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The Judicial Discretion to Exclude Relevant Evidence

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I. Introduction

...[I]n every criminal case a judge has a discretion to disallow evidence, even if in law relevant and therefore admissible, if admissibility would operate unfairly against a defendant.¹

The existence of an exclusionary discretion has been reiterated in so many English and Australian cases that it would seem entirely reasonable to suspect that a large body of scholarly writing dealing with the origins and proper grounds for the exercise of such a discretion would have come into existence. In fact the reverse is true. Individual academics have written about the particular exercise of the discretion in a narrowly confined situation,² but no systematic analysis of the existence and operation of the exclusionary discretion as a whole has yet been undertaken. The need for such an examination

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¹ *Callis v. Gunn* [1964] 1 Q.B. 495, 501 *per* Lord Parker C.J.

² *E.g.*, B. Livesey, *Judicial Discretion to Exclude Prejudicial Evidence* (1968) Camb. L.J. 291.

is apparent,³ especially since the decision of the Canadian Supreme Court in *R. v. Wray*.⁴

The facts of *Wray's* case are well known. The accused was charged with non-capital murder. He made a confession to the police which was clearly involuntary, and hence inadmissible. The accused told the police that he had thrown the murder weapon into a swamp and led them to the spot where the gun was to be found. The trial judge refused to allow the Crown to adduce evidence of the part taken by the accused in the actual discovery of the murder weapon, the accused being thereby acquitted. The Crown appealed, and the Court of Appeal upheld the acquittal on the basis that the trial judge in a criminal case had a discretion to reject evidence, even of substantial weight, if he considered that its admission would be "unjust or unfair to the accused" or "calculated to bring the administration of justice into disrepute".⁵ The Crown appealed once more.

The Supreme Court divided six to three, with the majority in favour of allowing the appeal.⁶ The leading judgment for the dissenters was delivered by Cartwright C.J. The learned Chief Justice pointed out that there were two matters at issue in this case. The first related to the so-called doctrine of confirmation by subsequent facts. Was the evidence of the finding of the gun and the accused's role in leading the police to it admissible at law? Or did the fact that evidence as to these matters was obtained as a direct consequence of an involuntary and inadmissible confession thereby render subsequently discovered facts inadmissible as well? If the subsequent facts were admissible as a species of real evidence, was any part of the confession rendered admissible by virtue of its reliability having been enhanced through subsequent confirmation? These questions were answered in favour of legal admissibility by Cartwright C.J. and all

³ See R.M. Eggleston, "The Relationship Between Relevance and Admissibility in the Law of Evidence", in H.H. Glass, *Seminars on Evidence* (1970), 89:

Although there are lots of statements in the text books about it, this is something which demands some research, somebody ought to find out what the law is on this subject and you can only do it of course by a very tedious kind of research, by looking through cases which are not listed in the books under this heading. That is something that has to be done over a long period and the facts assembled and then some kind of judgment made about it.

⁴ (1970) 11 D.L.R. (3d) 673. Hereafter all references to *Wray's* case will be to the decision of the Supreme Court of Canada.

⁵ [1970] 3 C.C.C. 122, 123 *per* Aylesworth J.A.

⁶ The majority comprised Martland, Judson, Ritchie, Pigeon, Fauteux and Abbott J.J. The dissenters were Cartwright C.J., Spence and Hall J.J.

the other members of the Court except Hall J., relying largely on the earlier Canadian case of *R. v. St. Lawrence*.⁷

The second question was whether the trial judge had an overriding discretion to exclude such evidence notwithstanding its admissibility at law. Cartwright C.J. together with Spence and Hall JJ. held that the trial judge did in fact have such a discretion, and that it had been properly exercised on the facts of *Wray's* case. He relied mainly on three English decisions to support the existence of such an exclusionary discretion. One was a case concerning the problem of similar fact evidence,⁸ and the other two concerned illegally or improperly obtained evidence.⁹

The Chief Justice was not unaware of the difficulties involved with such an approach:

I have difficulty in defining the conditions which would render a trial conducted strictly according to law "unjust or unfair" to an accused but the difficulty of defining the circumstances which call for its exercise does not necessarily negative the existence of the discretion which we are considering.¹⁰

In effect all three dissenting judges approved the formulation of the "discretion rule" adopted by Aylesworth J.A. in the Court of Appeal, namely the twin tests of the evidence being "unjust or unfair to the accused" or "calculated to bring the administration of justice into disrepute".¹¹ Spence J. in particular stressed the importance of the second criterion, arguing that the admission of this relevant and legally admissible evidence in this case would involve disregarding the principle of *nemo tenetur se ipsum accusare*.¹²

The leading judgment for the majority was prepared by Martland J. He denied the existence of a judicial discretion to exclude otherwise admissible evidence in a criminal trial simply because it was "calculated to bring the administration of justice into disrepute". He considered this a novel and unwarranted extension of the discretionary rule, with no authority to support it.¹³ He then turned to the first part of Aylesworth J.'s formulation. Mr Justice Martland pointed out that the discretion rule had been expressed as

⁷ (1949) 93 C.C.C. 376.

⁸ *Noor Mohamed v. R.* [1949] A.C. 182.

⁹ *Kuruma v. R.* [1955] A.C. 197; *Callis v. Gunn* [1964] 1 Q.B. 495.

¹⁰ *R. v. Wray, supra*, f.n.4, 683.

¹¹ *Ibid.*, 685.

¹² *Ibid.*, 698.

¹³ *Ibid.*, 685.

being both broad and narrow in scope.¹⁴ He argued that the wider formulations of its scope were not warranted by the authority on which they purported to be based. In a now celebrated passage, His Lordship proceeded to put forward a narrower conception of this discretionary power:

It (*Kuruma*) recognized a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against the accused. Even if this statement be accepted, in the way in which it is phrased, the exercise of a discretion by the trial Judge arises only if the admission of the evidence would operate unfairly. The allowance of admissible evidence relevant to the issue before the Court and of substantial probative value may operate unfortunately for the accused, but not unfairly. It is only the allowance of evidence *gravely prejudicial* to the accused, the admissibility of which is *tenuous*, and whose probative force in relation to the main issue before the court is *trifling*, which can be said to operate unfairly.¹⁶

In other words, Martland J. narrowed the scope of the exclusionary discretion by stipulating three requisite factors before it could be properly exercised by a trial judge. The evidence in question must be:

- (a) gravely prejudicial;
- (b) of tenuous admissibility; and
- (c) of trifling probative force.

The learned judge clearly derived these requisite factors from the judgment of Lord Du Parcq in *Noor Mohamed v. R.*¹⁶ The passage in question stated:

...in all such cases the judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial having regard to the purpose to which it is professedly directed, to make it desirable in the interest of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the judge will be right to exclude it. To say this is not to confuse weight with admissibility. The distinction is plain, but cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion and the sense of fairness of the judge.¹⁷

Unfortunately, Martland J. examined this passage somewhat out of context. The third word of the quotation, *i.e.*, "such", ties the

¹⁴ *E.g.*, *Rumping v. D.P.P.* (1962) 46 Cr.App.R. 398, 403 *per* Ashworth J.: "There is of course ample authority for the proposition that a judge has an overriding discretion to exclude evidence even if such evidence is in law admissible." Compare this wide statement of the scope of the discretion with the decision in *R. v. Sigmund* [1968] 1 C.C.C. 92, 102 *per* Davey J.A.

¹⁵ *R. v. Wray, supra*, f.n.4, 689 (my emphasis).

¹⁶ [1949] A.C. 182.

¹⁷ *Ibid.*, 192.

entire exposition of the scope of the discretion rule to the passage in *Noor Mohamed* which immediately preceded it. Lord Du Parcq did not purport to state criteria for the exercise of an exclusionary discretion in all the possible circumstances under which it might arise. He merely set out a test for the exercise of an exclusionary discretion in one particular instance.¹⁸ For Martland J. to rely on this passage as the basis for his restrictive statement of the scope of the exclusionary discretion is clearly specious reasoning.

The learned judge also relied on the actual decision in the case of *Kuruma v. R.*¹⁹ as support for the view that the exclusionary discretion ought to be narrowly circumscribed. *Kuruma* had been subjected to an unlawful search by police officers who alleged that ammunition and a weapon, to wit, a penknife had been discovered on his person. This was a capital offence. A good deal of the evidence in this case was unsatisfactory.²⁰ Lord Goddard held that this illegally obtained evidence was admissible if relevant, subject only to an exclusionary discretion. As Lord Goddard stated:

No doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused If, for instance, some admission of some piece of evidence, e.g., a document, had been obtained from a defendant by a trick, no doubt the judge might properly rule it out.²¹

Martland J. very properly noted that if ever there were a case for the exercise of an exclusionary discretion (assuming of course that a wide formulation of the discretion was proper), the facts of *Kuruma* clearly provided such an opportunity. He reasoned as follows:

If Lord Goddard intended that the discretion which he defined was applicable if the trial Judge felt that the proposed evidence had been obtained in an unfair manner, it is difficult to see how he could avoid saying that the discretion should have been exercised in *Kuruma's* favour. If, however, he meant that the discretion arose where the admission of

¹⁸ Lord Du Parcq was dealing with some observations by Lord Sumner in *Thompson v. R.* [1918] A.C. 221, 232. Lord Sumner had stated: "The prosecution cannot credit the accused with fancy defences in order to rebut them at the outset with some damning piece of prejudice." Lord Du Parcq accepted this formulation with one qualification — in certain circumstances a general denial of the crime alleged would provide a sufficient basis for the admissibility of similar fact evidence. The prosecution would not be crediting the accused with a "fancy defence" in such a situation, and the question of whether the similar fact evidence ought to be admitted in such a case would turn on the criteria set out in the passage which forms the basis of f.n.17.

¹⁹ [1955] A.C. 197.

²⁰ See J.D. Heydon, *Illegally Obtained Evidence* [1973] Crim.L.R. 603, 606-7.

²¹ *Kuruma v. R.*, *supra*, f.n.19, 204.

evidence, though legally admissible, would operate unfairly, because as stated in *Noor Mohamed, supra*, it had trivial probative value, but was highly prejudicial, then the course followed in the disposition of the *Kuruma* case is quite understandable.²²

Judson J. was even stronger in his denunciation of the wide discretion posited by the dissenters:

There is no judicial discretion permitting the exclusion of relevant evidence, in this case highly relevant evidence, on the ground of unfairness to the accused.²³

He went on to say:

The task of a Judge in the conduct of a trial is to apply the law and to admit all evidence that is logically probative unless it is ruled out by some exclusionary rule. If this course is followed, an accused person has had a fair trial.²⁴

His Lordship can therefore be read as denying the very existence of a judicial discretion to exclude *relevant* evidence. In effect, this involves a denial of the existence of an exclusionary discretion *per se*, since evidence which is not relevant is inadmissible anyway. It is interesting to note that Fauteux and Abbott JJ. concurred with both Martland and Judson JJ. while Ritchie and Pigeon JJ. concurred only with Martland J. It is difficult to understand how one can concur with both Martland J., who recognized the existence of an exclusionary discretion, albeit in a somewhat castrated form, and Judson J., who effectively denied the existence of any such discretion.

The judgments in *Wray's* case raise many fascinating and important questions. What is meant by the concept of a "judicial discretion" to exclude evidence? How does such a discretion differ from a rule of law of an exclusionary nature? Does an analysis of "relevance" assist discussion of these questions? Is there a sound historical and legal basis for the exercise of an exclusionary discretion in criminal cases? What are the principles on which courts purport to act in exercising this discretion? What underlying factors do the courts take into account without necessarily giving them full expression? What role ought the law of evidence and adjective law in general to play in the trial process?

The remainder of this article will be concerned not primarily to answer these questions, but rather to elaborate on them. The majority of the cases examined will be English or Australian, but the broader questions they raise may well be seen as applicable to

²² *R. v. Wray*, (1970) 11 D.L.R. (3d) 673, 691.

²³ *Ibid.*, 694-5.

²⁴ *Ibid.*, 695.

Canada, Scotland, and perhaps to a lesser extent even the United States.

II. Some Preliminary Observations

It has been said of the law of evidence that "No branch of the law lends itself more easily to philosophical inquiries or subtlety of distinctions".²⁵

In 1790, Grose J. dreaded "that rules of evidence shall ever depend upon the discretion of the Judges".²⁶ In the same case Lord Kenyon C.J. stated that:

[The rules of evidence] have been matured by the wisdom of ages, and are now revered from their antiquity and the good sense in which they are founded²⁷

Best, in his excellent nineteenth century study of the *Law of Evidence*, argued that the law of evidence was of comparatively recent origin, though based often on older principles. He noted that at an earlier period:

. . . the principles of evidence were looked on as something merely directory, which judges and jurymen might follow or not at their *discretion*.²⁸

A law of evidence, in the sense of a series of systematized "rules", began to form in the seventeenth century. Best observed:

The characteristic feature which distinguishes it, both from our own ancient system, and those of most other nations, is, that its rules of evidence, both primary and secondary, are in general rules of law, which are not to be enforced or relaxed at the discretion of the judges, but are as binding on the court, juries, litigants, and witnesses as the rest of the common and statute laws of the land, and that it is only in the forensic procedure which regulates the *manner* of offering, accepting, and rejecting evidence, that discretionary power, and even that a limited one, is vested in the bench.²⁹

Thus Best somewhat obscurely confined the existence of a judicial discretion to the narrow dimensions of "regulation of manner". Stephen, in his famous *Digest of the Law of Evidence* published in 1877, made no reference at all to the existence of any discretion, broad or narrow, to exclude evidence.³⁰ Taylor, writing in 1887, commented:

²⁵ Gray, in Maguire, *Evidence — Common Sense and Common Law* (1947), 2.

²⁶ *R. v. Inhabitants of Eriswell* (1790) 3 Term Rep. 707, 711, 100 E.R. 815, 818.

²⁷ *Ibid.*, 721 and 823.

²⁸ *Best on Evidence* 9th ed. (1902), 95 (my emphasis).

²⁹ *Ibid.*, 97 (my emphasis).

³⁰ Stephen, *Digest of the Law of Evidence* (1877), art. 24. The failure to discuss the concept of an exclusionary discretion by the author is quite explicable in terms of his now discredited wide usage of the concept of "relevance".

As the admission or rejection of a confession rests wholly in the discretion of the Judge, it is difficult to lay down particular rules, *a priori* for the government of that discretion.³¹

Wigmore, who did not recognize a specific exclusionary discretion, spoke of principles of "practical policy" as the basis for the exclusion of even some evidence of "appreciable probative value". "Practical policy" was said to include:

- (a) a risk of value prejudice, *i.e.*, tending to arouse emotions calculated to overwhelm calm, logical reasoning;
- (b) a risk of unfair surprise; and
- (c) a risk of confusion of issues.

However, Wigmore denied that these three practical policies of themselves were rules of exclusion, asserting that they formed the source of many of the exclusionary rules.³²

Is there a meaningful distinction to be drawn between a judicial discretion to exclude evidence and a rule of law to this effect? It has been suggested that the Rule/Discretion dichotomy is most conveniently analysed in terms of two ends of a sliding scale, the difference being a question of degree.³³ The difference between the concepts lies in the range of factors which the decision maker can properly take into account in coming to his decision. Thus, it might be argued that a concept such as "fairness" fails to provide judicially manageable criteria in order to arrive at a decision, while on the other hand the question whether a confession was "induced" or not is justiciable by virtue of a greater degree of inherent precision.

This is not a particularly satisfactory approach. Though the concept of "fairness" may seem too vague and uncertain to constitute a judicial standard without more, it is very seldom that any court is asked to apply a criterion of this type in its bare form. Subsidiary principles will usually emerge as to what factors ought to be evaluated in deciding whether "fairness" has been achieved. There comes a point where sufficiently precise subsidiary factors emerge to warrant describing the process of applying the primary principle as a "judicial" one. Furthermore, only blind mechanical jurisprudence will fail to take account of what Hart calls the "open texture of law", the penumbral areas.³⁴

³¹ Taylor, *A Treatise on the Law of Evidence* (1887), 748.

³² Wigmore, *The Principles of Judicial Proof* (1913), 52-3.

³³ K.C. Davis, *Discretionary Justice — A Preliminary Inquiry* (1969), 15 *et seq.*

³⁴ H.L.A. Hart, *The Concept of Law* (1961), 124 *et seq.* Compare, at 132, "... the life of the law consists to a very large extent in the guidance both

A thorough examination of the question of justiciability is beyond the scope of this article. Problems of where to draw the line are by no means unique to this area. It is relatively easy to ascertain whether the factors relevant to the exercise of a particular discretion are suitable for judicial determination or not, provided one is faced only with fairly extreme examples. As the examples become less extreme, so the degree of difficulty rises proportionately.

Some of the problems associated with a judicial discretion to exclude relevant evidence stem from the imprecision associated with the concept of "relevance". It has been noted that:

... the judicial discretion with regard to the admissibility of evidence is entirely exclusionary, although the requirement of a fairly high degree of relevancy in order to render evidence admissible sometimes creates the appearance of the exercise of an inclusionary discretion.³⁵

The concept of "relevance", so central to our law of evidence, has seldom been closely analysed.³⁶ Practitioners have been content to test for relevance by a reliance on instinct and experience. However, it is clear that the extent to which it is meaningful to speak of a judicial discretion to exclude relevant evidence will depend on how widely the term "relevance" is construed.

Stephen adopted a very wide definition of the concept of relevance. Hearsay evidence was excluded because it was "deemed to be irrelevant".³⁷ Voluntary confessions were admissible because they were "deemed to be relevant".³⁸ He rationalized the existence of all exclusionary rules in the law of evidence as turning on the question of relevance only. Such an approach, while having the merit of simplicity, is clearly distracting. It involves labelling as irrelevant much evidence which is rationally probative. It is of no predictive value in determining whether a tendered item of evidence will be treated as

of officials and private individuals by determinate rules which unlike the applications of variable standards, do *not* require from them a fresh judgment from case to case".

See generally *Salmond on Jurisprudence* (Glanville Williams) 11th ed. (1957), 44:

The total exclusion of judicial discretion by legal principle is impossible in any system. However great is the encroachment of the law, there must remain some residuum of justice which is not according to law — some activities in respect of which the administration of justice cannot be defined or regarded as the enforcement of the law.

³⁵ *Cross on Evidence* (J.A. Gobbo) Australian ed. (1970), 32.

³⁶ R.M. Eggleston, *supra*, f.n.3, 53, is a notable exception.

³⁷ Stephen, *supra*, f.n.30, 21.

³⁸ *Ibid.*, 29. See also s.7 of the *Indian Evidence Act*, 1872, drafted by the learned jurist.

relevant or not. It serves only to rationalize *ex post facto* earlier decisions on the admissibility of evidence.

A more satisfactory analysis is one which treats the concept of relevance as an empirical criterion. Wigmore defined as "relevant" those facts which have "rational probative value".³⁹ The test is a quantitative one — facts are relevant which render sufficiently probable the occurrence at issue, in a causative sense. The obvious question is what degree of probability is required to render evidence relevant? It has been said that "the law prescribes a minimum quantum of probative value for evidence before it will regard it as relevant".⁴⁰ The test of whether this minimum quantum has been met is said to be one of "logic and experience".⁴¹ Attempts have been made to distinguish logical relevancy (any fact which has some probative value) from legal relevancy (any fact which has sufficient probative value).⁴² In the absence of any clearer guidelines as to the content of the term "sufficient", these classifications shed little light.

It is important to note that the use of a quantitative concept of relevance allows us to make a very useful distinction. If evidence is excluded because it is insufficiently relevant (although it may have some rational probative value), an entirely different judicial process is involved from that which is encompassed in the notion of an exclusionary discretion. Because the question of what constitutes the "minimum quantum" of probative value is such a vague one, there is a temptation to say that the judge who determines whether evidence is relevant is really exercising a form of discretion.⁴³ In a

³⁹ 1 *Wigmore on Evidence* 3d ed. (1940), 289.

⁴⁰ Cowen and Carter, *Essays on the Law of Evidence* (1956), 125.

⁴¹ *Ibid.*

⁴² Cross, *supra*, f.n.35, 16.

⁴³ Viscount Simon in *Harris v. D.P.P.* [1952] A.C. 694, 708, was well aware of the distinction discussed above. In commenting on the decision in *Noor Mohamed*, he said:

The Board there took the view that the evidence as to the previous death of the accused's wife was not relevant to prove the charge against him of murdering another woman, and if it was not relevant it was at the same time highly prejudicial.

In other words, the evidence was excluded because it was not sufficiently relevant. The fact that it was highly prejudicial would have become important only if the initial hurdle had been cleared.

Cross, *supra*, f.n.35, also expresses the distinction well at 409:

As relevance is a matter of degree, a judge has a substantial discretion when determining whether evidence is admissible under the rule; but even so, there may be cases in which it is impossible to say that the evidence in question lacks the requisite degree of relevance, and yet it

sense this is true, but it is a very different kind of discretion from that which is commonly accepted under the rubric of the judicial discretion to exclude relevant evidence on the grounds of "unfairness". The latter discretion presupposes that the former has already been exercised in favour of admissibility, *i.e.*, that the trial judge has decided that the evidence is sufficiently probative to be relevant.

Of course, the question of "sufficiency" is one of degree; but it is a discretion based on empirical probabilities. The trial judge is involved in an assessment of probabilities based on his "logic and experience". How great is the degree of probability that Factor A caused Result B?⁴⁴ Once the trial judge has made his decision in favour of admissibility, it is said there is still an overriding discretion on his part to exclude on the basis of other criteria.⁴⁵ Those criteria are said to be non-empirical, but rather consist of a series of semi-ethical, semi-legal value judgments. The existence of the former discretion, though it is of uncertain application, clearly sets out the appropriate judicially manageable criteria for its exercise. The existence of the latter type of discretion, though perhaps it is no less certain in application, involves the use of standards which are of more dubious justiciability.

III. Sources of a Judicial Discretion to Exclude Relevant Evidence

The existence of an overriding judicial discretion to exclude evidence in criminal cases has been reaffirmed by the courts of England and Australia in at least seven distinct fields of the Law of Evidence. These are as follows:

- (a) Illegally obtained evidence;⁴⁶
- (b) Improperly obtained evidence;⁴⁷

might be unfair to admit it, having regard to its probative value as contrasted with its prejudicial propensity.

⁴⁴ See generally Hart and Honoré, *Causation in the Law* (1959) for an excellent discussion of the intricacies inherent in the concept of "causation".

⁴⁵ *E.g.*, *R. v. Wray* (1970) 11 D.L.R. (3d) 673 *per* Cartwright C.J.

⁴⁶ The following cases are examples of those which expressly assert the existence of an exclusionary discretion in respect of evidence obtained by a direct breach of law: *Kuruma v. R.* [1955] A.C. 197, 203; *R. v. Bruce* [1965] Q.W.N. 58, 61; *King v. R.* [1968] 2 All E.R. 610, 614.

⁴⁷ A large number of cases have asserted the existence of an exclusionary discretion where evidence was obtained as a result of "improper" but not unlawful conduct. Among the most important of these are:

Benney v. Dowling [1959] V.R. 237, 239; *R. v. Court* [1962] Crim. L.R. 697; *R. v. Payne* [1963] 1 All E.R. 848; *R. v. McNamara* [1963] V.R. 402; *Callis v.*

(c) Evidence of similar facts;⁴⁸

(d) Cross-examination of the accused as to character;⁴⁹

Gunn [1964] 1 Q.B. 495, 501; *R. v. Murphy* [1965] N.I. 138, 142; *R. v. Magsud Ali* [1965] 2 All E.R. 464, 469; *Walker v. Viney* [1965] Tas. S.R. 96; *R. v. Ireland* (1970) 44 A.L.J.R. 263, 268; *R. v. Burnett and Lee* [1973] Crim. L.R. 748.

⁴⁸ See the following cases dealing with similar fact evidence for judicial expression of the view that an exclusionary discretion in respect of relevant evidence exists in that area of law:

Perkins v. Jeffery [1915] 2 K.B. 702; *R. v. Pullman* [1942] S.A.S.R. 262; *R. v. Yuille* [1948] V.L.R. 41, 46; *Noor Mohamed v. R.* [1949] A.C. 182, 192; *Harris v. D.P.P.* [1952] A.C. 694, 707; *R. v. Tait* [1963] V.R. 520, 524.

⁴⁹ In England and almost all of the Australian states, the question of whether the accused who goes into the witness box can be cross-examined as to his character and record is governed by s.1(f) of the 1898 *Criminal Evidence Act*, 61-62 Vict., c.36 (England) and its Australian equivalent. S.1(f) reads as follows:

A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless —

- (i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or
- (ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or
- (iii) he has given evidence against any other person charged with the same offence.

Several of the Australian equivalents of s.1(f) add the following sentence at the end of s.1(f)(ii):

Provided that the permission of the judge (to be applied for in the absence of the jury) must first be obtained.

The following cases assert the existence of an overriding discretion to exclude evidence of an accused person's character and record notwithstanding its legal admissibility pursuant to s.1(f) and its equivalents: *R. v. Watson* (1913) 8 Cr.App.R. 249; *R. v. Fletcher* (1913) 9 Cr.App.R. 53; *R. v. Baldwin* (1925) 18 Cr.App.R. 175; *Curwood v. R.* 69 C.L.R. 561, 578, 580; *Stirland v. D.P.P.* [1944] A.C. 315, 327; *R. v. Cook* [1959] 2 Q.B. 340; *R. v. May* [1959] V.R. 683; *R. v. Brown* [1960] V.R. 382, 383, 398; *R. v. Martin* (1960) S.R. (N.S.W.) 286; *Dawson v. R.* 106 C.L.R. 1, 5; *R. v. Billings* [1961] V.R. 127, 137, 139-40; *R. v. Clarke* [1962] V.R. 657, 662; *Jones v. D.P.P.* [1962] A.C. 635, 692; *R. v. Flynn* [1963] 1 Q.B. 729; *R. v. Crawford* [1965] V.R. 586, 588; *R. v. Matthews* [1965] Qd. R. 306; *Murdoch v. Taylor* [1965] 1 All E.R. 406, 411; *R. v. Billings* [1966] V.R. 396; *Selvey v. D.P.P.* [1968] 2 All E.R. 497.

- (e) Confessions;⁵⁰
- (f) Admissions by accused person;⁵¹
- (g) Evidence calculated to prejudice the course of the trial.⁵²

(a), (b) *Illegally and Improperly Obtained Evidence*

The discretion does not appear to have been specifically mentioned in connection with these evidentiary areas until the late nineteenth century. It emerged in different forms at different times with respect to each of them. With regard to illegally and improperly obtained evidence, the discretion is said to derive from "miscellaneous and diverse sources",⁵³ including a series of civil cases in which copies of privileged documents were held to be admissible despite their having been illegally or improperly obtained.⁵⁴ In one classic instance, Crompton J. stated the position to be: "It matters not how you get it; if you steal it even, it would be admissible in evidence."⁵⁵ However, it was not until the case of *Kuruma v. R.* that

⁵⁰ The existence of an exclusionary discretion in respect of otherwise voluntary and legally admissible confessions is recognized in the following cases:

R. v. Rogerson (1870) 9 S.R. (N.S.W.) 234; *R. v. Knight and Thayre* (1905) 20 Cox C.C. 711; *R. v. Booth and Jones* (1910) 5 Cr.App.R. 177, 179; *R. v. Currie* (1912) W.N. (N.S.W.) 201; *Ibrahim v. R.* [1914] A.C. 599, 614; *R. v. Livingstone* (1915) 9 Q.J.P.R. 67; *R. v. Voisin* [1918] 1 K.B. 531, 539; *R. v. Lynch* [1919] S.A.L.R. 325, 333; *R. v. Hokin* (1922) 22 S.R. (N.S.W.) 280, 287; *R. v. Wongacurra* [1922] S.A.S.R. 192, 200; *Cornelius v. R.* 55 C.L.R. 235, 252; *R. v. Jeffries* (1947) 47 S.R. (N.S.W.) 284, 300, 311; *McDermott v. R.* 76 C.L.R. 501, 507, 512-15; *R. v. Lee* 82 C.L.R. 133, 144, 148; *R. v. Amad* [1962] V.R. 545, 548; *Wendo v. R.* 109 C.L.R. 559, 565, 570; *R. v. Batty* [1963] V.R. 451; *R. v. Smith* [1964] V.R. 95; *R. v. Von Aspern* [1964] V.R. 91, 93; *R. v. Pratt* (1965) 83 W.N. (Pt. 1) (N.S.W.) 358, 361; *Webb v. Cain* [1965] V.R. 91; *R. v. Buchanan* [1966] V.R. 9, 15; *R. v. Wright* [1969] S.A.S.R. 256, 261, 264; *R. v. Sykes (No. 1)* [1969] V.R. 631, 633-4; *R. v. Banner* [1970] V.R. 240.

⁵¹ Statements made in the presence of the accused are legally admissible, since the reaction of the accused on hearing them might possibly constitute an admission by conduct. Two cases have held that there is an overriding exclusionary discretion in respect of such evidence: *R. v. Christie* [1914] A.C. 545, 559-60, and *R. v. Doolan* [1962] Qd. R. 449.

⁵² The following cases support the view that the exclusionary discretion allows a trial judge to exclude evidence which is of such a nature as to inherently prejudice the course of a trial:

R. v. Cole (1941) 165 L.T. 125; *Mooney v. James* [1949] V.L.R. 22, 28; *R. v. Ames* [1964] N.S.W.R. 1489; *R. v. Deen* [1964] Qd. R. 569, 577; *R. v. List* [1965] 3 All E.R. 710, 711; *R. v. Knape* [1965] V.R. 469; *R. v. Doyle* [1967] V.R. 698, 699; *R. v. Devenish* [1969] V.R. 737, 740; *Wilson v. R.* (1970) 44 A.L.J.R. 221, 222.

⁵³ Heydon, *supra*, f.n.20, 603.

⁵⁴ *Lloyd v. Mostyn* (1842) 10 M. & W. 478, 152 E.R. 558; *Calcraft v. Guest* [1898] 1 Q.B. 759.

⁵⁵ *R. v. Leatham* (1861) 8 Cox C.C. 498, 501.

Lord Goddard first stated affirmatively the view that although it was legally admissible if relevant, illegally obtained evidence could be excluded at the discretion of the trial judge.⁵⁶ Lord Goddard relied on judicial dicta to this effect in *Noor Mohamed* and *Harris*,^{56a} both cases in the similar facts area. Lord Goddard had "no doubt" that in "a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused", and all the cases dealing with illegally or improperly obtained evidence decided after *Kuruma* have accepted this view with equanimity.⁵⁷ In *R. v. Murphy* the existence of such a discretion was said to be "established law", and reliance was again placed on the similar fact cases and *Kuruma* to justify this proposition.⁵⁸

Cross argues that the existence of a discretion to reject unfairly obtained evidence in criminal cases "has never been disputed", and concludes that the "basis of the exclusionary discretion in most of the cases that have been mentioned so far seems to be an offshoot of the privilege against self-incrimination".⁵⁹ Compare this with the views of Wigmore, who favoured the confinement of this privilege to a testimonial context.⁶⁰ No case prior to *Kuruma* establishes the existence of an exclusionary discretion of this type in this area. The question whether the discretion is of such general application that it can readily be transferred from one area of evidence to another, as Lord Goddard was prepared to do, has not received any consideration. Perhaps the fact that the discretion has only been exercised to exclude the evidence in four cases in the Commonwealth outside Scotland provides an explanation for this paucity of analysis.⁶¹

(c) Evidence of Similar Facts

The existence of the exclusionary discretion in the case of similar fact evidence certainly is based on an older if not more legitimate pedigree. In *R. v. Makin*, the Supreme Court of New South Wales expressly denied that there was any difference in the rules of

⁵⁶ *Kuruma v. R.* [1955] A.C. 197.

^{56a} *Noor Mohamed v. R.* [1949] A.C. 182; *Harris v. D.P.P.* [1952] A.C. 694.

⁵⁷ Cf. f.n.46 and f.n.47.

⁵⁸ *R. v. Murphy* [1965] N.I. 138, 142.

⁵⁹ Cross, *supra*, f.n.35, 29.

⁶⁰ 8 *Wigmore on Evidence* (McNaughton revision) (1961), paras. 2250-1, for the author's account of the origins of the privilege.

⁶¹ Heydon, *supra*, f.n.20, 605.

evidence in criminal and civil cases apart from the difference in the standard of proof required.⁶²

The cases dealing with the admissibility of similar fact evidence are generally in a confused state. However, two basic propositions appear to be valid. Similar fact evidence may be excluded because it lacks a "minimum quantum" of probative value, *i.e.*, it is insufficiently relevant.⁶³ Even if similar fact evidence is sufficiently relevant, it may still be excluded if it shows nothing other than bad disposition (or in the words of Cowen and Carter it is "relevant via propensity" only).⁶⁴ These are of course matters of degree and allow the trial judge considerable flexibility in their application. The question of whether there is a need for a still more general exclusionary discretion in this area is one which bears examination.⁶⁵

Be that as it may, a number of cases have affirmed the existence of such a discretion, and various criteria to be borne in mind by the trial judge in his exercise of it have been suggested. For example, as early as the case of *Perkins v. Jeffery*,⁶⁶ Avory J. referred to the existence and operation of such a discretion in the area of similar facts. He took as his source of the existence of the discretion certain remarks of Lord Moulton in the case of *R. v. Christie*,⁶⁷ decided one year earlier and dealing with an entirely separate question, *i.e.*, that of admissions. Not one of the cases dealing with similar fact evidence has looked into the origins of the exclusionary discretion in this area, and it is very hard to envisage a situation in which the evidence sought to be excluded by virtue of the discretion could not equally as well be excluded by virtue of the substantive similar facts rule itself.⁶⁸

⁶² (1893) 14 N.S.W.R. 1, 15 *per* Windeyer J.

⁶³ *Cf.* cases cited *supra*, f.n.56a.

⁶⁴ *E.g.*, *Thompson v. R.* [1918] A.C. 221. For a strong criticism of this decision, see *R. v. Morris* (1970) 54 Cr.App.R. 69.

⁶⁵ Cowen and Carter, *supra*, f.n.40, 155:

The existence of an extra and overriding exclusionary discretion is perhaps therefore in the case of similar fact evidence an additional safeguard which is in practice largely unnecessary.

⁶⁶ [1915] 2 K.B. 702.

⁶⁷ [1914] A.C. 545, 559.

⁶⁸ Cross, *supra*, f.n.35, 409, suggests that there may be only two cases in which the exclusionary discretion was used as the basis of the actual decision, rather than the similar facts rule itself. One was *Perkins v. Jeffery*, *supra*, f.n.66, and the other was *R. v. Fitzpatrick* [1962] 3 All E.R. 840.

(d) *Cross-examination of the Accused as to Character*

The legal basis for the exercise of the discretion in light of section 1(f) of the 1898 *Criminal Evidence Act*^{68a} and its Australian equivalents has been somewhat more controversial. One writer, Livesey,⁶⁹ has examined this question closely in the light of the decision of the House of Lords in *Selvey v. D.P.P.*⁷⁰ that there did exist a judicial discretion to exclude, in a criminal trial, evidence which was both relevant and admissible, on the ground that it was prejudicial to the accused, even where the statutory situation under section 1(f) had arisen. Livesey sums up the contribution of the individual Lords in *Selvey's* case on this point as follows:

Lord Dilhorne said: "Since [the case of *Fletcher*] it has been said in many cases that a judge has such a discretion." And: "In the light of what was said in all these cases by judges of great eminence one is tempted to say . . . that it is far too late in the day even to consider the argument that a judge has no such discretion." Lord Hodson speaks of "abundant authority". Lord Guest finds a "long-standing practice" which it is too late to overthrow, and which appears from a review of all the "authorities". And Lord Pearce, with whom Lord Wilberforce agreed, says that "there is an overwhelming mass of distinguished authority that the discretion exists".⁷¹

Of course, Lord Pearce went on to say that the source of the discretion could not lie in section 1(f) itself according to normal canons of construction. In his opinion, it arose "from the inherent power of the Courts to secure a fair trial for the accused".⁷² Livesey very properly asks whether there is in fact any scope in the law for any such inherent power to take precedence over the clear words of a statute.⁷³

The existence of such a discretion was first mentioned in *R. v. Watson*⁷⁴ and *R. v. Fletcher*,⁷⁵ both decided in 1913. These cases were

^{68a} Cf. f.n.49.

⁶⁹ Livesey, *supra*, f.n.2, 291.

⁷⁰ [1968] 2 All E.R. 497.

⁷¹ Livesey, *supra*, f.n.2, 292.

⁷² Discussed by Livesey, *ibid.*, 294. The suggestion that the exclusionary discretion is derived from the inherent power of the court to prevent abuse of process is tentatively supported by Eggleston, *supra*, f.n.3, 65. The argument is that the discretion is exercised to prevent the court being faced with a multiplicity of issues, which, though relevant, will take up too much time to deal with. With respect, the discretion to exclude relevant evidence seems to have gone well beyond this narrow formulation. For a fuller discussion of this problem, see below.

⁷³ *Ibid.*

⁷⁴ (1913) 8 Cr.App.R. 249

⁷⁵ (1913) 9 Cr.App.R. 53.

in many ways a reaction to the literal approach to the construction of section 1(f) taken in *R. v. Hudson*,⁷⁶ where the court held that even if it was necessary for the accused to make imputations against prosecution witnesses in order to establish his defence, the accused's record was thereby rendered admissible by virtue of section 1(f)(ii). This could render great hardship to an accused person with a record by effectively preventing him from presenting a defence. The truth of this has finally been recognized in England by the Criminal Law Revision Committee.⁷⁷ The courts have with one exception⁷⁸ preferred to read the section literally and rely on an exclusionary discretion to ameliorate hardship in individual cases, rather than read into the Act a caveat with respect to imputations "necessary" to the defence. However, it is interesting to note that in the cases of *Maxwell v. D.P.P.*⁷⁹ and *Stirland v. D.P.P.*,⁸⁰ the actual decisions to exclude the character evidence were based on its insufficient relevance rather than any exclusionary discretion. In fact, the first time the broad exclusionary discretion was actually exercised in this area was in 1963 in the case of *R. v. Flynn*,⁸¹ and much of that case was subsequently overruled in *Selvey v. D.P.P.*

In Australia, there is less doubt about the existence of the judicial discretion in this context because of the express statutory provision in some of the Australian counterparts of section 1(f) to this effect, *i.e.*, "Provided that the permission of the judge (to be applied for in the absence of the jury) must first be obtained". In a number of Australian cases on this legislation, however,

[t]he approach has been to grapple with the difficulties of construction of the section rather than fall back on the exercise of discretion to meet the problems raised by the operation of the section.⁸²

In *Dawson v. R.*,⁸³ Dixon C.J. attacked the approach of some of the English courts which sought to protect the accused by the use of a broad judicial discretion:

⁷⁶ [1912] 2 K.B. 464.

⁷⁷ *The Eleventh Report of the Criminal Law Revision Committee* (1972), Cmnd. 4991.

⁷⁸ *R. v. Turner* [1944] K.B. 463. See also *Stirland v. D.P.P.* [1944] A.C. 315 *per* Viscount Simon L.C.

⁷⁹ [1935] A.C. 309.

⁸⁰ [1944] A.C. 315.

⁸¹ [1963] 1 Q.B. 729.

⁸² Cross, *supra*, fn.35, 445-6. See generally (1962) 3 M.U.L.R. 486, 486-8, for a history of the Victorian equivalent of s.1(f), *i.e.*, s.399(e) of the *Crimes Act*, Victorian Statutes 1958, Vol. II, No. 6231.

⁸³ 106 C.L.R. 1.

There is, I know, a notion that the whole question is or should be reduced to discretion. But this is not what the legislature has said, and means re-writing the statute.^{83a}

In this case, and the earlier case of *Curwood v. R.*⁸⁴ Dixon C.J. carefully construed the meaning of the latter part of the Victorian equivalent to section 1(f)(ii). He limited the meaning of the term "imputations", and distinguished a denial of the Crown case (even an emphatic one) from

[t]he use of matter which will have a particular or specific tendency to destroy, impair or reflect upon the character of the prosecutor or witnesses called for the prosecution . . .⁸⁵

arguing that only the latter rendered the accused's character and record admissible in cross-examination.

The Dixonian approach has not been well received and a number of Victorian cases in particular have paid it only lip service, preferring to adopt a more literal approach to the meaning of "imputation", and relying on the broad discretion to ameliorate the effects of this.⁸⁶

In Canada, the legislature has taken a somewhat different approach to the problem of the accused person being cross-examined as to his record. The Anglo-Australian approach is to withhold from the jury the record of an accused's past misdeeds because of the fear that if this record were known, the question of the accused's guilt would be decided by the length of his record and not the admissible evidence presented by the prosecution. Recent empirical surveys dealing with the operation of the jury lend some support to the view that the accused's record can determine his guilt or innocence where it becomes known to the jury.⁸⁷ By contrast, the *Canada Evidence Act*,^{87a} section 12(i), provides as follows:

A witness may be questioned as to whether he has been convicted of any offence, and upon being so questioned, if he either denies the fact or refuses to answer, the opposite party may prove such a conviction.

The Canadian Courts have construed this provision so as not to allow the prosecution *carte blanche* in the evidence it can cross-examine on. In *Koufis v. R.*,⁸⁸ Kerwin J. explained:

^{83a} *Ibid.*, 16.

⁸⁴ 69 C.L.R. 561.

⁸⁵ *Dawson v. R.*, *supra*, f.n.83, 9.

⁸⁶ *E.g.*, *R. v. Billings* [1961] V.R. 127, 139.

⁸⁷ L.S.E. Jury Project, *Juries and the Rules of Evidence* (1973) Crim. L.R. 208. See also Kalven and Zeisel, *The American Jury* (1966), 127-8, 179-181.

^{87a} R.S.C. 1970, c.E-10.

⁸⁸ [1941] S.C.R. 481.

A person charged with having committed a crime is not only entitled to have placed before the jury only evidence that is relevant to the issues before the Court, but when testifying on his own behalf, he may not be asked questions that have no possible bearing upon such issues and might only tend to prejudice a fair trial.^{88a}

That statement seems to turn on the need for the evidence to be sufficiently relevant. In the case of *Colpitts v. R.*,⁸⁹ Spence J. argued for the existence of an overriding exclusionary discretion pursuant to section 12(i):

However, I am of the opinion that permission to cross-examine the accused person as to his character on the issue of the accused person's credibility is within the discretion of the trial Judge and the trial Judge should exercise that discretion with caution and should exclude evidence, even if it were relevant upon the credibility of the accused, if its prejudicial effect far outweighs its probative value.^{89a}

Unfortunately, Spence J. failed to state the basis for his opinion that the discretion was applicable in this context.

(e) Confessions

Turning now to the source of the discretion to exclude voluntary confessions on the grounds of "fairness", this appears to derive from a slightly older series of cases than those we have been concerned with thus far. Confessions are received as exceptions to the hearsay rule when they are voluntary because they are regarded as being reliable, and likely to be true. One reason for the exclusion of involuntary confessions is the fact that they are unlikely to be reliable or at least less likely to be so. In *R. v. Baldry*,⁹⁰ Baron Parke said,

[I]n order to render a confession admissible in evidence it must be perfectly voluntary: and there is no doubt that any inducement in the nature of a promise or of a threat held out by a person in authority vitiates a confession.^{90a}

In the early nineteenth century, cases arose where the judges expressed strong disapproval of the way in which confessions were obtained, but were forced to admit them because they were voluntary.⁹¹ Yet by 1852, Baron Parke was able to say of the law in this area,

I think there has been too much tenderness towards prisoners in this matter ... justice and common sense have too frequently been sacrificed at the shrine of mercy.⁹²

^{88a} *Ibid.*, 487.

⁸⁹ (1966) 52 D.L.R. (2d) 416.

^{89a} *Ibid.*, 423.

⁹⁰ (1852) 2 Den. 430, 169 E.R. 568.

^{90a} *Ibid.*, 445 and 574.

⁹¹ *R. v. Thornton* (1824) 1 Mood. 27, 168 E.R. 1171; *R. v. Wild* (1835) 1 Mood. 452, 168 E.R. 1341.

⁹² *R. v. Baldry*, *supra*, f.n.90, 445 and 574.

The earliest sign of a power on the part of the trial judge to exclude a confession which was not obtained as a result of a threat or promise, but was simply the result of considerable insistence on the part of the police that an accused in their custody answer their interrogation, was the isolated case of *R. v. Pettit*.⁹³ It was not until the period after 1885 that trial judges began to exclude voluntary confessions made to the police as a result of prolonged interrogations after being taken into custody. In the period 1885-1914, a different series of cases both affirm and deny the right of the trial judge to exclude otherwise relevant and admissible confessions obtained in this improper manner.⁹⁴

By the time the celebrated case of *Ibrahim v. R.*⁹⁵ was decided in 1914, the first of the Judges' Rules had been formulated, though not yet widely publicized. Lord Sumner, delivering the advice of the Privy Council, made no direct reference to the Rules, though he did deal with the contention by the appellant that his confession ought not to have been admitted even if it were voluntary, because he had been questioned while in custody. His Lordship stated:

This ground, *in so far as it is a ground at all*, is a modern one. With the growth of a police force of the modern type, the point has frequently arisen, whether, if a policeman questions a prisoner in his custody at all, the prisoner's answers are evidence against him, apart altogether from fear of prejudice or hope of advantage inspired by a person in authority. It is to be observed that logically these objections all go to the weight and not to the admissibility of the evidence.⁹⁶

He went on to conclude that English law on the question of whether an exclusionary discretion existed in respect of voluntary confessions was "still unsettled", though many judges did exclude such evidence, for fear that nothing less than the exclusion of such evidence could prevent improper questioning of persons in custody. Two earlier cases had expressly held that a trial judge could in his discretion refuse to allow such statements by an accused in evidence,⁹⁷ and Lord Sumner was most strongly influenced by these.

⁹³ (1850) 4 Cox. C.C. 164.

⁹⁴ Excluded in *R. v. Gavin* (1885) 15 Cox C.C. 656; *R. v. Male* (1893) 17 Cox C.C. 689; *R. v. Histed* (1898) 19 Cox C.C. 16. Admitted in *R. v. Brackenbury* (1893) 17 Cox C.C. 628; *R. v. Goddard* (1896) 60 J.P. 491; *R. v. Miller* (1895) 18 Cox C.C. 54.

⁹⁵ [1914] A.C. 599.

⁹⁶ *Ibid.*, 610 (my emphasis).

⁹⁷ *R. v. Knight and Thayer* (1905) 20 Cox C.C. 711; *R. v. Booth and Jones* (1910) 5 Cr.App.R. 177, 179:

...the moment you have decided to charge him and practically get him into custody, then, inasmuch as a judge even can't ask a question, or a magistrate, it is ridiculous to suppose that a policeman can. But there

In *R. v. Voisin*,⁹⁸ A.T. Lawrence J. analysed the effect of the new Judges' Rules in the following terms:

...statements obtained from prisoners, contrary to the spirit of these rules, may be rejected as evidence by the judge presiding at the trial.^{98a}

The Judges' Rules have their equivalents in a number of Australian jurisdictions as well.⁹⁹ These normally take the form of administrative directions to the police. They provide some guidelines for the trial judge in determining whether or not to exclude a confession otherwise admissible and voluntary at common law, but they have generally been treated as only part of the more general overriding discretion to exclude a confession "unfairly obtained", or the admissibility of which would be "unfair" to the accused. A breach of the Judges' Rules is not of itself generally sufficient to warrant the exercise of the exclusionary discretion, though it is a factor to be taken into account, along with others which shall be considered shortly.

In Australia, as early as 1870 the notion of a broad judicial discretion to exclude a legally admissible confession was first suggested. In *R. v. Rogerson*,¹⁰⁰ Stephen C.J. was faced with the question of whether he ought to allow into evidence a confession made to a policeman as a result of persistent questioning in custody. His Honour said:

I do not say that such questioning may not be carried to an improper length; but in law it does not affect the admissibility of the prisoner's answers, provided nothing has been done to entrap or mislead him.^{100a}

Other Australian decisions came to recognize the existence of this exclusionary discretion before the equivalents of the English Judges' Rules had come into existence in that country. For instance, in *R. v. Lynch*,¹⁰¹ Chief Justice Murray distinguished the common law rules relating to admissibility of a confession, and a judicial discretion to exclude "at the trial if he thinks they were unguarded answers made under circumstances that rendered them unreliable or unfair, for some reason, to be allowed in evidence against the prisoner".^{101a}

is no actual authority yet that if a policeman does ask questions it is inadmissible; what happens is that the judge says it is not advisable to press the matter.

⁹⁸ [1918] 1 K.B. 531.

^{98a} *Ibid.*, 539-40.

⁹⁹ Cross, *supra*, f.n.35, 576.

¹⁰⁰ (1870) 9 S.R. (N.S.W.) 234. See *R. v. Lee* 82 C.L.R. 133, 148, for a brief history of the application of the exclusionary discretion in this context.

^{100a} *Ibid.*, 236.

¹⁰¹ [1919] S.A.L.R. 325.

^{101a} *Ibid.*, 333.

However, in *R. v. Hokin*¹⁰² some doubts were cast on the extent to which a trial judge had any discretion to refuse to admit in evidence confessions which were voluntary and legally admissible. It was argued that all the presiding judge could do would be to suggest to counsel for the prosecution that it would be better not to press such evidence.

The Canadian approach in this area appears to have been not to recognize an overriding judicial discretion to exclude confessional evidence which is voluntary, but rather to take a broader view of the concept of voluntariness than that adopted in England and Australia.¹⁰³ Canadian cases have made reference to the English Judges' Rules and the question of the overriding exclusionary discretion of which they form the basis, but in the last analysis the admissibility of confessional statements turns upon their voluntariness. The older cases, such as *R. v. White*,¹⁰⁴ expressly deny the existence of any exclusionary rule other than one couched in the narrowest of terms. However, in cases such as *R. v. Nye*,¹⁰⁵ the accused contended that a statement she had made to the police was not a voluntary confession due to the length of time she was held in custody, and the court was prepared to accept that in some circumstances this might indeed go to the voluntariness of the confession. In the absence of any evidence of a threat or inducement, an English or Australian court would have dealt with the question of length of interrogation as a breach of the Judges' Rules possibly affording grounds for the exercise of the discretion.

¹⁰² (1922) S.R. (N.S.W.) 280.

¹⁰³ E.g., *R. v. Washer* [1948] O.W.N. 393, 393 per McRuer C.J.:

I do not think the law is that on the mere showing that there has been no inducement held out, and that there have been no threats made to the accused prior to the statement, and upon showing that a caution was given, the statement is necessarily admissible. There may be other circumstances that lead the trial judge to doubt the voluntary character of the statement and to doubt the sufficiency of the proof of its voluntary character.

See also *Boudreau v. R.* (1949) 94 C.C.C. 1, 8: "The underlying and controlling question then remains: Is the statement freely and voluntarily made?"

In *McDermott v. R.* 76 C.L.R. 501, 512, Dixon J. suggested that the development of the discretion rule may perhaps be "a consequence of a failure to perceive how far the settled rule of the common law goes in excluding statements that are not the outcome of an accused person's free choice to speak".

¹⁰⁴ (1908) 18 O.L.R. 640.

¹⁰⁵ (1958) 122 C.C.C. 1.

(f) Admissions by Accused Persons

The House of Lords in the case of *R. v. Christie*¹⁰⁶ held that where an accused person was in a position to hear a statement made in his presence, the contents of that statement were legally admissible in order to gauge the extent to which, if any, the accused acknowledged it as being true by his conduct. This was so notwithstanding the fact that the accused had expressly denied the truth of the statement at the time it was made. It was for the jury to determine what weight to give to this fact. However, there was a strong possibility that such evidence might have little probative value and might unfairly prejudice the accused in the eyes of the jury. Thus, a practice developed which Lord Moulton described as follows:

There has grown up a practice of a very salutary nature under which the judge intimates to the counsel for the prosecution that he should not press for the admission of evidence which would be open to this objection... Under the influence of this practice, which is based on an anxiety to secure for everyone a fair trial, there has grown up a custom of not admitting certain kinds of evidence which is so consistently followed that it almost amounts to a rule of procedure. It is alleged on the part of the respondent that an instance of this is the case of the accused being charged with the crime and denying it, or not admitting it.¹⁰⁷

Lord Reading¹⁰⁸ agreed that such a practice had "long existed" in relation to such statements as those under consideration in *Christie*. Viscount Haldane and Lord Atkinson made no reference to such a practice.

With respect, there was no basis at all for Lords Moulton and Reading to describe the application of an exclusionary discretion in this context as a matter of longstanding practice. Their Lordships relied on two cases as establishing the existence of this discretion. In *R. v. Welsh*,¹⁰⁹ evidence that the accused's mother said to him "What's the use of denying it" was held inadmissible because the accused had denied the truth of his mother's statement. The statement was hearsay, and could only be admitted as an exception to the hearsay rule if there was evidence from which it could be inferred that the accused had adopted the statement as his own. *R. v. Smith*¹¹⁰ was to the same effect, though Hawkins J. added that such evidence "could not fail to be most unfairly prejudicial to him". Again there was no mention of an exclusionary discretion: the statements were

¹⁰⁶ [1914] A.C. 545.

¹⁰⁷ *Ibid.*, 559.

¹⁰⁸ *Ibid.*, 564.

¹⁰⁹ (1862) 3 F. & F. 275, 176 E.R. 124.

¹¹⁰ (1897) 18 Cox C.C. 470.

held to be legally inadmissible. In *R. v. Norton*,¹¹¹ on facts which were very similar to those in *Christie*, the statements were excluded as being irrelevant, *i.e.*, legally inadmissible. *Christie* overruled *Norton* on this point and preferred to rely on the existence of the discretion.

(g) *Evidence Calculated to Prejudice the Course of the Trial*

Finally, the source of a judicial discretion to exclude evidence of an inherently prejudicial nature is somewhat more difficult to trace. Barry J. in the case of *Mooney v. James*¹¹² only hints at the source of this discretion:

This brings out an essential feature of trial by British Courts, namely, that it is the duty of the Judge to regulate and control the proceeding so that the issues for adjudication may be investigated fully and fairly [T]he existence of this duty clothes the Judge with all the discretionary powers necessary for the discharge of the duty, and he may therefore control and regulate the manner in which the evidence is presented or elicited.^{112a}

Again, this seems to refer the question to the "inherent powers" of the trial judge. But the scope of this discretion is closely circumscribed: it is to control the manner in which evidence is presented. Barry J. does not argue that the nature of the evidence itself is subject to this type of discretionary control. Other authorities do however make that claim, presumably based on a power akin to the inherent power to control abuse of process already mentioned.¹¹³

Of course, there is authority that the grant of jurisdiction to hear and determine actions of the kind specified in a statute in itself carries with it the grant of such incidental powers as are necessary for the exercise of the jurisdiction and to prevent abuses of process. Time and again it has been held that courts have an inherent power to "correct irregularities in and frauds upon" their own procedure.¹¹⁴ There is also a well-established line of authority that any court possesses a power inherent in its jurisdiction to stay or dismiss such cases brought to it as are frivolous or vexatious or an abuse of procedure, and to dismiss actions for want of prosecution.¹¹⁵ These are indeed matters for the discretion of the trial judge (subject of course to appellate review).

¹¹¹ [1910] 2 K.B. 496.

¹¹² [1949] V.L.R. 22.

^{112a} *Ibid.*, 28.

¹¹³ See the authorities cited in f.n.52.

¹¹⁴ *E.g.*, *Masson v. Ryan* (1884) 10 V.L.R. 335, 340.

¹¹⁵ *Metropolitan Bank Ltd. v. Pooley* (1885) 10 App.Cas. 210, 214; *Norman v. Mathews* (1916) 114 L.T. 1043; *Duncan v. Lowenthal* [1969] V.R. 180, 182.

It is suggested, however, that the abuse of process doctrine ought not to be taken too far. It is in essence a discretion pertaining to practice and procedure designed to promote the proper functioning of the trial process. It is a long step from such a power to one permitting the trial judge to exclude relevant evidence in his discretion, a step which seems to have been taken without proper regard for authority. There is no doubt that such an overriding exclusionary discretion has been created by the judges for themselves, and it becomes academic to challenge the validity of this creation. However, it is imperative to understand the dubious origins of the discretion in question in order to properly evaluate the principles on which it is supposedly exercised.

IV. The Exclusionary Discretion and Principles of its Exercise

In the course of exercising the exclusionary discretion, judges have been ready to apply criteria from diverse areas of evidence. For example, in *Wray* the majority placed great reliance on principles elucidated from cases dealing with the admissibility of similar fact evidence — a very different problem. Quite clearly, a general distinction can be made at the outset between the exercise of the discretion with respect to evidence which was improperly obtained before the trial, and evidence which, although obtained in an entirely proper manner, would be extremely prejudicial to the accused if admitted during the course of the trial.¹¹⁶ Some evidence may be both unfairly obtained and prejudicial during the trial.

The rationales for excluding evidence improperly obtained are quite different from those for excluding evidence unfair to the accused. Broadly speaking, the former evidence is excluded for three reasons. Firstly, it is said that only by excluding such evidence can

¹¹⁶ Cross, *supra*, f.n.35, 29; see also *R. v. Wray* (1970) 11 D.L.R. (3d) 673, 681 *per* Cartwright C.J.:

It will be observed that the nature of the discretionary power asserted in the two latter cases appears to differ in kind from that asserted in the first. Under the rule in *Noor Mohamed, supra*, the Judge excludes the evidence because of the danger of the jury attaching undue weight to it or using it for the inadmissible purpose of showing that the accused is the sort of person who is likely to commit the offence for which he is on trial. It does not furnish support for the assertion of a discretionary power to exclude legally admissible evidence relevant to the issue before the jury and objectionable only on the ground that it was obtained in an improper or unlawful manner.

Compare the views of Martland J. at 691.

public officials, such as the police, be deterred from continuing their improper conduct, as in the case of unfairly obtained confessions.¹¹⁷ A second rationale is that the court itself becomes a party to the impropriety if such evidence is allowed, and "judicial integrity" is therefore compromised.¹¹⁸ A third rationale is the privilege against self-incrimination.¹¹⁹

Where the exclusionary discretion is exercised to exclude evidence of the character or record of the accused, or pursuant to the *Christie* doctrine, or because the evidence *per se* is so prejudicial that it ought to be excluded, different considerations prevail. The evidence is excluded because its reliability is suspect notwithstanding its legal relevance, or because the probative value which a jury of laymen is likely to ascribe to the evidence is greater than the probative value it really warrants, or because the evidence is likely to confuse a jury by the multiplicity of secondary issues it raises. These factors have been neatly summed up by saying that the evidence "must be excluded if its prejudicial tendency outweighs its probative value in the sense that the jury may attach undue weight to it or use it for inadmissible purposes".¹²⁰ The two different types of evidence which may be excluded will now be discussed in detail.

(a) *Improperly Obtained Evidence*

(i) Conduct of public officials

Generally speaking, in deciding whether to exclude evidence which has been improperly obtained, the judge will concentrate solely on the nature of the impropriety committed by the public official obtaining the evidence. A distinction is drawn between conduct which was intentionally improper and mere negligence or oversight. For instance, in *Callis v. Gunn*,¹²¹ Lord Parker C.J. stated that the discretion would certainly be exercised "if there was any suggestion of it [the evidence] having been obtained oppressively,

¹¹⁷ *R. v. Bruce* [1965] Q.W.N. 58, 61 *per* Gibb J.:

It is true that he might have marked his disapproval of the manner in which the evidence was obtained by exercising his discretionary power to reject it, and he would no doubt have been more ready to take that course if it had appeared necessary to do so as a means of deterring the police from committing similar illegalities in the future.

¹¹⁸ See generally Bennett, *Judicial Integrity and Judicial Review: An Argument for Expanding the Scope of the Exclusionary Rule* (1973) 20 U.C.L.A. L.Rev. 1129.

¹¹⁹ *Miranda v. Arizona* 384 U.S. 436 (1966); *McDermott v. R.*, *supra*, f.n.103, 513.

¹²⁰ Cross, *supra*, f.n.35, 31.

¹²¹ [1964] 1 Q.B. 495.

by false representation, by a trick, by threat or bribes, anything of that sort".^{121a} Earlier, in *Kuruma*, Lord Goddard had said that if the evidence "had been obtained from a defendant by a trick, no doubt the judge might properly rule it out".¹²² The case of *King v. R.*¹²³ drew this distinction clearly *per* Lord Hodson:

That principle would obviously require consideration in any case in which the departure from the strict procedure had been adopted deliberately with a view to securing the admission of evidence obtained by an unfair trick... . On the other hand... it would usually be wrong to exclude some highly incriminating production in a murder trial merely because it was found by a police officer in the course of a search authorised for a different purpose or before a proper warrant had been obtained.^{123a}

In *Ibrahim v. R.*,¹²⁴ Lord Sumner pointed out that:

Many judges, in their discretion, exclude such evidence, for they fear that nothing less than the exclusion of all such statements can prevent improper questioning of prisoners by removing the inducement to resort to it.^{124a}

In *R. v. Wright*,¹²⁵ Bray C.J. promoted the conduct test strongly. He said,

... the situation with regard to impropriety or unfairness must be judged as it existed at the instant of time before the confession was made. Objectionable police methods do not become unobjectionable if they turn out to have been successful in eliciting the truth.^{125a}

In *R. v. Rogerson*,¹²⁶ the test was whether anything had been done to "entrap or mislead" the prisoner, and *R. v. Silva*¹²⁷ was to the same effect. In *R. v. Ragen*,¹²⁸ the test was whether "unfair methods" had been adopted by the police, while *McLean v. Cahill*¹²⁹ suggested that the court must consider whether "duress or deceit" had been used to obtain the evidence.

In all of the above cases, the discretion was exercised in favour of admissibility notwithstanding the improper conduct involved. However, in *R. v. Court*¹³⁰ and *R. v. Payne*,¹³¹ the appellants were

^{121a} *Ibid.*, 502.

¹²² [1955] A.C. 197, 204.

¹²³ [1968] 2 All E.R. 610, citing with approval *Lawrie v. Muir* [1950] S.C. (J) 19, 25 *per* Lord Cooper.

^{123a} *Ibid.*, 615.

¹²⁴ [1914] A.C. 599.

^{124a} *Ibid.*, 614.

¹²⁵ [1969] S.A.S.R. 256.

^{125a} *Ibid.*, 262.

¹²⁶ (1870) 9 S.R. (N.S.W.) 234.

¹²⁷ [1912] St. R. Qd. 198.

¹²⁸ [1964] N.S.W.R. 1515, 1522.

¹²⁹ [1932] S.A.S.R. 359, 361.

¹³⁰ [1962] Crim. L.R. 697.

¹³¹ [1963] 1 All E.R. 848.

successful. In both cases they had been asked at a police station whether they were willing to be examined by a doctor. However, they were told by the police that the doctor would not be examining them in order to form an opinion as to their fitness to drive. At the respective trials, the doctor in each case testified that the appellant was unfit to drive. On appeal, it was held that the evidence of the doctor, although admissible, should have been excluded. The appellant had been positively misled in each case.

In *R. v. Amad*,¹³² the accused, having been taken into custody, was cross-examined by the police without receiving a caution as to the right to silence. When questioned on *voir dire*, Amad admitted that what he had told the police was true. Nonetheless, the confession was excluded, the court deciding that the truth of the confession was not decisive in determining whether the discretion ought to be exercised. *R. v. Banner*¹³³ involved police improprieties of an even greater nature: the accused was unlawfully detained and not taken before a magistrate until the lapse of considerable time. The Victorian Supreme Court affirmed the existence of a discretion to exclude a confession criminally or tortiously obtained, but held that there was no unfairness to the accused in admitting his confession in this case. The Court found that Banner had been motivated to speak by "conscience" and not by reason of the irregularities to which he had been subjected.

(ii) Effects of improprieties on the accused

Often the court will look to the effect on the accused of the officials' improper behavior in obtaining the evidence. In *R. v. Murphy*,¹³⁴ the appellant was a soldier who had been charged with disclosing information useful to an enemy. The police had obtained incriminating evidence from him by posing as members of a subversive organization. The appellant contended that the trial judge ought to have excluded this evidence in his discretion, since the disclosures were induced by a trick. Lord MacDermott L.C.J. held:

Unfairness in this context cannot be closely defined. But it must be judged of in the light of all the material facts and findings and all the surrounding circumstances. The position of the accused, the nature of the investigation, and the gravity or otherwise of the suspected offence, may all be relevant.¹³⁵

¹³² [1962] V.R. 545.

¹³³ [1970] V.R. 240.

¹³⁴ [1965] N.I. 138.

¹³⁵ *Ibid.*, 149.

In *McDermott v. R.*¹³⁶ the question arose whether a voluntary confession ought to have been excluded on the grounds of "unfairness". Chief Justice Latham approved of a formulation of the discretion test laid down in *R. v. Jeffries*,¹³⁷ where it was stated that examples of unfairness "would be afforded by irresponsibility of the accused on the occasion when the statement was made or failure on his part to understand and appreciate the effect of questions and answers". In *Cornelius v. R.*,¹³⁸ the High Court explicitly rejected the "conduct" criterion in favour of an "effects" criterion:

Approval or disapproval of the measures taken by the detectives to obtain a confession appears to us to be beside the point in deciding this question. What matters for present purposes is the effect produced upon the prisoner.^{138a}

In *R. v. Von Aspern*,¹³⁹ O'Bryan J. stated:

Of course, there are many matters which have to be taken into consideration and one must have regard to the condition or health of the interrogated party, whether he is tired or not, the duration of the questions, the manner in which they are asked, and a number of other matters which bear upon the question as to the fairness or unfairness of the interrogation.^{139a}

(iii) Truth and reliability of the evidence

We must sometimes remind ourselves during this discussion that the court's goal is to arrive at the truth regarding the accused's guilt or innocence. In *R. v. Wright*,¹⁴⁰ Chamberlain J. commented:

The purpose of a criminal trial is to try the guilt or otherwise of the defendant, not to investigate the conduct of the police, except of course in so far as it affects the admissibility of evidence. It is not, in my view, correct to say that the policy of this branch of the law of evidence is designed to repress improper police practices; that is a matter for those in control of the police force.^{140a}

*R. v. Lee*¹⁴¹ provides a strong authority for the adoption of the truth criterion as at least one ground to be considered in the exercise of the discretion. The High Court of Australia unanimously approved the following formulation:

Surely, if the judge thought that the "impropriety" was calculated to cause an untrue admission to be made, that would be a very strong

¹³⁶ 76 C.L.R. 501, 507.

¹³⁷ (1947) 47 S.R. (N.S.W.) 284.

¹³⁸ 55 C.L.R. 235.

^{138a} *Ibid.*, 251.

¹³⁹ [1964] V.R. 91.

^{139a} *Ibid.*, 93-94.

¹⁴⁰ [1969] S.A.S.R. 256.

^{140a} *Ibid.*, 271.

¹⁴¹ 82 C.L.R. 133.

reason for exercising his discretion against admitting the statement in question. If, on the other hand, he thought that it was not likely to result in an untrue admission being made, that would be a good reason, though not a conclusive reason, for allowing the evidence to be given.^{141a}

The Tasmanian case of *Walker v. Viney*¹⁴² is of particular interest. A distinction was drawn between confessional statements and evidence of co-ordination tests. The accused had not been positively misled as to his right to decline a sobriety test, but he had not been affirmatively informed of that right either. It was pointed out that "the authenticity of confessional statements, made by an accused in the course of police questioning, may well be suspect and it may be unsafe to let them go to a jury".^{142a} But evidence of physical characteristics was unequivocal, and "free from the miasma of suspicion which may surround a confessional statement".^{142b} Thus, in respect of confessions, a breach of the Judges' Rules might of itself warrant their exclusion pursuant to the discretion, but in respect of evidence of physical characteristics, the discretion should not be exercised in the absence of proof of positive deception on the part of the police.

To the same effect was the case of *R. v. Pratt*, where it was stated by Macfarlan J. that a criterion for the exercise of the discretion was that the evidence be "deemed so unreliable that it would be an injustice" if admitted in evidence.¹⁴³ In *R. v. Smith*,¹⁴⁴ the accused had been interrogated only forty-eight hours after an accident while still sedated. No breach of the Judges' Rules had occurred as the accused was not in custody while being questioned. Gowans J. admitted the statements by the accused because

...I do not think there is established any case of physical or mental exhaustion which would make the evidence so unreliable as to justify its rejection.^{144a}

In *R. v. Batty*,¹⁴⁵ Sholl J. held:

The question whether discretion ought to be exercised against admitting such an alleged confession involves a consideration of, among other things, the probability or otherwise that the breach of the rules may have led to a false confession.^{145a}

^{141a} *Ibid.*, 153.

¹⁴² [1965] Tas. S.R. 96.

^{142a} *Ibid.*, 98.

^{142b} *Ibid.*

¹⁴³ (1965) 83 W.N. (Pt.1) (N.S.W.) 358, 366.

¹⁴⁴ [1964] V.R. 95.

^{144a} *Ibid.*, 97.

¹⁴⁵ [1963] V.R. 451.

^{145a} *Ibid.*, 455.

(iv) Breach of Judges' Rules and implied statutory prohibition

In *McDermott v. R.*,¹⁴⁶ Dixon J. referred to the operation of the Judges' Rules in England:

It is acknowledged that the rules drawn up by the judges at the request of the Home Secretary as guides for police officers have no binding force upon the court. "These rules have not the force of law; they are administrative directions the observance of which the police authorities should enforce upon their subordinates as tending to the fair administration of justice" (*R. v. Voisin*). Nevertheless the tendency among English judges appears to be strong to treat them as standards of propriety for the purpose of deciding whether confessional statements should be received.^{146a}

Such an approach received only qualified approval in *Lee's* case, where it was pointed out in relation to the Chief Commissioner's Standing Orders (the Victorian equivalents of the Judges' Rules) that

[t]he tendency to take them as a standard can easily develop into a tendency to apply rejection of evidence as in some sort a sanction for a failure by a police officer to obey the rules of his own organization, a matter which is of course entirely for the executive.¹⁴⁷

In *Walker v. Viney* it was observed that "Australian courts perhaps have not been as tender to an accused as the English Courts where non-compliance with the Judges' Rules more readily leads to exclusion".¹⁴⁸ However, a very recent decision of the English Court of Appeal (Criminal Division), namely *R. v. Prager*,¹⁴⁹ casts grave doubts on the future efficacy of the Judges' Rules as criteria for the exercise of the exclusionary discretion. Commenting on the effect of improper observance of these Rules, Edmund Davies L.J. said:

Their non-observance may, and at times does, lead to the exclusion of an alleged confession; but ultimately all turns on the judge's decision whether, breach or no breach, it has been shown to have been made voluntarily.¹⁵⁰

The Court of Appeal went on to consider whether the confession had been obtained involuntarily as a result of "oppression", a concept which appeared for the first time in the Judges' Rules of 1964 following dicta by Lord Parker C.J. in *Callis v. Gunn* relating to confessions "obtained in an oppressive manner". In *R. v. Priestly*, this word was said to import "something which tends to

¹⁴⁶ 76 C.L.R. 501.

^{146a} *Ibid.*, 513.

¹⁴⁷ 82 C.L.R. 133, 154.

¹⁴⁸ [1965] Tas. S.R. 96, 98.

¹⁴⁹ [1972] 1 All E.R. 1114.

¹⁵⁰ *Ibid.*, 1118.

sap, and has sapped, that free will which must exist before a confession is voluntary".¹⁵¹ In other words, there seems to have been a movement in England away from the use of an exclusionary discretion based on standards laid down in the Judges' Rules, and towards a broader, more flexible concept of voluntariness.

It has also been suggested that a suitable criterion for the exercise of the discretion in this area could be based on an implied statutory prohibition. The argument is that where evidence has been obtained unlawfully, whether in breach of common law or statute,

... it may be that acts in breach of a statute would more readily warrant the rejection of the evidence as a matter of discretion: or the statute may on its proper construction itself impliedly forbid the use of facts or things obtained or procured in breach of its terms.¹⁵²

This argument has received some academic support.¹⁵³

(b) Evidence Prejudicial at the Trial

The Courts have been even less explicit in articulating criteria for the exercise of an exclusionary discretion based on a vague notion of "fairness". The cases are studded with judicial statements indicating how undesirable it is in this area to attempt to lay down in advance any standards for the exercise of the discretion. It is argued that the discretion with regard to "fairness" ought to be kept as flexible as possible without the intrusion of fixed rules.

In *Selvey v. D.P.P.*,¹⁵⁴ Lord Pearce stated with regard to exclusionary discretion:

It is a sensible and valuable discretion left in the hands of the judge to see that a criminal is fairly tried. He can see better than counsel for the prosecution or defence where fairness lies. It is argued that fairness is too loose a concept to afford guidance. I do not agree. It has been a guiding light in criminal trials for many generations.^{154a}

His Lordship then discussed the attraction of rules:

Naturally each side seeks to establish a rule rather than a discretion, provided always that the rule is in his own favour. There is always an attraction in rules since they are so much easier to apply.¹⁵⁵

¹⁵¹ (1965) 51 Cr.App.R. 1.

¹⁵² *R. v. Ireland* (1970) 44 A.L.J.R. 263, 268.

¹⁵³ Heydon, *supra*, f.n.20, 698.

¹⁵⁴ [1968] 2 All E.R. 497.

^{154a} *Ibid.*, 526.

¹⁵⁵ *Ibid.*, 528. See also *per* Lord Hodson at 514:

If there is a discretion to admit or exclude questions where imputations are made it cannot be right to fetter that discretion by laying down rules

One might question whether the dichotomy which Lord Pearce draws between formalistic rules and open-ended discretion is an accurate statement of the options open to a trial judge. Some attempts have been made to set out principles on which the discretion based on fairness at the trial is to be exercised.

(i) The "scales test"

The trial judge applying this test is expected to indulge in a metaphorical balancing of the probative value of the item of evidence against the prejudicial effects on the minds of the jury. Even if the evidence is of substantial probative value (*i.e.*, it is highly relevant and reliable), it should be excluded if its prejudicial influence would be greater than its probative value.¹⁵⁶ In *Perkins v. Jeffery*,¹⁵⁷ Avory J. referred to the

... practice in a criminal case of guarding against the accused being prejudiced by evidence which though admissible would probably have a prejudicial influence on the minds of the jury out of proportion to its true evidential value.^{157a}

In *R. v. Fitzpatrick*,¹⁵⁸ the test was whether "its prejudicial value would be bound to exceed its probative value". In *R. v. Tait*,¹⁵⁹ the Victorian Supreme Court stated:

But such evidence, if relevant, is admissible and should be admitted unless the trial judge thinks that its prejudicial effect upon the accused outweighs its value on the relevant issues, and so as a matter of discretion it should be excluded.^{159a}

This view gives great scope to the exclusionary discretion. It is difficult to comprehend just how a trial judge is to balance evidence which is of high probative value (and therefore both relevant and reliable) against its supposed tendency to prejudice the accused, without looking more closely into the concept of "prejudice". Clearly prejudicial evidence is not the same as unreliable evidence. Otherwise evidence of substantial probative value could never be prejudicial since the evidence could not be both

and regulations for its exercise. "Fair", as a word, may be imprecise, but I find it impossible to define it or even to attempt an enumeration of all the factors which have to be taken into account in any given case.

¹⁵⁶ *R. v. Wray* (1970) 11 D.L.R. (3d) 673 *per* Cartwright C.J., Hall and Spence JJ. The three dissenting judges went even further than this in enlarging the scope of the exclusionary discretion, by prescribing the test of whether the evidence was "calculated to bring the administration of justice into disrepute".

¹⁵⁷ [1915] 2 K.B. 702.

^{157a} *Ibid.*, 708-9.

¹⁵⁸ [1962] 3 All E.R. 840.

¹⁵⁹ [1963] V.R. 520.

^{159a} *Ibid.*, 524.

reliable and unreliable at the same time. Such evidence can be prejudicial in the sense of diverting the attention of the trier of facts from the issues he is required to consider, causing him to reach the "correct" decision by means of improper reasoning.¹⁶⁰ But if the reliable evidence would have led to the same result, there is no real point in excluding it in the first place.

(ii) The "modified scales test"

The same metaphorical weighing process is used in the "modified scales test", but the discretion is applied only when the probative value of the evidence is slight, or tenuous. For example, in *R. v. Doyle*¹⁶¹ *per* Sholl J., the discretion was said to be

...to exclude admissible and relevant evidence if its probative value would be "slight", or "trifling", or "tenuous", and its prejudicial effect upon the accused out of proportion to its true evidential value.^{161a}

In *R. v. Ames*¹⁶² it was said that one factor to be considered in exercising the discretion was "if the probative value of the evidence is slight, and would be outweighed by its prejudicial aspect". In *R. v. Christie*¹⁶³ Lord Moulton stated that the discretion could properly be exercised to prevent "evidence being given in cases where it would have very little or no evidential value". Lord Reading¹⁶⁴ similarly qualified his statement of the scope of the discretion. In *R. v. Doolan*,¹⁶⁵ Philp J. said the discretion could be exercised if the evidence had "little value in its direct bearing upon the case", while in *R. v. Shellaker*¹⁶⁶ the court held that the

¹⁶⁰ *R. v. Wray*, *supra*, f.n.156, 689 *per* Martland J.: "The allowance of admissible evidence relevant to the issue before the Court and of substantial probative value may operate unfortunately for the accused, but not unfairly."

Presumably Martland J. is confining the concept of "unfairness" to the situation where the trier of fact comes to the wrong decision by convicting an innocent man. Since reliable evidence cannot have this tendency, it cannot be "unfair" to the accused. By implication, Martland J. would confine the concept of "prejudicial" evidence to a situation where irrelevant considerations were being taken into account by the trier of fact. It is possible to have highly probative evidence leading to this result — hence evidence may be highly probative and prejudicial, but by definition *not* highly probative and "unfair".

¹⁶¹ [1967] V. R. 698.

^{161a} *Ibid.*, 699.

¹⁶² [1964] N.S.W.R. 1489, 1492.

¹⁶³ [1914] A.C. 545, 560.

¹⁶⁴ *Ibid.*

¹⁶⁵ [1962] Qd. R. 449.

¹⁶⁶ [1914] 1 K.B. 414.

evidence might be excluded if the judge was of the opinion that it was of so little real value, and yet indirectly so prejudicial to the prisoner, that it ought not to be given. Of course, the celebrated remarks of Lord Du Parcq in *Noor Mohamed* which were eventually adopted by the majority in *Wray's* case are to the same effect.¹⁶⁷

(iii) **The distraction test**

In this test the evidence is said to be unfair to the accused because it will cause the jury to focus too closely on, and attribute too much weight to, the particular item of evidence, notwithstanding the fact that it is legally relevant and to some extent probative. In *R. v. Crawford*,¹⁶⁸ it was said in relation to the admissibility of the prior record of the accused,

that the detrimental effect of proof of such convictions was so overwhelming in the particular circumstances of the case as to be likely to distract the mind of the jury from determining the vital questions of fact which were before it for decision.^{168a}

In *R. v. Pullman*,¹⁶⁹ Napier C.J. declined to exercise his discretion, stating that the court could see "no prejudice in the sense of any tendency to divert the jury from the proper subject of enquiry".^{169a} Lord Chancellor Viscount Sankey said in *Maxwell's* case:

Such questions must, therefore, be excluded on the principle which is fundamental in the law of evidence as conceived in this country, especially in criminal cases, because if allowed they are likely to lead the minds of the jury astray into false issues . . .¹⁷⁰

(iv) **Criteria in relation to cross-examination of the accused**

According to Livesey,¹⁷¹ where the courts have chosen to rely on the exclusionary discretion to ameliorate the harsh consequences of a literal construction of the 1898 *Criminal Evidence Act* (section 1(f)) and its equivalents, they have seldom formulated criteria to be considered. Perhaps the clearest exposition of the principles on which this discretion ought to be based is found in the case

¹⁶⁷ Cf. *supra*, pp. 45.

¹⁶⁸ [1965] V.R. 586.

^{168a} *Ibid.*, 589.

¹⁶⁹ [1942] S.A.S.R. 262.

^{169a} *Ibid.*, 266.

¹⁷⁰ [1935] A.C. 309, 320-1.

¹⁷¹ Livesey, *supra*, f.n.2, 291 *et seq.*

of *R. v. Cook*¹⁷² as explained in *R. v. Brown*.¹⁷³ Smith J. in the latter case indicated that a trial judge ought to take account of the following factors in determining whether or not to exercise his discretion:

(a) That the legislation is not intended to make the introduction of a prisoner's previous convictions other than exceptional. (b) That the prejudicial effect on the defence of questions relating to the accused's long criminal record needed to be weighed against such damage as His Honour might think had been done to the Crown case by the imputations. (c) That on the issue of credibility, it might be unfair to the Crown to leave the Crown witnesses under an imputation while preventing the Crown from bringing out the accused's record. (d) That the actual prejudicial effect of the cross-examination, if allowed, might far exceed its legitimate evidentiary effect upon credit...¹⁷⁴

In *R. v. Cook*, the test propounded by Devlin J. involved determining whether a deliberate attack was being made upon the conduct of the police officer "calculated to discredit him wholly as a witness".¹⁷⁵ In *R. v. Billings*,¹⁷⁶ the learned trial judge had regard to

... the nature and extent of the proposed cross-examination, to the nature and gravity of the imputations against the character of the police witnesses, to the fact that the Crown case rested upon the evidence of those witnesses, and to the prejudicial effect upon the defence of the introduction of the accused's convictions.^{176a}

In addition, it was said that the evidence must be "overwhelmingly" prejudicial to warrant exclusion, and the onus of proof in relation to the exercise of the discretion was on the accused.¹⁷⁷

Finally, in *R. v. Gramanatz*,¹⁷⁸ following *R. v. Flynn*¹⁷⁹ (which was subsequently overruled in *Selvey*), the criterion adopted for the exercise of the discretion in this area was

... whether, if the allegations were accepted as being true, they would have a substantial effect on the mind of the jury in considering the question of his guilt or innocence, or whether their effect would merely be to destroy in some subsidiary way the credit of a witness.¹⁸⁰

¹⁷² [1959] 2 Q.B. 340.

¹⁷³ [1960] V.R. 382.

¹⁷⁴ *Ibid.*, 398.

¹⁷⁵ *Supra*, f.n.172, 348.

¹⁷⁶ *R. v. Billings* [1966] V.R. 396.

^{176a} *Ibid.*, 398.

¹⁷⁷ *R. v. Lee*, *supra*, f.n.141, 154.

¹⁷⁸ [1962] Q.W.N. 41, cited with approval in *R. v. Matthews* [1965] Qd. R. 306.

¹⁷⁹ [1961] 3 W.L.R. 907.

¹⁸⁰ *Supra*, f.n.178, 95.

Where the allegations went to the very heart of the accused's defence, the discretion ought normally to be exercised in his favour to exclude his prior record.

V. Conclusion

In the case of *R. v. Jeffries*,¹⁸¹ Jordan C.J. (dissenting) made the following statement:

To rule that all that a trial Judge need do is to consider whether the evidence, however illegally obtained, is admissible as a mere matter of the technical law [of] evidence, and if it is, may admit or reject it as a matter of pure discretion as he thinks fit, is to put him in a very invidious position...when the discretion proceeds from judge-made rules, and relates to trials for criminal offences, it is undesirable that the trial Judge, in directing himself as to how he should exercise it, should be set adrift on an uncharted sea with no instrument of navigation but "the length of the Chancellor's foot".^{181a}

Compare this formulation with some of the comments of their Lordships in *Selvey* about the undesirability of going beyond the term "fairness" as the criterion for the exercise of the judicial discretion to exclude relevant evidence.¹⁸²

It is apparent that in many cases judges have not been satisfied to apply the "fairness" criterion alone. A wide range of subsidiary factors which the trial judge should take into account (if it is to be said that he has exercised his discretion at all) have emerged. In fact, too many such criteria have been adopted by various courts, many of them entirely inconsistent with each other. Thus, substantial authority exists to support both the minority and majority formulations of the discretion in *Wray's* case.

In addition, judges have not been loathe to borrow and transfer criteria from one area of evidence to another, notwithstanding the inherent unsuitability of such criteria for this sort of cross-fertilization. The judgment of Martland J. in *Wray* is a classic example of this. Wanting to narrow the scope of the exclusionary discretion, the learned judge adopted a particular formulation of the discretion rule from a different context, and treated it as though it were intended to be a general, all-encompassing statement.

It is important to note that despite many judicial statements to the contrary, the law of evidence contains a great deal of inherent flexibility. The basic concept, underlying all the rigid ex-

¹⁸¹ (1947) 47 S.R. (N.S.W.) 284.

^{181a} *Ibid.*, 291.

¹⁸² *Selvey v. D.P.P.*, *supra*, f.n.154, 511, 528.

clusionary rules of evidence, is that of "sufficient relevance". This allows for considerable judicial freedom of manoeuvrability, constricted only by the need to apply justiciable standards. These standards include notions of causation and probability which, even if they are not analytically understood by trial judges, fall clearly within the realm of their daily forensic experience. It is suggested that the loose notion of "fairness", even where subsidiary criteria have developed in relation to the exercise of the discretion, fails to provide sufficient guidance for that task. The guilt or innocence of an accused ought not to depend on whether he appears before a judge who favours a very wide or narrow formulation of the discretion rule.

The reasons that the exclusionary discretion has not stirred up substantial controversy are twofold. First, the discretion to exclude has been affirmatively exercised very rarely.¹⁸³ Second, despite the numerous judicial statements about "fairness" and the subsidiary criteria which have developed thereunder, it is perfectly obvious that many judges have paid these only lip service.

In practice the dominant criteria in determining whether to exclude an item of evidence have been its probative value, its truth, its reliability. Martland J. was approaching this point in *Wray's* case when he insisted that the discretion could not come into play unless the evidence was gravely prejudicial, of tenuous admissibility and of trifling weight.¹⁸⁴ Even in respect of improperly obtained evidence it remains true that truth and reliability have been the most significant factors in most cases. There are only a handful of cases where evidence of substantial probative value has been excluded pursuant to the discretion. Sometimes this has been done to deter improper future police conduct, sometimes to preserve the judicial integrity of the court. But the probative value of the evidence has overridden these other principles in almost every case where the principles have clashed.¹⁸⁵

¹⁸³ Heydon, *supra*, f.n.20, 605. (Just how rarely the discretion is in fact exercised may be seen from the fact that out of almost two hundred cases dealing with the existence of an exclusionary discretion which the author of the present article has read, ranging right across all the pertinent areas of evidence, he has been able to discover fewer than twenty cases in which relevant evidence was in fact excluded.)

¹⁸⁴ *R. v. Wray*, *supra*, f.n.156, 689.

¹⁸⁵ There are only four clear cases where evidence of high probative value, and undoubted truth and reliability, has been excluded pursuant to the discretion. These are: *R. v. Court* [1962] Crim. L.R. 697; *R. v. Payne* [1963] 1 All E.R. 848; *R. v. Ireland* (1970) 44 A.L.J.R. 263; and *R. v. Amad* [1962] V.R. 545. In Canada, the case of *DeClercq v. R.* [1968] S.C.R. 902, 70 D.L.R. (2d) 530

It is suggested that this is as it should be. As Dixon J. stated in *Sinclair v. R.*:¹⁸⁶

The tendency in more recent times has been against the exclusion of relevant evidence for reasons founded on the supposition that the medium of proof is untrustworthy, in the case of a witness, because of his situation and, in the case of evidentiary material, because of its source.^{186a}

In the United States the exclusionary principle reached a high point during the 1960's. A number of Supreme Court decisions, ranging from *Mapp v. Ohio*¹⁸⁷ in 1961 (all evidence obtained by searches and seizures in violation of the Constitution was held to be, by virtue of that authority, inadmissible in a state court) to *Miranda v. Arizona*¹⁸⁸ in 1966 (the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the accused unless it first demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination), developed the exclusionary principle. In *Orozco v. Texas*,¹⁸⁹ it was held that the *Miranda* warnings must be given even where the interrogation took place in the home of the defendant, and not at the police station, and the sanction for failure to give these warnings was exclusion of the confession.

Surveys indicated that the exclusionary rules were not having a significant effect on promoting proper police procedures.¹⁹⁰ Furthermore, *Miranda* could be eroded by police practices. With the change in composition of the United States Supreme Court, judicial erosion of the exclusionary principle began to occur, and in the case of *Harris v. New York*,¹⁹¹ it was held five to four that statements which were inadmissible in the prosecution's case in chief as obtained in violation of the *Miranda* rules might, if trustworthy, be used to attack the credibility of the defendant if he takes the stand. The theory that impermissible police conduct would be thereby encouraged was described as a "speculative possibility".

held by a six to three majority that truthfulness was a relevant criterion in determining whether a confession was obtained voluntarily or not. Compare the position in the United States, where in *Rogers v. Richmond* 365 U.S. 534 (1960) and *Jackson v. Denno* 378 U.S. 368 (1964) the reverse was held to be law.

¹⁸⁶ 73 C.L.R. 316.

^{186a} *Ibid.*, 337.

¹⁸⁷ 367 U.S. 643 (1961).

¹⁸⁸ 384 U.S. 436 (1966).

¹⁸⁹ 394 U.S. 324 (1969).

¹⁹⁰ *Interrogations in New Haven: The Impact of Miranda* (1967) 76 Yale L.J. 1519.

¹⁹¹ 401 U.S. 222 (1971). See also *Gustafson v. Florida* 42 (20) Law Week 3209.

In addition there have been many expressions of disenchantment with the exclusionary rule in the United States, both judicial and academic.¹⁹² Ironically enough, at this time in Australia legislation has been drafted which would expressly introduce the full exclusionary principle as regards evidence obtained in violation of 'Human Rights'.¹⁹³

This raises still more interesting questions concerning the proper function of adjective law and the rules of evidence in general. It is suggested that the primary task of a law of evidence is to ensure that the probative value of the facts presented can be properly evaluated. The task of weighing and evaluating this probative value is one which is only hindered by the injection of extraneous values into the principles of evidence. Political judgments about how best to control improper police methods ought to be made and implemented by legislation or regulation: to impose such a task on the law of evidence detracts from its value in terms of assessment, and serves only to create uncertainty.¹⁹⁴

¹⁹² See *Bivens v. Six Unknown Named Agents* 403 U.S. 388 (1971), 416 *per* Burger C.J. (diss.):

Some clear demonstration of the benefits and effectiveness of the exclusionary rule is required to justify it in view of the high price it extracts from society — the release of countless guilty criminals... . But there is no empirical evidence to support the claim that the rule actually deters illegal conduct of law enforcement officials.

Some other critical studies of the exclusionary principle include La Fave, *Improving Police Performance Through the Exclusionary Rule* (1965) 30 *Mo.L.Rev.* 391; and Oaks, *Studying the Exclusionary Rule in Search and Seizure* (1970) 37 *U.Chi. L.Rev.* 665.

¹⁹³ Clause 42 of the Human Rights Bill reads: "Evidence obtained in contravention, or in consequence of any contravention of Part II is not admissible in any court or before any tribunal for any purposes."

(Part II sets out a series of "Fundamental Rights and Freedoms", including those relating to "Arrest" and "Post-arrest" procedures.)

¹⁹⁴ See J.A. Coutts, *The Accused* (1966), 14-15:

The continental courts claim to have only one aim — the discovery of the truth. The English adversary system claims to settle an issue between the prosecution and the defendant and it is a commonplace remark that this emphasises the sporting element in an English trial. This sporting element is a psychological factor of the greatest importance, for it is out of it that there arises the notion of "fair play" for the accused. It has recently been argued that with the steady growth of professionalism in crime and the increase (as alleged) in the number of acquittals of those guilty of crime this notion of a sporting element should be abandoned.

Summary

1. The view of the majority in *Wray's* case is greatly to be preferred to that of the dissentients, notwithstanding some flaws of reasoning in the judgment of Martland J. The judicial discretion to exclude relevant evidence ought to be as narrowly confined as possible.

2. More attention to the concept of "sufficient relevance" would provide any necessary flexibility to the rules of evidence.

3. The existence of an exclusionary discretion stems from dubious legal sources. In particular, the judgments of Lords Moulton and Reading in the leading case of *R. v. Christie*¹⁹⁵ are based on a serious misreading of earlier decisions, and their judgments form the basis of many subsequent judicial statements on the discretion.

4. Judges have provided a wide variety of subsidiary criteria in determining whether "fairness" requires the exercise of the discretion. These criteria are vague and often conflicting. In practice the discretion is seldom exercised, and even where it has been exercised, in all but a very few cases the evidence was of little probative value.

¹⁹⁵ [1914] A.C. 545.