant that the confusion in *McGovern* has permeated other decisions which concern the nature of the irregularity. For example, in *Fairley v. Fishmongers of London*,[37] two inspectors of a private company collected evidence illegally. This was excused on appeal because "the appellant's assumption of the guise of a champion of the liberties of the subject failed to elicit [the court's] sympathies".[38]

As well as the seriousness or triviality of the illegality, then, it thus appears that the court's sympathies are a relevant factor. This is hardly a satisfactory criterion, given its extremely subjective nature.[39] Furthermore, the decisions in *McGovern* and *Fairley* seem to underplay the significance of the first criterion discussed above: the seriousness of the crime charged. McGovern was a safe-cracker, which is surely a more serious crime than possessing salmon out of season, the offense with which Fairley was charged.[40] Nevertheless, the illegally obtained evidence was admitted in relation to the less serious crime, but excluded in relation to the

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[34] The accused can voluntarily be searched before this point: Davidson v. Brown 1990 JC 324. Merely ceasing to resist demands to be searched does not constitute consent to be searched: Lucas v. Lockhart (1980) SCCR (Supp) 256. As always, the over-arching principle is fairness to the accused: Brown v. Glen 1998 JC 4, 7 *per* Lord Sutherland.

[35] Adair v. McGarry 1933 JC 72, 89 *per* Lord Morison.

[36] Duff (2004b, 84). The quoted section is from McGovern v. HM Advocate 1950 JC 33, 37 *per* the Lord Justice-General (Cooper).

[37] 1951 JC 14.

[38] Ibid, 24, *per* the Lord Justice-General (Cooper).

[39] Gray (1966, 99) and Duff (2004b, 85).

[40] Duff (2004b, 85).

graver offense. This appears perverse. Nevertheless, the vagueness of the "balancing act" envisaged in *Lawrie* perhaps makes such unsatisfactory decisions inevitable.

The situation is further compounded by the courts' frequent reliance on whether the evidence was obviously incriminating[41] and whether it was discovered "accidentally" (yet irregularly) in a legal search for other evidence.[42] On the first point, the court has appeared confused as to whether evidence must be "plainly incriminating", or simply "very suspicious".[43] The second point led to a strange situation in *Drummond v. HM Advocate*[44] where the key question became – quite bizarrely – whether the police had opened a wardrobe to search for stolen furniture (which they had a warrant to do) or other stolen goods (which was not in terms of the warrant). The wardrobe contained stolen clothing, so the point appears to be that – if the search was for furniture – the irregularity would be trivial (and therefore excusable). If, however, the search was for any other incriminating evidence, it would be irregular.[45] For the sake of completeness, the court held that the police had been searching for furniture; the irregularity was excused.

Finally, it appears that, in some cases, the courts are not prepared to excuse irregularities in the execution of warrants,[46] whilst in other cases they are.[47] The reason for this distinction is not at all clear: the courts rarely articulate clearly whether (or why) they perceive some irregularities as *more* serious than others. All in all, it appears impossible to discern any consistent principle at the heart of the courts' assessment of whether an irregularity was serious or trivial. A similar situation exists with regard to whether or not the urgency of the situation justified (or excused) an illegal search.

3.1.3.3 Urgency

Urgency is one of the most frequently cited reasons for excusing an irregularity.[48] Unfortunately, this has not led to any consistency in the approach the courts adopt. A core consideration is clearly the likelihood that evidence will disappear if the

[41] On the importance of the obviousness of incriminating evidence, see Mowbray v. Valentine 1992 SLT 416.

[42] See, for example: HM Advocate v. Hepper 1958 JC 39; Burke v. Wilson 1988 SCCR 361; Tierney v. Allan 1990 SLT 178; Drummond v. HM Advocate 1992 JC 88.

[43] Both of these terms appear in HM Advocate v. Hepper 1958 JC 39, 40, *per* Lord Guthrie.

[44] 1992 JC 88.

[45] For examples of "fishing" for evidence, see: Jackson v. Stevenson (1897) 2 Adam 255; HM Advocate v. Turnbull 1951 JC 96; Leckie v. Miln 1982 SLT 177.

[46] Bulloch v. HM Advocate 1980 SLT (Notes) 5; McAvoy v. Jessop 1988 SLT 621; Hepburn v. Brown; 1998 JC 63; Singh v. HM Advocate 2001 JC 186.

[47] HM Advocate v. Foulis and Grant 2002 JC 262.

[48] Other than the cases discussed individually below, urgency appears to have been important in: HM Advocate v. McGuigan 1936 JC 16; HM Advocate v. Hepper 1958 JC 39; McHugh v. HM Advocate 1978 JC 12; Walsh v. MacPhai*l* 1978 SLT (Notes) 29; Webley v. Ritchie 1997 SLT 1241.

police take the time to seek a warrant. In some cases, this concession appears absolutely necessary. For example, in *Bell v. Hogg*,[49] the police took rubbings of the accused's hands in order to ascertain whether he had been in contact with copper wire. The police could hardly have prevented the accused from going to the bathroom and washing his hands (thus destroying the evidence), so there was a real urgency.[50] Other cases are, however, less convincing. For example, in *Hay v. HM Advocate*,[51] the Procurator Fiscal (public prosecutor) craved a warrant to take an impression of the suspect's teeth. The fear expressed was that, if this was delayed, the suspect could visit a dentist or damage his teeth. As Finnie notes, this is rather unconvincing: "it is unlikely that [the accused's teeth] would be destroyed accidentally and it would take a remarkably determined suspect to smash his own teeth deliberately, especially to the point of unrecognisability".[52] Again, then, it appears that there is room for argument over exactly what constitutes "urgency". The courts insist that urgency must be assessed objectively,[53] but this requirement has acted as a veil allowing the courts to act inconsistently. The courts have, for example, refused to excuse irregularities on the basis that there was no urgency,[54] or that the situation was not urgent *enough* to excuse an irregularity.[55] Again, the reasoning behind these decisions is usually unclear.

Further confusion appears to exist as to whether urgency justifies or excuses an illegal search. This question is important because the courts appear to assume that a justified search is not illegal, whilst an excused search is. In *Bell v. Hogg*,[56] however, Lord Migdale suggested that this distinction ought not to matter: "[w]hether one regards Sergeant Muirhead's actings as justified or holds them to be 'excused' … the question still remains whether it was 'fair' to the accused to allow this evidence to be used … against them".[57] Lord Migdale's statement appears to assume that urgency and fairness are both parts of one test, but this appears contrary to other authority. For example, in *HM Advocate v. McKay*,[58] Lord Wheatley opined that "the two tests of fairness and urgency fail to be applied".[59]

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[49] 1967 JC 49.

[50] Another example of real urgency is where a breath sample is required from a driver in order to establish whether or not she is over the legal alcohol limit: Cairns v. Keane 1983 SCCR 277. Furthermore, where drugs are involved, the ease of destroying evidence clearly plays an important role in the courts' thinking: MacNeil v. HM Advocate 1986 SCCR 288.

[51] 1968 JC 40.

[52] Finnie (1982, 291).

[53] See: Bell v. Hogg 1967 JC 49, 61, *per* Lord Cameron.

[54] HM Advocate v. Turnbull 1951 JC 96.

[55] For example, where a warrant has been sought, urgency does not excuse errors in its form: HM Advocate v. Cumming 1983 SCCR 15.

[56] 1967 JC 49.

[57] Ibid, 59.

[58] 1961 JC 47.

[59] Ibid, 50.

3.1.3.4 Authority of Searcher

A further factor that the court may take into account in deciding whether to admit unlawfully obtained evidence is the authority of the person who carried out the search. Here, once again, the approach of the courts has been far from consistent. The person who uncovers evidence through illegal means will not always be a police officer. In comparison with other areas of the law on irregularly obtained evidence, however, the situation with regard to police officers appears to be relatively settled – the police must have reasonable grounds to exercise a statutory or common-law power of search. In other words, the police may not conduct "fishing" exercises, where they search a person or her property in the hope of finding evidence of illegal activity. This rule has been recognized for a long time,[60] but the question of what constitutes reasonable suspicion still gives rise to appeals. The consensus appears to be that the police must have objectively reasonable grounds for suspicion.[61] Without these, any evidence obtained from the search will be inadmissible.[62]

When the searcher is not a police officer, distinct issues are raised. Stewards in a nightclub, for example, have no authority to forcefully search a person for drugs.[63] Any evidence of illegal conduct gleaned from such a search is, thus, inadmissible.[64] Where a citizen's arrest has taken place, the citizen similarly has no right to search the accused. Nevertheless, as long as the police are contacted and they conduct their own search, evidence gleaned from such a search has, in the past, been admitted.[65] Furthermore, even if a citizen has acted illegally (for example, by performing an illegal eviction), evidence recovered as a result of the illegal act may be admissible if she acted in good faith.[66] Reconciling these conflicting opinions with regard to nightclub stewards and private citizens is difficult.

Whether the searcher acted in good faith is a wider concern in relation to both police officers and others. This factor has proved important in cases where the searcher misunderstood the scope of her authority, but – unfortunately – the courts have failed to decide cases consistently. Acting under an illegal warrant (or without warrant at all) has been excused in some cases,[67] but exceeding the terms of a warrant

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[60] See, for example, Jackson v. Stevenson (1897) 2 Adam 255.

[61] Weir v. Jessop *(No 2)* 1991 SCCR 242; Cooper v. Buchanan 1997 SLT 54; Stark v. Brown 1997 JC 209; Houston v. Carnegie 1999 SCCR 605.

[62] See, for example, Ireland v. Russell 1995 JC 169.

[63] Where no force is used and the accused simply accedes to a request to hand over drugs to a steward, such evidence is, nevertheless, admissible: Mackintosh v. Stott 1999 SCCR 291. See, similarly, Devlin v. Normand 1992 SCCR 875.

[64] Wilson v. Brown 1996 JC 141.

[65] Wightman v. Lees 2000 SLT 111.

[66] Howard v. HM Advocate 2006 SCCR 321.

[67] Walsh v. MacPhail 1978 SLT (Notes) 29 (illegal warrant); Edgley v. Barbour 1995 SLT 711 (no warrant); Webley v. Ritchie 1997 SLT 1241 (no warrant); Hepburn v. Brown 1998 JC 63 (warrant's terms exceeded); Henderson v. HM Advocate 2005 1 JC 301 (information gathering not authorised in statutory terms).

has been held – despite the police officers' good faith – to be inexcusable in others.[68] (Again, this inconsistency is probably explained by the presence of other factors which the courts failed to explain fully.) Another circumstance where good faith has been held to excuse an irregularity is where the police are temporarily in charge of a suspect's possessions (for example, a car) and, while ensuring the possessions are secure from theft or damage, they uncover evidence of illegal activity.[69]

3.1.3.5 Fairness to the Accused

The final concern that the court should bear in mind when considering whether or not to admit illegally obtained evidence is fairness to the accused. It is unclear, however, whether fairness to the accused is part of the test which the court must consider, or is, in fact, *the* test. Certainly, from the parts of *Lawrie* cited above, it appears that the court envisaged the former scenario,[70] but other cases indicate otherwise. In *HM Advocate v. Turnbull*,[71] for example, the lack of urgency in the police's search combined with the fact that they were "fishing" for information meant that, in the court's opinion, a fair trial could not be conducted.[72] Other cases were decided on a similar basis.[73]

The notion of "fairness" has assumed renewed importance with the incorporation of the European Convention on Human Rights (ECHR) into Scots law[74] – an issue that will be discussed in more detail in the next section.[75] For now, it is sufficient to note that Art. 6 ECHR's right to a fair trial has been considered as equivalent to *Lawrie v. Muir*'s concern with "fairness".[76] As Art. 6 ECHR requires the circumstances of the trial to be looked at as a whole,[77] it is certainly plausible that fairness is the ultimate concern, not merely a constituent part of the test to be applied in deciding whether to excuse an irregularity.[78] Nevertheless, the matter remains to be settled definitively.

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[68] McAvoy v. Jessop 1988 SLT 621; Morrison v. O'Donnell 2001 SCCR 272.

[69] See, for example, Baxter v. Scott 1992 SLT 1125.

[70] See, similarly: HM Advocate v. McKay 1961 JC 47; Miln v. Cullen 1967 JC 21.

[71] 1951 JC 96.

[72] See: HM Advocate v. Turnbull 1951 JC 96, *per* Lord Guthrie at 103–104.

[73] See, for example: Weir v. Jessop *(No 2)* 1991 SCCR 636; Namyslak v. HM Advocate 1995 SLT 528.

[74] Via the Human Rights Act 1998 and the Scotland Act 1998.

[75] See the discussion below of: HM Advocate v. Robb 2000 JC 127; Hoekstra v. HM Advocate (No 5) 2002 SLT 599; HM Advocate v. Higgins 2006 SLT 946. See, further, McGibbon v. HM Advocate 2004 JC 60.

[76] HM Advocate v. Higgins 2006 SLT 946.

[77] Holland v. HM Advocate 2005 1 SC (PC) 3, [41], *per* Lord Rodger.

[78] See Mowbray v. Valentine 1992 SLT 416, where the court held that, in order to establish whether proceedings were "fair," all circumstances must be known.

Now that the development of the doctrine of illegally obtained evidence in Scots law has been discussed, the paper moves on to consider the impact of human rights legislation upon it. The focus will be on Art. 8 ECHR, which deals with the right to privacy. As will become clear, however, the courts have also drawn upon the accused's Art. 6 ECHR right to a fair trial in their discussions of the law.

3.2 Rules of Admissibility/Exclusion in Relation to Violations of the Right to Privacy

This section discusses the impact of the right to privacy upon the Scots law on illegally obtained evidence. It begins by explaining the mechanism by which an alleged human rights violation can be heard before a Scottish court, before exploring the relevant jurisprudence.

3.2.1 The Right to Privacy in Scots Law

As Scotland does not have a written, legally-enforceable constitution, it is virtually meaningless to speak of a "right" to privacy before the introduction of the Human Rights Act 1998 (HRA). The HRA essentially incorporated the rights and protections of the ECHR into United Kingdom law.[79] Under Art. 8 ECHR, "[e]veryone has the right to respect for his private and family life, his home and his correspondence". Breaches of this right can, thus, now be complained about in the Scottish courts.

From the perspective of procedure, the accused in a Scottish criminal trial can now rely on the provisions of the HRA directly. This was not always the case. Initially, the accused had to rely on the Scotland Act 1998 (SA) because it came into force before the HRA.[80] The SA became relevant because members of the Scottish Executive have, under § 57(2), "no power to … do any … act, so far as the … act is incompatible with any of the Convention rights or with Community law". The Lord Advocate, the head of the public prosecutorial service in Scotland (the Crown Office and Procurator Fiscal Service (COPFS)), is a member of the Scottish Executive.[81] Accordingly, he has to act

[79] Art. 1 ECHR (the obligation upon contracting States to secure the rights under the Convention) and Art. 13 ECHR (the provision of an effective remedy for breaches of human rights) were excluded because it was felt that the HRA fulfilled the same roles.

[80] Since the HRA came into force, the courts have struggled with the question of whether the accused can still rely on the provisions of the SA. See: Jamieson (2007a, b). This has implications where the accused seeks damages, as such applications are time-restricted under the HRA, but not under the SA: Somerville v. Scottish Ministers 2007 SC (HL) 45. For claims arising after 2 November 2009, a time limit has been introduced into § 100(3B) of the SA.

[81] SA, § 44(1).

in accordance with the rights secured under the ECHR, including a suspect/accused's right to privacy.

In most trials[82] the accused can now also complain about the unfairness of her prosecution and trial in *general* (alleging a breach of her Art. 6 ECHR right to a fair trial). Accordingly, as will be seen in the next section, the Scottish courts have been asked to consider whether the submission of illegally obtained evidence – obtained through a breach of the accused's Art. 8 ECHR right to privacy – renders a trial unfair.

In the next section it will be argued that the incorporation of the rights protected under the ECHR has not resulted in any real change in the Scottish courts' approach towards illegally obtained evidence.

3.2.2 Interpreting the Right to Privacy When Considering Illegally Obtained Evidence

The starting point for discussion of the impact of the ECHR on the admissibility or otherwise of unlawfully obtained evidence is the case of *HM Advocate v. Robb*.[83] In *Robb* the accused argued that because his repeated requests to consult a solicitor during police questioning were ignored, the evidence obtained from the interview should not be tendered at his trial. Although there was, at the time, no right under Scots law to have a solicitor present during police questioning,[84] the accused relied on the Art. 6 ECHR right to a fair trial to argue that the act of the Lord Advocate, in tendering such evidence, would automatically render his trial unfair overall. The court held, however, that "in performing the 'act' of tendering evidence in a criminal trial, the Lord Advocate would [not] be infringing the Convention rights of the accused, even if there were a question of whether the evidence was obtained by means which themselves involved an infringement of such rights".[85] In other words, § 57(2) SA did not apply in relation to the presenting of evidence, so the accused could not complain that his human rights had been infringed before the close of the trial. Then, the ultimate test of "fairness" (under Art. 6 ECHR) would take the irregularity into account.

[82] There exists a limited right to private prosecution in solemn cases (i.e. proceedings before a jury), but not summary cases (where a judge sits alone): Criminal Justice (Scotland) Act 1995, § 63. This right requires the assent of the High Court and (at least) the acquiescence of the Lord Advocate. Accordingly, the right has been exercised twice in the last 100 years: J&P Coats Limited v. Brown 1909 JC 29; X v. Sweeney and Others 1983 SLT 48. It can thus be safely ignored for present purposes.

[83] 2000 JC 127.

[84] This has since changed: see Sect. 3.3.2.2 below.

[85] HM Advocate v. Robb 2000 JC 127, *per* Lord Penrose at 131.

From *Robb*, then, it appeared that Art. 6 ECHR's right to a fair trial was going to take on more importance than any other rights which might have been relevant to proceedings. This was confirmed in *Hoekstra v. HM Advocate (No 5)*.[86] There, Art. 8 ECHR was specifically relied upon by the accused, whose boat had been illegality "bugged" with a tracking device. Interestingly, however, the court decided to base its decision on *Lawrie*-esque reasoning. It considered whether the illegality could be excused and, given the limited role that the evidence from the "bug" played at trial, held that it could be. (This appears to be an example of a "trivial" irregularity, as discussed above.) The court then stated that, in its opinion, Art. 8 ECHR had been infringed but "it seems to … be impossible to state that the fairness of the proceedings has been affected by the introduction of [the tracking] evidence".[87] In other words, the ultimate test remained the fairness of proceedings: a breach of privacy was merely one piece of evidence to be considered in that assessment.

The decision in *Hoekstra* is in line with the European Court of Human Rights' (hereafter ECtHR) decision in *Khan v. United Kingdom*.[88] Khan was convicted of drugs offenses as a result of evidence obtained from a listening device unlawfully planted by the police. His appeals against conviction were rejected by the English courts. The ECtHR held that, irrespective of a breach of Art. 8 ECHR, "[t]he central question … is whether the proceedings as a whole were fair",[89] concluding that in Khan's case the proceedings were not rendered wholly unfair.

The decision in *Khan* did, nevertheless, lead to legislation regarding the covert surveillance of suspects in Scotland[90] – the Regulation of Investigatory Powers (Scotland) Act 2000 (RIPSA). This is because Art. 8 ECHR has an exception: privacy can be breached "in accordance with the law [where] necessary in a democratic society … for the prevention of disorder or crime".[91] In passing RIPSA, the devolved Scottish Parliament allowed breaches of Art. 8 ECHR to be authorized where necessary. The Scottish courts have, however, been rather inconsistent in their approach to breaches of RIPSA.

In *Gilchrist v. HM Advocate*,[92] for example, the police obtained invalid clearance to monitor a suspect. Nevertheless, by viewing the accused's acts as "public", the court bypassed Art. 8 ECHR and excused the irregularity in the police's approach. Similarly, in *Henderson v. HM Advocate*,[93] the court appears to have ignored Art.

[86] 2002 SLT 599.

[87] Ibid, 32, *per* the Lord Justice-General (Cullen).

[88] (2001) 31 E.H.R.R. 45.

[89] Ibid, 38.

[90] See, also, the Regulation of Investigatory Powers Act 2000, which regulates the procedure for covert surveillance in England and Wales. § 17 of RIPA applies to Scotland, and can result – in practice – in evidence of *intercepted* communications being declared inadmissible. This provision has not been explored meaningfully in any reported Scottish case, but see Spencer (2008).

[91] See Art 8(2) ECHR.

[92] 2005 JC 34.

[93] 2005 JC 301.

8 ECHR even where *no* authorization was sought in terms of RIPSA. The court applied the principles in *Lawrie*, noting that: RIPSA did not protect suspects (unlike, for example, the rules relating to the police's power of search)[94]; the evidence gleaned (a recording of the suspect's voice) was not "private"[95]; the police acted in good faith[96]; and the "phone tap" was installed with the consent of the owners of the telephone.[97] All of these factors conspired against the accused to render the proceedings against him "fair". Lord Marnoch relied upon *Lawrie* expressly: "I am further of the opinion that there is nothing so special or fundamental about a breach of Art 8 as to make it inappropriate to consider the effect of that breach on Art. 6 and the common law principle of 'fairness' within the context of *Lawrie v. Muir*".[98] Lord Hamilton agreed with this approach, suggesting that there was "no reason why in Scotland the admissibility of evidence obtained irregularly should not be addressed by reference to the common law principles set out definitively in *Lawrie v. Muir*".[99] In other words, the ECHR (via the HRA and the SA) added nothing new.

The provisions of the ECHR were discussed further in *HM Advocate v. Higgins*.[100] There, the court found that Arts. 6 and 8 ECHR were "entirely inseparable".[101] It was held that covertly listening to suspects strategically placed in adjacent cells was inexcusable as no explanation was given as to why RIPSA authorization was not sought. In consequence, police activities "must be regarded as a serious irregularity which not only cannot be condoned but also points strongly towards the transgression of the principle of fairness".[102] The decision in *Higgins* is noteworthy in two respects. First, although he referred to it, the judge thought it was unnecessary to address Art. 8 ECHR. He preferred to base his decision on the common law.[103] Second, the fact that importance was placed on the lack of an explanation for the irregularity suggests that transgressions of RIPSA might in some circumstances be explained away. In *Higgins*, the seriousness of the crime was offered as an "excuse" for the breach of RIPSA, but was not accepted. As the crime concerned was armed robbery, this suggests that breaches of RIPSA must have to be regarded as extremely "serious" irregularities (see above).

From *Gilchrist*, *Henderson* and *Higgins*, then, it is clear that even post-incorpo ration of the HRA, the Scottish courts have not departed markedly from the rather abstract principle of fairness set out in *Lawrie v. Muir*. An illegal breach of privacy is simply one factor which must be considered in determining the fairness of the

[94] Ibid, 9, *per* Lord Marnoch.

[95] Ibid, 10.

[96] Ibid, 11.

[97] Ibid, 12.

[98] Ibid, 16.

[99] Ibid, 36.

[100] 2006 SLT 946.

[101] Ibid, 13, *per* Lord MacPhail.

[102] Ibid, 25.

[103] Ibid, 29.

overall proceedings. Despite attempts by defense counsel to rely on it in illegally obtained evidence trials, the right to privacy in the HRA has not led the courts to adopt a more concrete and satisfactory approach.

One area concerning privacy which has only been addressed briefly by the Scottish courts concerns the "fruits of the poisoned tree" – real evidence which is obtained on the basis of a prior, illegally-obtained private statement by the accused. This issue has been, Raitt argues, "partially answered" in Scotland in the context of inadmissible confessions resulting from interrogation.[104] It is to this topic which the final part of the chapter now turns.

3.3 Rules of Admissibility/Exclusion in Relation to Illegal Interrogations

Interrogations clearly give rise to dual concerns about the accused's right to silence (or privilege against self-incrimination) and the reliability of any "confessions" elicited. This part of the chapter considers, first, the right to silence in Scots law. It then considers the Scots courts' approach to evidence gleaned from illegal interrogations.

3.3.1 The General Right to Silence/Privilege Against Self-Incrimination

The procedural provisions relating to police interrogations are contained in the CP(S)A, as amended by the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 ("the 2010 Act"). A suspect may be detained without charge for questioning at a police station for 12 h[105] and this period can be extended to 24 h under certain conditions.[106] Until 2010, detained suspects had no right to legal assistance during detention but this was rectified when the 2010 Act came into force and suspects now have the right to a "private consultation with a solicitor (a) before any questioning … begins, and (b) at any other time during such questioning".[107] This change, which was a momentous one for Scotland, came after the United Kingdom Supreme Court held in *Cadder v. HM Advocate*[108] that the failure to provide legal assistance during detention violated Article 6 of the ECHR, the right to a fair trial.[109]

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[104] Raitt (2008, para. 10.19).

[105] CP(S)A, §14(2), as amended by the 2010 Act.

[106] CP(S)A, §14A, as inserted by the 2010 Act.

[107] CP(S)A, § 15A(3), as inserted by the 2010 Act.

[108] [2010] UKSC 43.

[109] For discussion, see Leverick (2011a, b) and Stark (2011).

Other than being obliged to give her name and address, the suspect has the right to remain silent during police questioning and must be informed of this right.[110] No adverse inferences may be drawn from silence either at the police questioning stage or at trial.[111]

The question of whether unlawfully obtained confessions can be admissible in evidence is considered in the next section. Three possible scenarios are examined: (1) confessions where the accused was not informed of her right to remain silent; (2) confessions obtained in the absence of legal advice; and (3) confessions obtained as a result of coercion or threats. The chapter then proceeds to consider the approach taken to the admissibility of "fruits of the poisoned tree".

3.3.2 Case Law Regarding Illegally Obtained Confessions

3.3.2.1 Confessions Obtained Where the Accused Was Not Informed of the Right to Remain Silent

It is important to note at the outset that, although a privilege against self-incrimi nation has been read into Art. 6 ECHR,[112] the position with regard to the admissibility of illegally obtained confessions has remained largely unchanged since the passing of the HRA. The starting point for any discussion of illegally obtained confessions is the case of *Chalmers v. HM Advocate*.[113] There, the accused had been subjected to "not merely … interrogation but … 'cross-examination'", and was "confronted with police information contradictory of the statement which he had already made".[114] This process continued until the accused broke down and confessed. A Full Bench of five judges decided that this confession had not been elicited voluntarily and, as such, was inadmissible. To argue for the contrary would be unfair to the accused.[115]

Thus, where the accused has not been advised of her right to remain silent, the test of whether any confession she makes thereafter can be admitted as evidence is whether it would be fair to her to do so.[116] It might have been thought at one time

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[110] CP(S)A, §14(9).

[111] Larkin v. HM Advocate 2005 SLT 1087.

[112] Art. 6 ECHR itself provides only that everyone charged with a criminal offense shall be presumed innocent until proved guilty according to law, but see, for example, Condron v. United Kingdom (2001) 31 E.H.R.R. 1.

[113] 1954 JC 66.

[114] Ibid, 75, *per* the Lord Justice-General (Cooper).

[115] Ibid, 79.

[116] This test was confirmed in HM Advocate v. Aries [2009] HCJ 4, *per* Temporary Judge MacIver at [15]. See also Pennycuik v. Lees 1992 SLT 763; Williams v. Friel 1998 SCCR 649.

that it would never be considered fair to admit an admission obtained without the accused having been informed of her right to silence. In *HM Advocate v. Docherty*,[117] for example, a confession made by the accused after a defective caution had been administered (in which the right to remain silent was not mentioned) was held to be inadmissible because the accused "was not informed of one of his basic rights".[118]

Later cases do, however, suggest a relaxation of approach – if indeed this was ever a strict rule in the first place. In *Tonge v. HM Advocate*,[119] although the accused's confession was in fact deemed inadmissible after the police deliberately failed to caution him in the hope he would incriminate himself, the court noted that this need not always be the case where a caution has not been administered.[120] The court stressed that the significant factor in its decision was the fact that the police *deliberately* omitted to caution the accused. Likewise, in *Pennycuick v. Lees*,[121] the Lord Justice-General (Hope) stated that "[t]here is no rule of law which requires that a suspect must always be cautioned before any question can be put to him",[122] stressing once again that the ultimate test of the admissibility of any resulting confession is "whether what was done was unfair to the accused".[123] Thus, the admission by the accused in the case that he was falsely claiming state benefits was subsequently deemed to be admissible despite no caution having been administered. Likewise, in *Williams v. Friel*[124] incriminating statements made by the suspect to customs officers concerning his identity and nationality – in the absence of a caution – were also held to be admissible and the admission by the accused that he was in possession of a knife was treated similarly in *Custerson v. Westwater*.[125] All that can be stated with certainty, therefore, is that a failure to administer a caution will place the admissibility of any confession by the accused "in peril"[126] but will not necessarily result in its exclusion.

3.3.2.2 Confessions Obtained in the Absence of Access to Legal Advice

A related situation to that where a caution has not been administered is where the accused has confessed without having had access to legal advice. Until 2010, there was no right to legal assistance during detention in Scots law and, consequently, a confession obtained in the absence of legal assistance was not necessarily inadmissible

[117] 1981 JC 6.

[118] Ibid, 9, *per* Lord Cowie.

[119] 1982 JC 130.

[120] Ibid, 140, *per* the Lord Justice-General (Emslie).

[121] 1992 SLT 763.

[122] Ibid, 765. See also HM Advocate v. Aries [2009] HCJ 4, [11] *per* Temporary Judge MacIver.

[123] Pennycuick v. Lees 1992 SLT 764,765.

[124] 1999 JC 28.

[125] 1987 SCCR 389.

[126] Tonge v. HM Advocate 1982 JC 130, 145–146, *per* the Lord Justice-General (Emslie).

(presuming the general test of fairness was satisfied). The ECHR compatibility of this provision had been challenged unsuccessfully on a number of occasions following the incorporation of the ECHR into domestic law.[127] It became increasingly apparent, however, that this position was untenable. The catalyst for change was *Salduz v. Turkey*,[128] a unanimous decision of the Grand Chamber of the ECtHR, in which it was held that Article 6(1) requires that "as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of the case that there are compelling reasons to restrict this right".[129] In *Cadder v. HM Advocate*,[130] the United Kingdom Supreme Court held that it would breach Article 6 of the ECHR for a confession obtained in the absence of legal assistance to be admitted as evidence. This led to the passing of emergency legislation, the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010, which amended the CP(S)A to provide for a right to legal assistance during detention.[131] It can now be said with certainty that an admission made during detention where the accused was not offered legal assistance is inadmissible as evidence.

Various questions as to the scope of its applicability were left open by *Cadder* but at least some of these have been resolved. In *Ambrose v. Harris*,[132] the Supreme Court held that the *Cadder* ruling was not limited to detention under section 14 of the CP(S)A but applied to any situation where the accused was questioned as a suspect rather than as a potential witness.[133] However, the court did not go so far as to hold that any confession obtained in a non-custodial situation would always be inadmissible. Rather where a suspect was questioned without being detained in custody, the absence of legal assistance would simply be "one of the circumstances that should be taken into account in the assessment as to whether the accused was deprived of a fair hearing".[134] In *HM Advocate v. P*,[135] the Supreme Court held that incriminating evidence discovered as a result of questioning without legal assistance (the so-called "fruits of the poisoned tree") would not necessarily be inadmissible, but that this would depend on "whether the accused's right to a fair trial would be violated by the leading of the evidence".[136] In *McGowan v. B*,[137] it was held that

[127] See e.g. HM Advocate v. Robb 2000 JC 127; Paton v. Ritchie 2000 JC 271.

[128] (2009) 49 E.H.R.R. 19, 421.

[129] Ibid, 437, §55.

[130] [2010] UKSC 43.

[131] See Sect. 3.3.1 above.

[132] [2011] UKSC 43.

[133] Ibid. [63] *per* Lord Hope of Craighead. In *Ambrose*, for example, one accused was questioned by police in his car on suspicion of being in charge of a motor vehicle having consumed excess alcohol. Another was questioned in his house while it was being searched under a warrant relating to the possession of controlled drugs. Handcuffs had been applied to the suspect.

[134] Ibid, [64] *per* Lord Hope of Craighead.

[135] [2011] UKSC 44.

[136] Ibid, [27] *per* Lord Hope of Craighead. For further discussion, see Sect. 3.3.2.4 below.

[137] [2011] UKSC 54.

where the right to legal assistance had been validly waived, a confession made in these circumstances would be admissible, provided it met the overall test of fairness. Waiver is valid where the accused has "been told of his right, [where he] understands what the right is and that it is being waived and [where] waiver is made freely and voluntarily".[138]

3.3.2.3 Confessions Obtained as a Result of Coercion or Threats

Where a confession has been obtained as a result of coercion or threats, it will not be admitted in evidence unless it would be fair to the accused to do so.[139] Once again, the test is one of fairness to the accused. Following *Chalmers*, it will never be fair to the accused to admit a confession unless it was made "voluntarily".[140] Thus, as the Lord Justice-Clerk (Thomson) stated, evidence obtained by "bullying, pressure, third degree methods and so forth" is always inadmissible.[141]

Three points can be made about the decision in *Chalmers*. First, the court's concern was, very clearly, with the reliability of evidence obtained through interrogation. The Lord Justice-Clerk (Thomson) made specific reference to the "jury's problem" of discovering the truth of the matter and how an illegally obtained statement would be likely to hinder them in doing so.[142]

Second, the requirement for a *voluntary* confession in *Chalmers* has led to some difficulties in determining exactly what type or degree of police pressure would vitiate voluntariness. In *Lord Advocate's Reference (No 1 of 1983)*,[143] it was held that "improper forms of bullying or pressure designed to break [a suspect's] will" would render a confession inadmissible.[144] In *Brown v. HM Advocate*,[145] however, it was held that clarifying – rather than testing – the terms of a statement was not unreasonable. Where threats or inducements have been used, this will generally render a confession inadmissible. Thus in *Harley v. HM Advocate*,[146] the accused's confession was deemed inadmissible because the police had obtained it by threatening to tell of his affair with a married woman. Likewise, in *HM Advocate v. Aries*,[147] a threat to the accused that, unless he admitted certain things, he would be locked up for a long time without release would have rendered his confession inad-

[138] Ibid, [46] *per* Lord Hope of Craighead.

[139] Chalmers v. HM Advocate 1954 JC 66.

[140] Ibid, 82, *per* the Lord Justice-Clerk (Thomson). See also Manuel v. HM Advocate 1958 JC 41.

[141] Chalmers v. HM Advocate 1954 JC 66, 81–82, *per* the Lord Justice-Clerk (Thomson).

[142] Ibid, 83.

[143] 1984 JC 52.

[144] Ibid, 58, *per* the Lord Justice-General (Emslie).

[145] 1966 SLT 105.

[146] 1996 SLT 1075.

[147] [2009] HCJ 4.

missible.[148] This principle does, again, seem to have been applied rather inconsistently. In *Stewart v. Hingston*,[149] for example, the police arrived at the door of a woman who was suspected of theft and asked her to accompany them to the police station for an interview. She was at home with her young children at the time and no one else was available to look after them. She was told that they could be taken into the care of a social worker, and she could be forcibly detained, but that this could be avoided if she made a statement immediately. Immediately after being told this, she confessed. This was held not to be an inducement and her confession was admissible evidence at her subsequent trial.[150]

Third, *Chalmers* concerned not only the admissibility of the accused's confession, but also that of real evidence gleaned from it ("fruit of the poisoned tree"). This point is considered below.

3.3.2.4 Fruits of the Poisoned Tree

In *Chalmers*, after he had confessed, the accused took police officers to where he had hidden the deceased's purse. The court held that this evidence should not have been admitted at trial because it was "part and parcel of the same transaction as the interrogation and if the interrogation and the 'statement' which emerged from it are inadmissible as 'unfair,' the same criticism must attach to the conducted visit to the [locus]".[151]

Until recently this was the only reported case in which the courts had considered the question of the fruits of the poisoned tree but, in *HM Advocate v. P*,[152] the issue arose again, this time in relation to evidence obtained as a result of an interview conducted with a suspect who had not been offered legal assistance. In *P*, the accused was charged with rape, but claimed that he had not had sexual intercourse with the complainer. Whilst being questioned by police, he claimed to have ingested mind altering drugs at the time of the incident and told police that a friend of his could speak to this. When the police questioned the friend, the friend told of a telephone call between himself and the accused in which the accused admitted (consensual) sexual intercourse with the complainer. The United Kingdom Supreme Court was asked to rule on the question of whether evidence obtained in this way would, in principle, be admissible. The court drew a clear distinction between evidence "created by answers given in reply to … impermissible questioning" and evidence that "existed independently of those answers, so that those answers do not have to be relied upon to show how it bears upon the question whether the accused is guilty

[148] Ibid, 4, *per* Temporary Judge MacIver. In the event his confession was admissible as it was not proved that such a threat had, in fact, been made by the police.

[149] 1997 SLT 442.

[150] Ibid, 444, *per* the Lord Justice-General (Hope).

[151] Chalmers v. HM Advocate 1954 JC 66, 76 *per* the Lord Justice-General (Cooper).

[152] [2011] UKSC 44.

of the offence with which he has been charged".[153] The evidence in *Chalmers* fell into the first category and this was rightly excluded. The evidence in *P* fell into the second category as it could have equally been discovered independently, without the assistance provided by the accused. In this case, the question to be considered is "whether the accused's right to a fair trial would be violated by the leading of the evidence".[154] This determination is in line with earlier recommendations made by MacPhail,[155] the Thomson Committee[156] and the Scottish Law Commission[157] – all of whom proposed that, provided the "fruit of the poisoned tree" was appropriated legally, it should be admissible.

3.4 Conclusion

In this chapter we have tried to demonstrate the confused nature of Scots law's approach to illegally obtained evidence. It is submitted that this is symptomatic of a wider problem in Scots criminal procedure: uncertainty.[158] The problem with the term "fairness" is, as Chalmers notes, its malleability.[159] Basing Scots law's approach upon the test of fairness has thus led to, in one commentator's opinion, distinctions of "dubious validity and sometimes … to rather absurd results".[160] There is little doubt that, although at one point lauded elsewhere, the Scots approach to illegally obtained evidence is in need of a more concrete basis.[161] It is regrettable (yet perhaps unsurprising) that aside from the issue of confessions obtained in the absence of legal assistance, the ECHR has failed to have much of an impact in this regard, itself focussing on the fairness test, albeit in a different guise: that of what constitutes a "fair" trial.

None of the above is new: reform has long been argued for. A particularly stinging article by Professor Peter Duff argues that the court must have a clear rationale at the heart of its approach, and he discusses various possible options.[162] Rather than the current "fairness" approach, Duff proposes that a firmer basis would be the

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[153] Ibid,[27], *per* Lord Hope of Craighead.

[154] Ibid.

[155] MacPhail (1987, para. 21.04).

[156] *Criminal Procedure in Scotland: Second Report* (Cmnd 6218, 1975), para. 7.27.

[157] *The Law of Evidence* (Scot Law Com Memo No 46, 1980), at para. U.02. Nb: this memorandum was meant to be read in conjunction with MacPhail (1987).

[158] Another example is the Crown's duty to disclose "material" evidence to the accused. See: Criminal Justice and Licensing (Scotland) Act 2010, pt 6.

[159] Chalmers (2007, 102).

[160] JTC (1969, 64). The use of initials indicates that the author was probably an advocate (a lawyer with right of audience in the High Court of Justiciary and the Court of Session).

[161] Chalmers (2007, 102).

[162] Duff (2004c).

"moral legitimacy" of the trial. The advantage of this approach, he argues, is that the courts explicitly have to consider a number of factors "which would lead not only to fewer 'rogue' decisions but also to greater clarity and consistency in the law in future".[163] This approach certainly sounds sensible: rather than picking and choosing which factors to consider (as seen above in part I), the courts would be required to elucidate the principles at the heart of their judgments. Unfortunately, it is unlikely that the courts will wish to depart from the veil of "fairness". In fact, a review of the law of criminal procedure set up in the wake of *Cadder*[164] has recommended that Scotland move towards a position of free evaluation of evidence constrained only by the principle that the accused's right to a fair trial under Article 6 should not be breached:

> In the modern world, the courts, including juries, must be trusted to be sufficiently sophisticated to be able to assess the quality and significance of testimony without the need for intricate exclusionary rules. [This] would move Scotland towards a system in which evidence is freely considered by judge or jury on its own merits, and with an emphasis on its relevancy to the crime charged, rather than its admissibility in terms of exclusionary rules drafted in and for a bygone age.[165]

To date, there is no indication whether the Scottish government will implement the proposals of the review, which include abandonment of the fairness test in *Chalmers* (to be replaced by test of whether or not to admit the evidence would breach the accused's fair trial rights under Article 6)[166] and abolition of the requirement in Scots law for corroboration of evidence in criminal trials.[167] Either way, it seems that the Scots approach to illegally obtained evidence is likely to continue to be vague and, inevitably, arbitrary for some time yet.

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[163] Ibid, 176.

[164] The Carloway Review (2011 para 7.0.10). For discussion of *Cadder* – the landmark case in which it was held that admitting confessions obtained where the suspect had not been offered legal assistance breached Article 6 of the ECHR – see Sect. 3.3.2.2 above.

[165] Ibid, para. 7.0.10.

[166] Ibid, para. 6.2.64.

[167] Ibid, para. 4.0.14.

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