

Unconstitutionally Obtained Evidence in Ireland: Protectionism, Deterrence and the Winds of Change

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Introduction

The law on the admissibility of improperly obtained evidence in Ireland was first authoritatively considered and decided upon by the Supreme Court in the mid-1960s.¹ While later courts have revisited, and to some extent refined, the law in this area,² the original formulation of the so-called exclusionary rule largely remains in place today. The law on improperly obtained evidence in Ireland is thus well established, however, it is not without its detractors, and recent times have seen both criticism of the exclusionary rule from the bench,³ and calls for change from an independent advisory group set up by the Department of Justice.⁴

This group, the Balance in the Criminal Law Review Group (“the Group”), recommended that the stringent Irish rule in relation to the exclusion of unconstitutionally obtained evidence, specifically, ought to be replaced by a rule which allows discretion to the trial judge to admit or exclude such evidence based on the totality of the circumstances, with particular regard to the rights of the victim. While the Group put forward a number of interesting arguments for change, the main focus of this article is the claim that “radical changes in the nature of policing in recent years” have superseded “any contention that the [current] rule is necessary to ensure that the police comply with the relevant legal requirements”.⁵

It is submitted within this article that any suggestion that there might be a necessity or opportunity for change in the law on the exclusion of unconstitutionally obtained evidence in Ireland on the basis of recent innovations and advances in garda accountability and discipline involves a misperception of the reasoning behind the law on exclusion as formulated by the Irish courts.

This article outlines the development and application of the exclusionary rule in Ireland and, importantly, clarifies the rationale for the specific rule in relation to unconstitutionally obtained evidence. The article then looks to developments in the

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¹ *People (A.G.) v O'Brien* [1965] I.R. 142. It should be noted that the rules on the exclusion of improperly obtained evidence in Ireland have been constructed almost exclusively by the courts. The legislature has had little to do, to date, with this area of criminal procedure. The only exceptions being ss.7(3) and 27 of the Criminal Justice Act 1984 which state that a breach of the Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987 or the Criminal Justice Act 1984 (Electronic Recording of Interviews) Regulations 1997 alone will not of itself affect the admissibility in evidence at trial of any statement made by a suspect in the pre-trial process. Also, the European Court of Human Rights has held that the issue of the admission or exclusion of evidence is a matter for individual jurisdictions: *Schenk v Switzerland* (1988) 13 E.H.R.R. 242; *Teixeira de Castro v Portugal* (1998) 28 E.H.R.R. 101; and *Khan v United Kingdom* (2000) 31 E.H.R.R. 1016.

² For example, *People (DPP) v Kenny* [1990] 2 I.R. 110; [1990] I.L.R.M. 569; and *People (DPP) v Balfe* [1998] 4 I.R. 50.

³ See the dicta of Charleton J. in *DPP (Walsh) v Cash* [2007] I.E.H.C. 108; (unreported, High Court, Charleton J., March 28, 2007)

⁴ See the *Final Report of the Balance in the Criminal Law Review Group*, March 15, 2007

⁵ *Final Report of the Balance in the Criminal Law Review Group*, March 15, 2007, pp.159–60.

United States where a change to the exclusionary rule has recently come about and finally concludes on the question of altering the Irish rule due to recent improvements in garda accountability and discipline.

Development and Application of the Exclusionary Rule in Ireland

The seminal case in relation to the exclusion of improperly obtained evidence in Ireland is *People (A.G.) v O'Brien*.⁶ This case involved a search warrant which had been issued by the District Court⁷ for the search of the suspects' dwelling at 118 Captain's Road, Crumlin in Dublin. However, the search warrant obtained by Gardaí was in fact defective: it had been, innocently but erroneously, issued for "118 Cashel Road, Crumlin". The defendants argued that the search of their dwelling in the absence of a valid warrant was both illegal (as it amounted to a trespass) and unconstitutional (as it breached Art.40.5 of the Irish Constitution which guarantees the inviolability of the dwelling⁸) and that the evidence obtained as a result ought not to be admitted at trial.

Considering the admissibility of improperly obtained evidence in the Court of Criminal Appeal, Maguire C.J. adopted an inclusionary approach based on the common law position of the courts of England and Wales. Maguire C.J. referred to the dicta of Goddard L.J. in the English case of *Kuruma v The Queen*⁹ where he stated that "the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the Court is not concerned with how the evidence was obtained."¹⁰ Thus, the Court of Criminal Appeal held that, although improperly obtained, the evidence had been correctly admitted at trial as it was relevant to the charge against the accused.

The Supreme Court, however, adopted a somewhat different approach.¹¹ In relation to evidence obtained illegally, but not unconstitutionally, Kingsmill Moore J. held that it is a matter of discretion for the trial judge to decide, in all the circumstances of the case, whether or not to admit such evidence. This, he suggested, would involve an assessment of the nature and extent of the illegality; whether it was intentional or unintentional; whether it was an illegality of a trivial nature or otherwise; whether it was the result of an ad hoc decision or represented deliberate, settled policy; and whether the public interest would be best served by the admission or exclusion of the evidence in question.¹²

⁶ [1965] I.R. 142.

⁷ Under s.54 of the Dublin Police Act 1842.

⁸ Constitution of Ireland 1937, Art.40.5: "The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law."

⁹ [1955] A.C. 197.

¹⁰ [1955] A.C. 197, at 203 *per* Goddard L.J. cited by Maguire C.J. in *People (A.G.) v O'Brien* [1965] I.R. 142, at 145: *Kuruma* had previously been followed in the Irish High Court case of *People (A.G. and O'Brien) v McGrath* (1960) 99 I.L.T.R. 59.

¹¹ It ought to be noted that there is some controversy as to the true ratio decidendi of the *O'Brien* case and as to which judgment delivered by the members of the Supreme Court ought to be regarded as the majority judgment. McGrath suggests, however, that the matter is one of academic interest only at this juncture as the judgment of Walsh J. (which supports that of Kingsmill Moore J. in relation to illegally obtained evidence) has generally come to be regarded as containing the ratio of the case: McGrath, D. *Evidence* (Dublin: Thomson Round Hall, 2005), para.7.07 fn.23.

¹² [1965] I.R. 142, at 160.

Walsh J., in the Supreme Court, agreed with the judgment of Kingsmill Moore J. in relation to illegally obtained evidence but went on to set out a different rule in relation to unconstitutionally obtained evidence. Walsh J. stated that “the defence and vindication of the constitutional rights of the citizen is a duty superior to that of trying such citizen for a criminal offence.”¹³ He declared, accordingly, that where there has been a “deliberate and conscious violation” of the constitutional rights of the accused, in the absence of extraordinary excusing circumstances, such evidence as has been obtained as a result of the violation should be absolutely inadmissible, with no discretion for the trial judge to admit such evidence.¹⁴ As examples of possible extraordinary excusing circumstances, Walsh J. suggested the imminent destruction of vital evidence; the need to rescue a victim in peril; or a search without warrant which was incidental to and contemporaneous with a lawful arrest.¹⁵

On the facts of *O’Brien*, the Supreme Court unanimously held that the mistaken address on the warrant was a pure oversight; there was nothing to suggest deliberate treachery, imposition, deceit or illegality; there was no apparent policy to disregard the Constitution or to conduct searches without a warrant¹⁶; and there was clearly no deliberate and conscious violation of the rights of the accused on the part of Gardaí.¹⁷ Therefore, it was held that the trial judge had correctly exercised his discretion to admit the evidence in the circumstances of this case.

A two-tiered approach to improperly obtained evidence was thus adopted in Ireland:

- where evidence is deemed to have been illegally obtained, i.e. in breach of the legal rights of a suspect, the exclusion or inclusion of such evidence is a matter for the discretion of the trial judge; and
- where evidence is deemed to have been obtained in breach of the constitutional rights of a suspect it must be automatically excluded from evidence, unless there are extraordinary excusing circumstances in existence which would justify its admission; in which case, admission or exclusion is a matter for the discretion of the trial judge.

In relation to illegally—though not unconstitutionally—obtained evidence, the court in *O’Brien*, and indeed the courts in later cases,¹⁸ seem to have generally adopted a

¹³ [1965] I.R. 142, at 170.

¹⁴ [1965] I.R. 142, at 170.

¹⁵ [1965] I.R. 142, at 170. Both Kingsmill Moore and O Dálaigh J.J. concurred with Walsh J. in relation to unconstitutionally obtained evidence, however, Kingsmill Moore J. was of the opinion that it would be wiser not to enumerate examples of possible exceptions to the rule which was laid down by Walsh J. in order to allow some discretion to remain in the hands of the trial judge even in such instances. The non-exhaustive list of possible extraordinary excusing circumstances put forward by Walsh J. (the imminent destruction of vital evidence; the need to rescue a victim in peril; or a search without warrant which was incidental to and contemporaneous with a lawful arrest) has not been extended by the courts. McGrath has suggested that the courts wish to avoid undermining the exclusionary rule in relation to unconstitutionally obtained evidence and will therefore adopt a restrictive approach to extending this list: McGrath, D. *Evidence* (Dublin: Thomson Round Hall, 2005) para.7.46.

¹⁶ [1965] I.R. 142, at 161, per Kingmill Moore J.

¹⁷ [1965] I.R. 142, at 170, per Walsh J.

¹⁸ For example, *People (DPP) v Lawless* (unreported, Court of Criminal Appeal, November 28, 1985); *People (DPP) v McMahon, McMeel and Wright* [1987] I.L.R.M. 87; *People (DPP) v Connell* [1995] 1 I.R. 244; *DPP v Spratt* [1995] 1 I.R. 585; [1995] 2 I.L.R.M. 117; *People (DPP) v Van Onzen* [1996] 2 I.L.R.M. 387; *People (DPP) v Darcy*, (unreported, Court of Criminal Appeal, July 29, 1997); *People*

rather inclusionary approach. In fact, Hogan has suggested that in practice the courts almost never exclude evidence on the ground that there has been a breach of legal rights only as there is almost always a reason why such evidence should be admitted in the overall public interest.¹⁹

Interestingly, it might be suggested that the threshold for a breach of rights to be considered a breach of constitutional, rather than mere legal, rights is quite low in practice. This is due to the fact that the interaction between a criminal suspect and the Gardaí in the pre-trial period affects so many important constitutional rights, e.g. the right to liberty, the inviolability of the dwelling, the right to silence, the right of access to pre-trial legal advice and the right to bodily integrity. Therefore, there is little interaction between Gardaí and suspects in the pre-trial process, which might be classified as purely legal rather than involving at least some constitutional element. Arguably then, the more significant law in relation to improperly obtained evidence in Ireland is that which applies to unconstitutionally, rather than illegally, obtained evidence and it is this law which is under consideration here.

The Rationale of the Irish Exclusionary Rule in Relation to Unconstitutionally Obtained Evidence

It is important to be clear on the reasoning behind the rule which requires the exclusion of unconstitutionally obtained evidence in Ireland. However, clarifying that reasoning is not a straightforward task and the Irish courts have struggled with this issue in a number of important cases. Attempting to elucidate the main principles behind the exclusion of unconstitutionally obtained evidence, Finlay C.J., in the Supreme Court in *Trimbole v Governor of Mountjoy Prison*,²⁰ suggested a number of varying reasons for exclusion. The learned Chief Justice stated that the courts have both an inherent jurisdiction and indeed a positive duty to:

- 1) protect persons against the invasion of their constitutional rights;
- 2) (if invasion has occurred) restore as far as possible the person to the position he would be in if his rights had not been violated; and
- 3) ensure as far as possible that persons acting on behalf of the executive who consciously and deliberately violate the constitutional rights of citizens do not, for themselves or their superiors, gain the planned results of that invasion.²¹

This analysis seems to suggest that unconstitutionally obtained evidence might be excluded in order to protect or vindicate rights (a protectionist rationale); to deter police misconduct (a deterrent rationale); and/or on the grounds that its admission would bring the criminal justice system into disrepute (a repute or legitimacy

(DPP) v *Holland*, (unreported, Court of Criminal Appeal, June 15, 1998); *People (DPP) v Smith*, (unreported, Court of Criminal Appeal, November 22, 1999); *People (DPP) v Murphy*, (unreported, Court of Criminal Appeal, July 12, 2001); *People (DPP) v Connolly* [2003] 2 I.R. 1; *People (DPP) v Paul Kelly*, (unreported, Special Criminal Court, November 26, 2004); *D.P.P. v Diver* [2005] 3 I.R. 270.

¹⁹ Note of Dissent on Exclusionary Rule by the Chairman of the Balance in the Criminal Law Review Group, Gerard Hogan, in the *Final Report of the Balance in the Criminal Law Review Group*, March 15, 2007, p.289.

²⁰ [1985] I.R. 550; [1985] I.L.R.M. 465

²¹ [1985] I.R. 550, at 573; [1985] I.L.R.M. 465, at 484.

rationale²²).²³ However, the Irish courts continued to grapple with the identification of the true rationale for the rule on the exclusion of unconstitutionally obtained evidence in other cases and ultimately, it is submitted, a more definitive rationale has emerged.

Under the rule formulated by the Supreme Court in *O'Brien*, evidence obtained by Gardaí in “deliberate and conscious violation” of the constitutional rights of a suspect, in the absence of extraordinary excusing circumstances, could not be admitted at trial. The meaning of the phrase “deliberate and conscious violation” has been central to the discernment of the rationale for the exclusionary rule in relation to unconstitutionally obtained evidence within Irish jurisprudence. In determining the rationale for that rule in Ireland then, it is important to examine the true meaning of that phrase and the manner in which this has affected the application of the rule. This requires, amongst other things, an examination of the language of the judges who formulated the rule and their views on the reasons for the stringent rule adopted.

In setting out the exclusionary rule in relation to unconstitutionally obtained evidence in *O'Brien*, Walsh J.’s choice of language seemed to suggest that the stringent rule adopted was predicated on a rationale of deterrence. He set out the rule in the following terms:

“The Courts ... must uphold the objection of an accused person to the admissibility at his trial of evidence obtained or procured by the State or its servants or agents as a result of a deliberate and conscious violation of the constitutional rights of the accused person where no extraordinary excusing circumstances exist ...”²⁴

The reference here to a “deliberate and conscious violation” suggests that a violation of constitutional rights which is neither deliberate nor conscious will not lead to the exclusion of evidence; that is to say that if a member of the Garda Síochána breached the constitutional rights of a suspect in obtaining certain evidence against him, but was unaware of the fact that he was breaching such rights, his innocent actions would not give rise to a successful claim of exclusion on the part of the suspect at later trial. This suggests that the need to deter improper behaviour on the part of the Gardaí was the central reasoning behind the adoption of the strict exclusionary rule: where Gardaí did not *intentionally* breach the constitutional rights of a suspect the evidence obtained could be admitted at later trial.

However, in discussing the exclusionary rule in relation to unconstitutionally obtained evidence more generally and coming to the above-outlined formulation Walsh J. invoked sentiments more closely associated with a rationale of protectionism, where

²² This is one of the rationales adopted for exclusion of evidence obtained in breach of the Canadian Charter of Rights and Freedoms in Canada. Such evidence will be excluded if its admission would be likely to bring the administration of justice into disrepute. See *R v Collins* [1987] 1 S.C.R. 265.

²³ For further information on the possible rationales for exclusion generally see Choo, A. “Improperly Obtained Evidence: a Reconsideration” (1989) 9 Legal Studies 261; Zuckerman, A.A, *Principles of Criminal Evidence* (Oxford: Clarendon, 1989), p.346; Ashworth, A. “Excluding Evidence as Protecting Rights” [1977] Crim. L.R. 723. In relation to the Irish rationale for the rule see also Martin, F. “The rationale of the exclusionary rule of evidence revisited” (1992) 2(1) I.C.L.J. 1; McGrath, D. “The Exclusionary Rule in Respect of Unconstitutionally Obtained Evidence” (2004) 11(1) D.U.L.J. 108; and McGrath, D. *Evidence* (Dublin: Thomson Round Hall, 2005) Ch.7.

²⁴ [1965] I.R. 142, at 170.

the defence of rights is seen as more important than other concerns such as the repression of crime. He suggested that:

“The vindication and protection of constitutional rights is a fundamental matter for all Courts established under the Constitution. That duty cannot yield place to any competing interest...The defence and vindication of the constitutional rights of the citizen is a duty superior to that of trying such citizen for a criminal offence”.²⁵

These sentiments clearly suggest a greater adherence to a rationale of protectionism than does the rule as actually expressed by the learned judge. There is something of a contradiction, then, between the language and expressed rationale in Walsh J.’s judgment and his actual formulation of the test for the exclusion of unconstitutionally obtained evidence in *O’Brien*.

The true rationale of the exclusion of unconstitutionally obtained evidence in Irish law and the meaning of the phrase “deliberate and conscious violation” have caused some controversy in the courts since *O’Brien*, with differing judges adopting differing views on the issues.

In *People (D.P.P.) v Madden*,²⁶ the Court of Criminal Appeal excluded from evidence a confession made by the accused at a time when he had been held beyond the statutorily allowable period. The court held that the two senior Gardaí in this case must have known that the accused had been held beyond the lawful period and therefore, it appeared that the breach of the accused’s rights in the pre-trial period had been deliberate and conscious. The Court accepted that the Gardaí acted for what they thought were the best reasons, to secure the confession and thereafter the conviction of the accused; but it found nonetheless that this action was in breach of the accused’s right to liberty. The confession was accordingly excluded.

This case, which was the first major case to apply the *O’Brien* test, made it clear that there is no requirement of *mala fides* on the part of the Gardaí for exclusion to later occur. It does not matter *why* the Gardaí have breached the right, only that they have done so “deliberately and consciously”. This case did not wholly rule out a rationale of deterrence for the exclusionary rule in Ireland however, as it was held that the Gardaí *knew* that they were acting in breach of the accused’s right to liberty, even though they had arguably good intentions in doing so.

Perhaps more clarity can be found in *People (D.P.P.) v Shaw*,²⁷ where the same decision on the facts was made by both the majority and the minority of the Supreme Court, but on a very different application of the law.

In *Shaw*, a man suspected of involvement in the abduction of two missing women was arrested, detained and questioned by Gardaí beyond the legal limit of time.²⁸ During

²⁵ [1965] I.R. 142, at 170.

²⁶ [1977] I.R. 336.

²⁷ [1982] I.R. 1.

²⁸ At the time, no general power of arrest for detention and questioning existed and an arrested suspect had to be brought before a court for charging at the first reasonable opportunity. It was found as a fact that the suspect in *Shaw* had not been brought before a court as required but had been detained and questioned in the Garda station.

this period of prolonged pre-trial detention, the suspect confessed to the murder of one of the missing women. It was argued on his behalf that such confession ought to be excluded from evidence at trial as it had been obtained in breach of his constitutional right to liberty under Art.40.4.1°. ²⁹

Griffin J., giving the majority judgment of the Supreme Court, suggested in relation to the exclusionary rule on unconstitutionally obtained evidence that the term “deliberate and conscious” related to the *violation* of the individual’s constitutional rights, and not to the act of the Gardaí. ³⁰ Therefore, evidence would only be excluded at trial where Gardaí knew that they were breaching the rights of the suspect and continued to do so anyway. By contrast, Walsh J. (the original formulator of the exclusionary rule in relation to unconstitutionally obtained evidence in *O’Brien*), giving the minority judgment in *Shaw*, stated that it was the *act* of the Gardaí which need to be carried out “deliberately and consciously” and that it was “immaterial whether the person carrying out the act may or may not have been conscious that what he was doing ... amounted to a breach of constitutional rights.” ³¹

Walsh J. made it clear that he agreed with the ruling in *Madden* and the suggestion therefrom that there was no need for *mala fides* on the part of the Gardaí for the exclusionary rule to be applied. He then went beyond the factual scenario which had presented itself in *Madden*, and stated that the admissibility or exclusion of evidence did not depend upon the violator’s knowledge of the Constitution. The suggestion from Walsh J. was that if there has been a violation of constitutional rights, then the evidence must be excluded (unless there are extraordinary excluding circumstances) whether or not the person who has breached the rights realised that he was doing so, or even realised that such rights existed. He stated that:

“[T]here is nothing in *O’Brien’s Case* to suggest that the admissibility of the evidence depends upon the state or degree of the violator’s knowledge of the constitutional law, or, indeed, of the ordinary law.” ³²

Clearly, the approach of Griffin J. points to a rationale of deterrence for the exclusionary rule, where it is only if a Garda intentionally breached constitutional rights that evidence obtained as a result would be excluded. This would impress upon Gardaí the need to avoid breaching constitutional rights but would allow evidence obtained where a Garda did not realise that his actions were breaching such rights, even if they were, to be admitted at trial. By contrast, the approach of Walsh J. points to a rationale of protectionism for the exclusionary rule, where evidence would be excluded where the intentional actions of a Garda have breached the suspect’s constitutional rights, whether or not such Garda knew that he was breaching constitutional rights in that manner. This would mean that a suspect would, to some extent, be compensated for the breach of his rights or would be returned to the position in which he was prior to the breach of his rights, regardless of the relevant Garda’s knowledge of constitutional law or awareness that his actions were breaching the suspect’s constitutional rights.

The phrase “deliberate and conscious violation” was explored in a number of other cases also, ³³ but its meaning and the related rationale behind the exclusionary rule on

²⁹ “No person shall be deprived of his liberty, except in accordance with law” (Art.40.4.1°).

³⁰ [1982] I.R. 1, at 55–56.

³¹ [1982] I.R. 1, at 32.

³² [1982] I.R. 1, at 33.

unconstitutionally obtained evidence in Ireland were most comprehensively addressed in *People (D.P.P.) v Kenny*.³⁴ This case, somewhat like *O'Brien*, involved the purported execution of a defective search warrant. In *Kenny*, however, the search warrant was not defective due to errors on the document itself, rather it was found to be invalid because it had been issued by a Peace Commissioner without any evidence that he himself was satisfied that there were reasonable grounds for the suspicion held by the member of the Garda Síochána who swore information before him.³⁵ That meant that the search warrant had been issued without lawful authority. Unlike the situation in *O'Brien*, the defects on the warrant in *Kenny* were not apparent on the face of the warrant and there was no way that the Gardaí could have known that the warrant was invalid and that in executing it they were breaching the suspect's constitutional right to the inviolability of his dwelling under Art.40.5.

The Court of Criminal Appeal held that there had been no “deliberate and conscious violation” of the constitutional rights of the suspect in this case as the relevant Garda had done all that he thought necessary to obtain the search warrant and he was entirely unaware of its inherent defect. In coming to this conclusion, the Court relied on the United States' authority of *U.S. v Leon*³⁶ where the exclusionary rule was clearly stated to be for the purpose of deterring police misconduct.

However, the Irish Supreme Court adopted a different standpoint in *Kenny* and held that evidence obtained from the search carried out pursuant to the defective warrant ought to have been excluded from trial as the search had breached the accused's constitutional right to the inviolability of his dwelling under Art.40.5, whether or not the relevant garda knew that to be the case. The majority of the Court expressly denounced the deterrence principle as a rationale for the exclusion of unconstitutionally obtained evidence in the Irish context, favouring the ideals of protectionism as the basis for the operation of the rule. Finlay C.J. stated that:

“[A]s between two alternative rules or principles governing the exclusion of evidence obtained as a result of the invasion of the personal rights of a citizen, the Court has ... an obligation to choose the principle which is likely to provide a stronger and more effective defence and vindication of the right concerned.”³⁷

He held that a rule of absolute protection would provide far more security for the personal, constitutional rights of citizens than would an exclusionary rule based solely on the concept of deterrence. Such latter rule would act negatively only and deter police officers from acting in a manner which they know to be unconstitutional or from acting in a manner reckless as to the constitutionality of their actions. The former approach however, would not only achieve this negative deterrent effect, but would also ensure that those who hold authority over the detection and crime prevention services in the country consider in detail the rights of citizens and the

³³ For example, *People (DPP) v Madden* [1977] I.R. 336; *People (DPP) v Walsh* [1980] I.R. 294; *People (DPP) v Healy* [1990] 2 I.R. 73; [1990] I.L.R.M. 313.

³⁴ [1990] 2 I.R. 110; [1990] I.L.R.M. 569.

³⁵ As is required under the provisions of the Misuse of Drugs Act 1977.

³⁶ (1983) 468 US 897.

³⁷ [1990] 2 I.R. 110, at 133; [1990] I.L.R.M. 569, at 578.

effect which their powers of arrest, detention and search have on such constitutional provisions.³⁸

Finlay C.J. acknowledged that the high protectionist stance adopted in *Kenny* could create problems in criminal trials given its propensity to exclude from evidence items of immense probative value. However, he, like Walsh J. in *O'Brien*, was of the opinion that:

“[T]he detection of crime and the conviction of guilty persons, no matter how important they may be to the ordering of society, cannot ... outweigh the unambiguously expressed constitutional obligation ‘as far as practicable to defend and vindicate the personal rights of the citizen’”.³⁹

Finlay C.J. clearly declared that the court’s constitutional duty to protect the personal rights of the citizen outweighs the social need to detect crime and convict guilty persons; again clarifying the protectionist basis of the exclusionary rule in relation to unconstitutionally obtained evidence in Ireland.

Finlay C.J. stated the rule in the following terms:

“... [E]vidence obtained by invasion of the constitutional personal rights of a citizen must be excluded unless a court is satisfied that either the act constituting the breach of constitutional rights was committed unintentionally or accidentally, or is satisfied that there are extraordinary excusing circumstances which justify the admission of the evidence in [the court’s] discretion”.⁴⁰

The absence of the phrase “deliberate and conscious violation” is notable in this revised formulation. Finlay C.J. appeared to relate the intention of the Gardaí to the *act* rather than to the *violation*. Unlike the formulation of the exclusionary rule in relation to unconstitutionally obtained evidence in *O'Brien* then, it now seems that the emphasis is on the *act* of a Garda rather than on the *violation* of a constitutional right. A Garda need not purposefully breach a constitutional right in order to have evidence excluded; so long as he purposefully carried out an *act* which breached the constitutional right, the evidence must be excluded. This affords a greater protection to constitutional rights as even though they may have been unknowingly violated by a Garda who was intentionally doing a particular act, evidence obtained in those circumstances must be excluded at trial. This also suggests that the rationale is now clearly one of protectionism rather than deterrence.

Hogan has suggested that the development of the strict exclusionary rule in relation to unconstitutionally obtained evidence was the logical corollary of a series of related constitutional provisions.⁴¹ Among these he listed Art.34.5 which requires that each judge, upon appointment, must declare in open court that he “will uphold the Constitution”; Art.38.1 which guarantees the right to a fair trial; and Art.40.3.1 which

³⁸ [1990] 2 I.R. 110, at 133; [1990] I.L.R.M. 569, at 578.

³⁹ [1990] 2 I.R. 110, at 134; [1990] I.L.R.M. 569, at 579 quoting Art.40.3.1 of the Irish Constitution.

⁴⁰ [1990] 2 I.R. 110, at 134; [1990] I.L.R.M. 569, at 579. In *Kenny*, the actions of the Gardaí in obtaining the warrant and later forcibly entering the dwelling could not be said to be unintentional or accidental and, although the Gardaí concerned had no knowledge that they were invading the constitutional rights of the appellant, the evidence ought not to have been admitted at trial.

⁴¹ Note of Dissent on Exclusionary Rule by the Chairman of the Balance in the Criminal Law Review Group, Gerard Hogan, in the *Final Report of the Balance in the Criminal Law Review Group*, March 15, 2007, p.288.

provides that the State shall “as far as practicable, by its laws ... defend and vindicate the personal rights of the citizen”.⁴² He then asked how a judge who had made the solemn declaration to uphold the Constitution could receive and act upon evidence which he knew to have been obtained in breach of the Constitution.⁴³ While this question has not been expressly asked in the jurisprudence of the Irish courts in this area, it seems clear that the majority of the Supreme Court in *Kenny* were keenly aware of the duty of the courts to defend and protect the constitutional rights of citizens above all else.

However, the ruling of the majority of the Supreme Court in *Kenny*⁴⁴ was not accepted by all members of the Court. Both Griffin and Lynch JJ. issued strong dissents in the case, suggesting that some element of culpability on the part of the Gardaí ought to be required before exclusion would occur. Griffin J. argued that it is the violation of the person’s constitutional rights and not the particular act complained of that needed to be “deliberate and conscious” in order to have evidence excluded,⁴⁵ while Lynch J. suggested that Gardaí in the instant case had shown respect for the constitutional rights of the appellant by applying for the issue of a warrant to the Peace Commissioner in a manner believed for many years to be the correct way to lead to the issue of such warrants under the Misuse of Drugs Act 1977.⁴⁶ Lynch J. stated that he could see nothing in the conduct of the Gardaí to support the drawing of an inference that they had “deliberately and consciously” violated the appellant’s constitutional rights.⁴⁷ He proposed that unless there was some element of blame or culpability or unfairness in relation to the breach of a constitutional right on the part of those who obtained the evidence such evidence ought not to be excluded.⁴⁸ Both Griffin and Lynch JJ. were of the opinion that the instant case was “on all fours” with *O’Brien* and would therefore have dismissed the appeal because no evidence was admitted which ought not to have been admitted.⁴⁹

Despite the dissents of the two learned judges, the decision in *Kenny* stands and the high protectionist stance adopted therein in relation to unconstitutionally obtained evidence generally continues to be applied by the Irish courts.⁵⁰ One prominent example of the ongoing application of this rule is *People (D.P.P.) v Laide and Ryan*,⁵¹ where Gardaí entered the home of the second-named appellant on foot of a search warrant which was later found to be invalid and arrested the second-named appellant

⁴² Note of Dissent on Exclusionary Rule by the Chairman of the Balance in the Criminal Law Review Group, Gerard Hogan, in the *Final Report of the Balance in the Criminal Law Review Group*, March 15, 2007, p.288

⁴³ Note of Dissent on Exclusionary Rule by the Chairman of the Balance in the Criminal Law Review Group, Gerard Hogan, in the *Final Report of the Balance in the Criminal Law Review Group*, March 15, 2007, p.288

⁴⁴ Finlay C.J., Walsh and Hederman JJ.

⁴⁵ [1990] 2 I.R. 110, at 137; [1990] I.L.R.M. 569, at 582 quoting from his own judgment in *People (DPP) v Shaw* [1982] I.R. 1, at 55–56.

⁴⁶ [1990] 2 I.R. 110, at 141; [1990] I.L.R.M. 569, at 586.

⁴⁷ [1990] 2 I.R. 110, at 141; [1990] I.L.R.M. 569, at 586.

⁴⁸ [1990] 2 I.R. 110, at 142; [1990] I.L.R.M. 569, at 587.

⁴⁹ [1990] 2 I.R. 110, per Griffin J. at 139, per Lynch J. at 142; [1990] I.L.R.M. 569, per Griffin J. at 584, per Lynch J. at 587.

⁵⁰ For example, in *DPP v Yamanoha* [1994] 1 I.R. 565; *DPP v Connell* [1995] 1 I.R. 244; *People (DPP) v Dillon* [2002] 4 I.R. 501; *People (DPP) v Laide and Ryan* [2005] 1 I.R. 209; *Competition Authority v Irish Dental Association* [2005] 3 I.R. 208.

⁵¹ [2005] 1 I.R. 209.

within his home. McCracken J. in the Court of Criminal Appeal clearly held that although the Gardaí considered themselves to be lawfully within the appellant's home at the relevant time, their intentional and deliberate actions in entering the home were in fact in breach of the appellant's constitutional right to the inviolability of the dwelling (due to the invalid search warrant) and therefore the arrest was unlawful.⁵² In the absence of extraordinary excusing circumstances then, statements made by the appellant to Gardaí while in unlawful detention consequent on the unlawful arrest ought to have been excluded from evidence at trial.

The continuing application of the term “deliberate and conscious” to the *actions* of Gardaí rather than to their violation of constitutional rights ensures an ongoing rationale of protectionism in relation to unconstitutionally obtained evidence in Ireland, despite certain attempts to circumvent that approach, certain criticisms of it, and certain calls for change.

Circumvention, Criticism and Calls for Change

Despite the rule from *Kenny* being generally applied in relation to unconstitutionally obtained evidence in Ireland, an attempt to circumvent the rigorous application of the rule was made in at least one significant case: *People (D.P.P.) v Balfe*.⁵³ In this case, the Court of Criminal Appeal viewed the *O'Brien* and *Kenny* formulations of the exclusionary rule as alternatives, rather than viewing *Kenny* as a restatement or extension of *O'Brien*, and chose to rely on *O'Brien* rather than *Kenny*.

Murphy J. suggested that there were two different rules formulated in *O'Brien* and *Kenny* respectively to deal with two different scenarios: the *O'Brien* formula being relevant where a mistake in the recording of the order of a District Court judge or Peace Commissioner issuing a search warrant is made and is apparent on the face of the warrant; and the *Kenny* formula applying where a search warrant is made without lawful authority.⁵⁴ As the facts in *Balfe* related to defects on the face of the warrant, they were held to fall under the *O'Brien* rule, were thereafter deemed to be mere oversights, and ultimately it was held that the trial judge had correctly exercised his discretion to admit the relevant evidence.

In *Kenny*, Finlay C.J. examined the *O'Brien* case and held that the court therein had left unresolved the choice between a rule based on deterrence and one based on protectionism.⁵⁵ In choosing the protectionist approach in *Kenny* then, Finlay C.J. and the majority of the Supreme Court clearly believed themselves to be furthering the

⁵² [2005] 1 I.R. 209, at 234–35.

⁵³ [1998] 4 I.R. 50.

⁵⁴ [1998] 4 I.R. 50, at 60. Murphy J. suggested that there was an important difference between *O'Brien* and *Kenny*: in *O'Brien*, while the occupiers of 118 Captains Road would have been entitled to refuse entry to Gardaí carrying a search warrant for 118 Cashel Road, the evidence obtained on foot of the warrant where Gardaí were not prohibited from executing it could be admitted in court as there was sufficient validity in the warrant, despite its deficiencies, to justify such admission. However, in *Kenny* there was no indication of the inherent flaw on the face of the warrant, therefore the occupiers of the relevant premises would have seen no flaw on the face of the warrant and could not have known that there were any grounds on which to prohibit its execution, but the evidence obtained on foot of the warrant could not be admitted at trial as the warrant lacked legal effect given no inquiry had been made by the Peace Commissioner before issuing the warrant which could have allowed him to be personally satisfied that there were reasonable grounds for the suspicion held by the Garda.

⁵⁵ [1990] 2 I.R. 110, at 131; [1990] I.L.R.M. 569, at 576.

jurisprudence in relation to the exclusionary rule on unconstitutionally obtained evidence and building upon the judgment in *O'Brien* rather than creating an alternative stream of jurisprudence. The reasoning in *Balfe* in relation to the difference between a warrant with apparent defects and a warrant which is impliedly though not apparently lacking in authority is convincing. However, by viewing and applying the rules from *O'Brien* and *Kenny* as alternatives, the Court of Criminal Appeal in *Balfe* managed to circumvent the high protectionist *Kenny* rule in favour of the weaker protection afforded to constitutional rights by the *O'Brien* rule.⁵⁶

As well as circumvention of the stringent exclusionary rule in relation to unconstitutionally obtained evidence in the aftermath of *Kenny*, distaste for that rule has also been expressly articulated from the bench. In *D.P.P. (Walsh) v Cash*,⁵⁷ for example, Charleton J. in the High Court accepted that he was bound to apply the exclusionary rule as set out in *Kenny*, but he strongly expressed his dislike for that rule. Charleton J. suggested that the *Kenny* judgment undermined the original exclusionary rule which was formulated in *O'Brien*, as it allowed for no balancing of the interests of the parties.⁵⁸ He stated that the rule in *Kenny* automatically requires the exclusion of any evidence obtained through a mistake which had the accidental, and therefore unintended, result of infringing a constitutional right of a suspect. He considered that “[a] rule which remorselessly excludes evidence obtained through an illegality occurring by a mistake does not commend itself to the proper ordering of society which is the purpose of the criminal law”.⁵⁹ The learned judge considered that the decision whether or not to exclude evidence at trial should be based on a balancing of the interests of society as against the interests of the accused, taking into account the rights of the victim, as well.

As noted in the introduction to this article, the main body which has called for change in this area in recent times is the Balance in the Criminal Law Review Group which was set up by the then Minister for Justice, Michael McDowell, in November 2006. This ad hoc committee was asked to consider and examine a number of specific issues including, inter alia, the right to silence, the rules on hearsay evidence, the admissibility of character evidence of an accused and the exclusionary rule of criminal evidence. In their final report, which was published in March 2007, a majority of the Group advocated a change in the exclusionary rule in relation to unconstitutionally obtained evidence: they recommended that trial courts ought not to be under a duty to automatically exclude evidence which has been obtained in breach of the constitutional rights of a suspect, but should have a discretion to admit such evidence or not, having regard to the totality of the circumstances with particular regard to the rights of the victim.⁶⁰

⁵⁶ In the later, civil case of *Competition Authority v Irish Dental Association* [2005] 3 I.R. 208 it is interesting to note that, unlike the Court of Criminal Appeal in *Balfe*, McKechnie J. in the High Court applied the *Kenny* formulation to evidence obtained on foot of a search warrant where there were errors of fact apparent on the face of the warrant (as was the fact-scenario in *O'Brien*).

⁵⁷ [2007] I.E.H.C. 108; (unreported, High Court, Charleton J., March 28, 2007).

⁵⁸ The fact that Charleton J. views the *Kenny* rule as a furthering of the *O'Brien* rule further strengthens the argument made above, that the reading of *Kenny* as an alternative to *O'Brien* in *Balfe* is misguided.

⁵⁹ [2007] I.E.H.C. 108; (unreported, High Court, Charleton J., March 28, 2007), per Charleton J. at para.65.

⁶⁰ *Final Report of the Balance in the Criminal Law Review Group*, March 15, 2007, p.166.

One of the arguments which was noted by the majority of the Group in favour of removing the current rule and replacing it with a discretionary rule based on the balancing of the interests in a given case was that which pointed to “radical changes in the nature of policing in recent years” in this jurisdiction. Listed among these radical changes were the videotaping of interviews, the creation of the Garda Ombudsman Commission and the regulation of the Garda Síochána by statute.⁶¹ Similar claims in relation to the modern nature of policing and police forces were recently successful in leading to a change in the application of the exclusionary rule in the United States. It is interesting, at this juncture, to note the manner in which such change came about in that jurisdiction and to consider whether such change might indeed be appropriate within the Irish criminal justice system.

The United States and External Remedies

The exclusionary rule in relation to unconstitutionally obtained evidence in the United States, as noted earlier, is based on a rationale of deterrence: unconstitutionally obtained evidence will only be excluded where such exclusion would have a deterrent effect on police. In *US v Calandra*⁶² Powell J. stated that “... the rule is a judicially created remedy ... rather than a personal constitutional right of the party aggrieved ... deterrence is the rule’s sole and prime purpose”.⁶³ Similarly, in his dissenting judgment in *Wolf v Colorado*,⁶⁴ Murphy J. suggested that the exclusion of evidence was the only way to “impress upon the zealous prosecutor that violation of the Constitution will do him no good”.⁶⁵ Where deterrence is not a factor in the US cases, the courts will allow the evidence to be admitted, even though it may have been obtained improperly. In *US v Leon*,⁶⁶ for example, a warrant used by the police was deficient, but the police were wholly unaware of such deficiency. Evidence obtained as a result of the execution of this warrant was deemed admissible at trial in the absence of any *mala fides* on the part of the police and the consequent futility of any attempt to deter such practice in the future.

So, the traditional rationale for the exclusion of evidence obtained in breach of the US Constitution is that of deterrence: the US courts will only exclude unconstitutionally obtained evidence where doing so would highlight an issue to police and discourage them from behaving in a similar manner again. Clearly, the deterrence basis of the rule in the United States offers a lower level of protection to constitutional rights than does the protectionist stance adopted and applied by the Irish courts.

Recently, the US courts have taken a step towards an even weaker level of protection for constitutional rights in terms of the application of their exclusionary rule to unconstitutionally obtained evidence. In *Hudson v Michigan*,⁶⁷ police officers knowingly breached the rights of the suspect under the Fourth Amendment of the US Constitution by failing to knock and announce prior to entering premises on foot of a search warrant.⁶⁸ It had previously been held by the US Supreme Court that, in

⁶¹ *Final Report of the Balance in the Criminal Law Review Group*, March 15, 2007, pp.159–60.

⁶² (1974) 414 US 338.

⁶³ (1974) 414 US 338, at 348.

⁶⁴ (1949) 338 US 25.

⁶⁵ (1949) 338 US 25, at 41.

⁶⁶ (1983) 468 US 897.

⁶⁷ (2006) 547 US 586.

⁶⁸ The Fourth Amendment states that

pursuance of the Fourth Amendment, police executing a search warrant must knock on the door of the relevant premises, announce their presence and wait for 20–30 seconds before forcibly entering the property.⁶⁹

As the police in *Hudson* had been found to have knowingly breached the constitutional rights of the suspect, the deterrent element of the exclusionary rule could have been expected to take effect and it might have been supposed that the evidence would have been excluded. However, the US Supreme Court adopted a new approach in this case and held that in the modern circumstances of improved police discipline and accountability exclusion of the relevant evidence was not warranted. It was held that police discipline and education were so enhanced since the time when the exclusionary rule was first formulated in the United States that its application now ought to be altered.⁷⁰

The court therefore embarked on a balancing test, contrasting the social costs of excluding evidence—including the potential that a guilty person would go free—with the value of excluding the evidence, mainly in terms of the deterrent effect of such a ruling. It held that the level of deterrence achievable by the exclusion of evidence in a given case would have to outweigh the dangers of excluding the evidence and the risk that a guilty person could go free as a result. In *Hudson* then, the impugned evidence was held to be relevant to the case at hand and so it was admitted despite the manner in which it was obtained. The court was of the opinion that police discipline and education along with remedies under tort law for injured parties were a better way of addressing unconstitutionally obtained evidence than the exclusion of probative evidence.

This dichotomy between remedies external to the criminal process in a given case (e.g. police discipline, tort remedies) and remedies internal to the criminal process in such a case (e.g. exclusion of evidence at trial, dismissal of charges against a suspect whose rights have been violated) is interesting and may in fact play a role in determining the manner in which improperly obtained evidence is dealt with in differing jurisdictions. If there is a robust system of police discipline and accountability and if actions for trespass against errant police officers are likely to result in satisfactory damages for injured parties, then the role of the courts in addressing pre-trial improprieties may be reduced. However, if the system of police discipline and accountability is not sufficiently robust, or if tort actions in relation to police misbehaviour are not utilised by injured parties, then the courts may feel more inclined to rebuff police within the criminal process and to exclude improperly obtained evidence as a mark of disapproval.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

⁶⁹ See *Wilson v Arkansas* (1995) 514 US 927.

⁷⁰ Scalia J. stated that

“... [T]he social costs of applying the exclusionary rule to knock-and-announce violations are considerable; the incentive to such violations is minimal to begin with, and the extant deterrents against them are substantial—incomparably greater than the factors deterring warrantless entries when *Mapp* was decided. Resort to the massive remedy of suppressing evidence of guilt is unjustified.” (2006) 547 US 586, at s.III B.

The reference is to *Mapp v Ohio* (1961) 367 US 643.

Of course, this reasoning is predicated on the assumption that the exclusion of evidence is used as a mark of disapproval of police misconduct, or a deterrent to further police wrongdoing. However, as outlined above, the Irish courts have expressed the view that the exclusion of unconstitutionally obtained evidence is based on a rationale of protectionism and that evidence obtained in that manner will be automatically excluded regardless of the fact that there may have been no *male fides* on the part of the Gardaí who breached the rights of the suspect. Therefore, it is submitted that the issues raised in *Hudson* in the United States would not have the same effect on the continued existence and application of the Irish exclusionary rule as they had on the US incarnation of the rule.

Ireland and External Remedies

Despite the important difference in rationale for the exclusionary rule between the United States and Ireland, the majority of the Balance in the Criminal Law Review Group, as noted above, suggested that changes in the nature of policing in Ireland in recent years superseded any “contention that the [current] rule was necessary in order to ensure that the police comply with the relevant legal requirements”.⁷¹ But this was not and is not now the reason for the exclusion of unconstitutionally obtained evidence in the Irish courts. As shown throughout this article, the Irish courts’ primary concern is not ensuring that the police comply with the “relevant legal requirements” (a term which to some extent belittles the importance of individual constitutional rights), but, rather, ensuring that the constitutional rights of citizens are protected and respected. It is submitted then that any claim that advances in police accountability and discipline should lead to an alteration in the Irish incarnation of the exclusionary rule is misplaced and is based on a misperception of the underlying rationale of that rule within the Irish legal landscape. Furthermore, even if deterrence of garda misconduct was a factor in the exclusion of unconstitutionally obtained evidence from the Irish courts, it is surely too soon to suggest that the recent changes in terms of garda accountability and discipline, or the “external remedies” of the Irish criminal process, are a success or have made a significant difference to garda behaviour.

While the introduction of the Garda Síochána Ombudsman Commission⁷² to replace the much maligned Garda Complaints Board,⁷³ the establishment of new Garda

⁷¹ *Final Report of the Balance in the Criminal Law Review Group*, March 15, 2007, pp.159–60.

⁷² Established under the Garda Síochána Act 2005. See further Vaughan, B. “Reforms to Policing: North and South” (2006) 16(2) I.C.L.J. 17 and www.gardaombudsman.ie.

⁷³ Established under the Garda Síochána (Complaints) Act 1986. See further Walsh, D. *The Irish Police* (Dublin: Round Hall Sweet & Maxwell, 1998), pp.260–99; Walsh, D. “The Proposed Garda Complaints Procedure: A Critique” (2004) 14(4) I.C.L.J. 2; and the *Concluding Observations of the UN Human Rights Committee* on their visit to Ireland, July 24, 2000 paras.13–14. In the *Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 20 to 28 May 2002*, the Committee stated that “[t]he information gathered by the delegation confirmed that the existing internal accountability mechanism for the police, the Garda Síochána Complaints Board, enjoys little public confidence. Indeed, the CPT delegation heard accounts of solicitors discouraging clients from filing a complaint.” para.18; see also O’Mahony, P. “Who Guards the Gardaí?” in *Criminal Chaos—7 Crises in Irish Criminal Justice* (Dublin: Round Hall Sweet & Maxwell, 1996), Ch.4, where he states in relation to the Garda Complaints Board that “... it manifestly lacks independence from the Garda Síochána. In effect, the Garda Síochána have a decisive, or at least, a very powerful influence on the final outcome of complaints against their own members. It is obvious that only a small proportion of complaints are fully upheld and that in the vast majority of cases the

Disciplinary Regulations,⁷⁴ the clarification of the vicarious liability of the State in civil claims taken against Gardaí,⁷⁵ along with other developments such as the introduction of audio-visual recording of suspect interviews in Garda stations,⁷⁶ are welcome developments in relation to policing in Ireland they are: a) too newly-established for their value in relation to the promotion of good garda practices and the deterrence of garda misconduct to be determined and b) largely irrelevant to the operation of the exclusionary rule within the Irish criminal justice system as this is primarily concerned with the protection of constitutional rights and not the deterrence of garda misconduct.

Conclusion

Before reaching a final conclusion, it seems important to outline the manner in which any change to the Irish law on unconstitutionally obtained evidence, if it were to come about, would be achieved. The majority of the Balance in the Criminal Law Review Group suggested that the current rule in relation to unconstitutionally obtained evidence could potentially be altered through a re-interpretation of the law by the Supreme Court,⁷⁷ through a constitutional amendment by the People, or through a statute enacted by the legislature. However, in his note of dissent the Chairman of the Group, Dr Gerard Hogan S.C., disagreed with this third option and considered that the exclusionary rule in relation to unconstitutionally obtained evidence is a constitutional rule which could not be altered by way of legislation.⁷⁸

complaints against gardaí are vindicated by the system. Resultant sanctions in the few cases where a garda has been found guilty of misconduct also appear to be relatively lenient.” p.134.

⁷⁴ Garda Síochána (Discipline) Regulations 2007. On introducing the new Regulations, the Minister for Justice and Tánaiste at the time, Michael McDowell, referred to the Government's response to the Third, Fourth and Fifth Reports of the Morris Tribunal into Garda activities in Donegal, when the Government acknowledged and accepted the views of the Tribunal that the current disciplinary regulations for the force needed to be replaced by a new, less complex approach which would be swift and fair with a simple appeal process. See <http://www.justice.ie/en/JELR/Pages/PR07000630>.

⁷⁵ Under s.48 of the Garda Síochána Act 2005, the State may be held vicariously liable in damages in respect of an “actionable wrong” perpetrated by a member of the Gardaí in the course of performing his duties. An “actionable wrong” is defined within the section as a tort or breach of a constitutional right, whether or not the wrong is also a crime and whether or not the wrong is intentional. While this, to some extent, merely places current practice on a statutory footing, the legislative clarification of the fact that the State may pay damages for the improper conduct of Gardaí in obtaining evidence in the pre-trial process, may lead to more civil actions being taken in the future than has been the case to date.

⁷⁶ Provision for the recording of suspect interviews in Garda stations was made in the Criminal Justice Act 1984 although it took 13 more years to come into place under the Criminal Justice Act 1984 (Electronic Recording of Interviews) Regulations 1997 and even longer to become routine in Garda stations: see *People (DPP) v Holland*, (unreported, Court of Criminal Appeal, June 15, 1998); *People (DPP) v Connolly* [2003] 2 I.R. 1; *People (DPP) v Kelly* (unreported, Special Criminal Court, November 26, 2004); and *People (DPP) v Diver* [2005] 3 I.R. 270.

⁷⁷ The Balance in the Criminal Law Review Group pointed to the insertion of s.34 of the Criminal Procedure Act 1967 by s.21 of the Criminal Justice Act 2006 which allows for the Director of Public Prosecutions to refer a question of law to the Supreme Court without prejudice to the verdict in a case where the accused has been acquitted. This, the Group contended, may allow for the Supreme Court to revisit the exclusionary rule in the future. *Final Report of the Balance in the Criminal Law Review Group* March 15, 2007, pp.161–66.

⁷⁸ In support of this argument Hogan pointed to the US case of *Dickerson v US* (2000) 530 US 428 wherein the US Supreme Court rejected an attempt by the legislature to remove the so-called *Miranda* ruling as that ruling was said to be “constitutionally based” and could not be legislatively overruled. *Final Report of the Balance in the Criminal Law Review Group* March 15, 2007, pp.289–91.

It is submitted that Hogan's view is correct. The exclusionary rule in relation to unconstitutionally obtained evidence was derived from the Constitution by the Supreme Court of Ireland, thus it is a constitutional rule. It would appear that the only way in which the rule could be altered, then, is by way of a re-interpretation by the Supreme Court, overruling their original declaration and the long-standing application of the rule, or by constitutional amendment sanctioned by the people voting at referendum. Any purported alteration by statute would surely meet with constitutional challenge.

The Supreme Court is generally slow to depart from its earlier rulings in any situation⁷⁹ and in such a well-established, oft-applied circumstance as the rule in relation to unconstitutionally obtained evidence it would seem unlikely that the Supreme Court would sanction a significant departure from the stringent rule as it currently stands. It is difficult to assess what view the people would take on such a question, but Hogan has suggested that it is dangerous to allow for ad hoc amendments to the Constitution merely because of a disagreement with a particular line of Supreme Court jurisprudence or because another view could be taken on the issue. Furthermore, he stated that:

“... [T]he whole theory of the Constitution is that certain fundamental rights – such as free speech, habeus corpus, personal liberty, fair trial and religious freedom – are not dependant on the whim of a legislative majority or the protestations of a populist media.”⁸⁰

Hogan further recorded his dissent to the recommendation of the majority that there ought to be a change in the formulation and application of the exclusionary rule in relation to unconstitutionally obtained evidence in Ireland. He stated that:

“Our society has committed itself to abiding by the rule of law and to respect and vindicate the fundamental freedoms enshrined in the Constitution. It behoves us to take these rights and freedoms seriously and if the occasional exclusion of otherwise relevant evidence is the price of respecting these constitutional rights, then that is a price society should be prepared to pay in the interests of upholding the values solemnly enshrined in our highest law ...”⁸¹

This statement clearly depicts the protectionist stance which has been adopted by the Irish courts in relation to unconstitutionally obtained evidence. It is both descriptive of the Irish law at present and aspirational in terms of the future, and it is submitted that Hogan's view ought to be favoured over that of his co-members of the Group.

The consideration that there is a necessity or opportunity for change in the law on the exclusion of unconstitutionally obtained evidence in Ireland on the basis of recent innovations and advances in garda accountability and discipline seems to involve a misperception of the reasoning behind the rules on exclusion, as formulated by the

⁷⁹ See *State (Quinn) v Ryan* [1965] I.R. 110; *Attorney General v Ryan's Car Hire Ltd* [1965] I.R. 642; *Mogul of Ireland Ltd v Tipperary (North Riding) County Council* [1976] I.R. 260.

⁸⁰ Note of Dissent on Exclusionary Rule by the Chairman of the Balance in the Criminal Law Review Group, Gerard Hogan, in the *Final Report of the Balance in the Criminal Law Review Group* March 15, 2007, p.293.

⁸¹ Note of Dissent on Exclusionary Rule by the Chairman of the Balance in the Criminal Law Review Group, Gerard Hogan, in the *Final Report of the Balance in the Criminal Law Review Group* March 15, 2007, pp.287–88.

Irish courts. While similar advances in police accountability and discipline in the United States have led to a reduction in the application of the exclusionary rule, the original incarnation of the rule on exclusion in that jurisdiction is significantly different to the Irish incarnation of the rule. In the United States, from the beginning, unconstitutionally obtained evidence would only be excluded where doing so would have a deterrent effect on police. The rule was based solely on the need for deterrence and the prospect of successful deterrence on the facts of each individual case. In direct comparison with this, the Irish rule, as it has developed, is expressly *not* to be used for deterrence alone and is to be applied even where Gardaí had no intention of breaching constitutional rights or no idea that they were breaching such rights. The exclusion of unconstitutionally obtained evidence in Ireland is for the sole purpose of defending and protecting constitutional rights.

It seems clear that in a criminal justice system where deterring police misconduct is the reason for the exclusion of evidence, the fact that improved measures exist outside of the criminal process to achieve such deterrence in another manner would be likely to affect the number of cases where exclusion occurs and the general rule on exclusion. However, in a criminal justice system such as the Irish one, where the courts have clearly held that exclusion occurs in order to reassert constitutional rights which have been violated and to offer a more general protection for constitutional rights, then any outside advances in garda discipline or accountability will have no effect on the level of exclusion or the general rule on exclusion.

Therefore, it is submitted that recent improvements in garda accountability and discipline do not necessitate and should not be viewed as a reason for alteration to the well-established rule on the exclusion of unconstitutionally obtained evidence. Furthermore, it is submitted that there is no evidence to suggest that there is any substantial difficulty in the functioning of the current exclusionary rule, that it has led to the erroneous acquittal of a significant number of persons or occasioned the collapse of a significant number of trials. While certain trials may have been affected, there is no evidence that the level of exclusion under the current regime is excessive. Without such evidence it is submitted that change is unwarranted in this area.

While the focus of this article has been on the misperception involved in the claim that advances in policing in Ireland have superseded the need for the stringent exclusionary rule in relation to unconstitutionally obtained evidence, a brief comment on another claim made in calling for change to this rule might also be appropriate in the context of the discussion within this article of the rationale for the rule. Both Charleton J. in *DPP(Walsh) v Cash* and the Balance in the Criminal Law Review Group suggested that the current rule does not allow for the balancing of all interests in a given case including, in particular, the rights of the victim.⁸² Such suggestions are both interesting and emotive, however, it might be argued in response that in both the original judgment of Walsh J. in *O'Brien* and the reformulation and assessment of the exclusionary rule in *Kenny*, the Supreme Court made the balancing decision for all future cases, deciding that when all of the interests in a case are considered, the highest concern must be for the protection of constitutional rights. As noted earlier, Walsh J. in *O'Brien* stated that “the defence and vindication of the constitutional

⁸² *DPP (Walsh) v Cash* [2007] I.E.H.C. 108; (unreported, High Court, Charleton J., March 28, 2007), per Charleton J. at paras.50 and 66; *Final Report of the Balance in the Criminal Law Review Group* March 15, 2007, pp.159–60, 166.

rights of the citizen is a duty superior to that of trying such citizen for a criminal offence”⁸³ and in *Kenny*, Finlay C.J. held that:

“[T]he detection of crime and the conviction of guilty persons, no matter how important they may be to the ordering of society, cannot ... outweigh the unambiguously expressed constitutional obligation ‘as far as practicable to defend and vindicate the personal rights of the citizen’ ”.⁸⁴

Thus, the balance to be achieved in a criminal trial has been considered by the most superior of our courts and the need for such balance is not ignored or the interests of victims disregarded in the decision to exclude unconstitutionally obtained evidence. Rather, it has been decided that the protection of constitutional rights is always the highest concern.

In conclusion, it is contended that the time for change is not upon us, evidence of the need for change is not apparent, and the current rule on unconstitutionally obtained evidence in Ireland should continue to be applied, unaltered.

⁸³ [1965] I.R. 142, at 170.

⁸⁴ [1990] 2 I.R. 110, at 134; [1990] I.L.R.M. 569, at 579 quoting Art.40.3.1 of the Irish Constitution.