"A Revolution in Principle"? The Impact of the New Exclusionary Rule

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1. Introduction

The 2015 Supreme Court case of *DPP v JC*[1] has been described as 'the most astounding judgment ever delivered by an Irish court.'[2] Reflecting primarily on the passionate dissent of Hardiman J in the case, Fennelly says that 'DPP v JC has everything: law, literature, history, polemic and vast learning but also emotion, horror, anger, even shame.'[3]

In *JC*, a 4:3 majority of the Court removed and replaced the exclusionary rule in relation to improperly obtained evidence which had been in operation in this jurisdiction for 25 years. The old rule, set out in *People (DPP) v Kenny*,[4] was viewed by the majority as operating in an overly strict manner, excluding evidence obtained in breach of constitutional rights even where such breach was inadvertent, in the sense that the person whose actions constituted the breach did not realise, or in some cases could not possibly have realised, that a breach would result. The new rule ensures that evidence obtained in inadvertent breach of constitutional (or other) rights may be admitted at trial. It further provides that where any apparent unconstitutionality arises as a result of subsequent legal developments (e.g. a judicial finding that a statutory garda power is unconstitutional), the evidence obtained may yet be admitted.

While the new provision for the admission of evidence on the basis of inadvertent breach has been given most attention in the aftermath of *JC*, importantly, that case also introduces a rebuttable presumption against the admission of evidence obtained in reckless or grossly negligent breach of constitutional rights. Only evidence obtained in knowing breach of constitutional rights will be automatically excluded.[5]

JC was decided by a slim majority and there were strong dissents on both substantial and procedural grounds. The late Hardiman J, as noted above, gave an impassioned dissent. He

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[1] [2015] IESC 31.
[2] Nial Fennelly, 'The Judicial Legacy of Mr Justice Adrian Hardiman' (2017) 58 Irish Jurist 81-105, 91.
[3] ibid.
[4] [1990] 2 I.R. 110.
[5] subject to possible admission on the basis of extraordinary excusing circumstances.

termed the abrupt alteration of the existing rule in this case "a revolution in principle",[6] which was at odds with the 'gradualist, minimalist and "interstitial" power of the Common Law judges to develop or evolve the law in light of changing circumstances.'[7] He expressed the view that the *Kenny* case was one of the 'monuments of the constitutional jurisprudence of independent Ireland',[8] and on the substance of the change being brought about by the majority he contended that matters of Garda accountability and discipline had not improved to the point where a strong exclusionary rule had become unnecessary;[9] the *Kenny* rule was not "absolute" or "near absolute" in its terms;[10] and, breaches of constitutional rights ought to result in exclusion of evidence so as to ensure *restitutio in integrum* for the rights-holder.[11]

On the question of restitution, Bloom and Dewey, writing on the Irish exclusionary rule prior to *JC* contended that

> Every right requires a remedy that restores individuals to the position they would have occupied prior to the violation, not a remedy that merely deters future conduct or that balances a number of factors beyond the violation to maintain judicial integrity. Rather, the objective of the exclusionary rule must be to vindicate constitutional rights and to establish a consistent and strong remedy for the vindication of such rights.[12]

The majority in *JC* were not of like mind; they sought to delineate differing circumstances which might occasion a breach, and to allow for differing judicial responses to same.

A similar approach was adopted by the New Zealand Court of Appeal in moving from the strictly-operated *prima facie* rule of exclusion of evidence obtained in breach of the New Zealand Bill of Rights Act 1990 (NZBORA) to the more flexible "proportionality-balancing" test. In a case which pre-dated the eventual alteration of that rule, Richardson P suggested that

[6] *JC* (n 1) *per* Hardiman J para 134.
[7] *JC* (n 1) *per* Hardiman J para 132.
[8] *JC* (n 1) *per* Hardiman J para 198.
[9] 'Since this matter has been raised by the appellant I have to make it clear that I do not consider that any changes, legal or otherwise, have taken place over the last twenty-five years which would make it desirable, or even safe, to make the change which the present appeal is designed to bring about. On the contrary, there have, during that time, been a considerable number of deeply disturbing developments both in relation to the Garda Síochána itself and to the arrangements for its oversight. These have been expressly acknowledged in impressive and authoritative sources, as will be seen.' *JC* (n 1) *per* Hardiman J para 160
[10] *JC* (n 1) *per* Hardiman J para 199, using the language of O'Donnell J at para 49 of his judgment.
[11] *JC* (n 1) *per* Hardiman J para 224.
[12] Robert M. Bloom and Erin Dewey, 'When Rights become Empty Promises: Promoting an Exclusionary Rule that Vindicates Personal Rights' (2011) 46(1) Irish Jurist 38-73, 73.

> [a] robust and rights-centred approach to individual rights is not necessarily inconsistent with flexibility of remedies where rights are breached. A remedy is no less an effective remedy because it is one appropriate to the circumstances of the breach rather than a remedy inflexibly applied in respect of all breaches.[13]

The New Zealand experience of moving from a strict to a more flexible exclusionary rule bears some resemblance to the situation in this jurisdiction and will be referenced throughout this article. But how different is the new Irish rule to its predecessor? How is it being applied by the courts? And has it had any significant impact to date? This article explores the new rule, its rationale and operation, and the main cases wherein it has been considered since its pronouncement three years ago, in April 2015.

2.1 The New Exclusionary Rule

As set out in brief terms above, the majority of the Supreme Court in *JC* held that the rule adopted a quarter of a century previously in *Kenny*, and in operation throughout the judicial system ever since, was erroneous and ought to be replaced by a new rule. The main difficulty identified with the *Kenny* rule was its application, and the resultant exclusion of evidence, even in cases where the breach was wholly inadvertent. It was claimed that the rule was operating in an overly strict manner to the detriment of the criminal process, and a new rule was accordingly pronounced.

The ardent terms of Hardiman J's dissent, in particular, suggested that this new test signified a significant shift away from the status quo and that its impact would likely be detrimental to the protection of individual rights within the criminal process. However, on examination of the new rule the reality may not be quite so extreme. Hogan, writing extra-judicially, has suggested that:

> the modified *Kenny* test proposed by the majority in *JC* did not abandon the exclusionary rule doctrine entirely, but simply sought to mitigate its more dramatic, unanticipated results by essentially proposing a negligence-based standard for assessing whether there had been a deliberate and conscious violation of constitutional rights.[14]

[13] *R v Grayson & Taylor* [1997] 1 NZLR 399, 412.
[14] Gerard Hogan, 'Mr Justice Brian Walsh: The Legacy of Experiment and the Triumph of Judicial Imagination' (2017) 57 Irish Jurist 1-13, at footnote 53.

The new rule is set out in the judgment of Clarke J.[15] It begins by declaring that the onus is on the prosecution to establish the admissibility of all evidence. Where there is a challenge to evidence on grounds of alleged unconstitutionality in the manner that it was obtained, the prosecution must establish, on the basis of facts proven beyond reasonable doubt, that either (a) it was not obtained in breach of constitutional rights, or (b) if it was obtained in breach of constitutional rights it is still appropriate for the court to admit the evidence. Essentially, it will only be appropriate to admit evidence obtained unconstitutionally if (i) this occurred due to inadvertence, in the sense that the person who breached the rights and/or relevant superior officials did not know that rights would be breached through the relevant actions, or (ii) if the unconstitutionality resulted from subsequent legal developments (as was the situation on the facts of *JC* itself).

On the other hand, if it is accepted by the court that the violation of rights was deliberate and conscious, then the evidence ought to be excluded, unless there are extraordinary excusing circumstances in existence (as defined in the pre-*JC* jurisprudence). The meaning of deliberate and conscious is explicitly defined as referring to the *knowledge* of the person whose actions breach the right(s) and/or relevant superior official(s).

Clarke J also declared that "inadvertence" does not include the concepts of recklessness and gross negligence.[16] He referenced a presumption against the admission of relevant evidence where it is obtained in circumstances of unconstitutionality which was not conscious and deliberate (i.e. not within the knowledge of the individual garda or his superiors). It is clear, from the judgment, that the presumption is rebutted if the evidence was obtained inadvertently in breach of rights, or if the breach derives from subsequent legal developments. In relation to inadvertence, Ní Choileáin and Bazarchina observe that '[n]o guidance is given as to how the prosecution is to discharge the onus of establishing inadvertence, bearing in mind that the requirement to do so extends beyond the garda directly involved.' [17]

There is an even greater lack of clarity in relation to circumstances involving recklessness and gross negligence. It would appear that the presumption against admissibility is still in play in such circumstances, but how can it be rebutted? No clarity is provided in *JC* as to the exact operation of this presumption and its potential rebuttal. Is this entirely a matter of judicial

[15] *JC* (n 1) *per* Clarke J para 7.2.
[16] *JC* (n 1) *per* Clarke J para 5.14.
[17] Cecilia Ní Choileáin and Anna Bazarchina, 'Admissibility of unconstitutionally obtained evidence after DPP v JC' (2015) 20(4) *Bar Review* 83-86, 86.

discretion? Are there guidelines for trial judges to follow in exercising said discretion, or factors which must explicitly be balanced against one another? It seems not; or at least not pronounced within *JC* itself.

Clarke J noted that the precise application of the principles set out in *JC* would need to be developed on a case by case basis. The editorial in the *Irish Criminal Law Journal* following the case also observed that

> [t]he practical significance of the new direction taken by the Supreme Court will only become apparent when it is applied by trial judges to everyday arguments about the admissibility of evidence. For a while there is bound to be some uncertainty whilst the prosecution and the defence seek to test the boundaries of the new regime.[18]

While some cases, discussed below, have touched on *JC* and its principles, no great sense of clarity has yet come through the case law.

2.2 Rationale and Operation of the Rule

The new test has undoubtedly moved away from the protectionist/vindication rationale that was overtly adopted by the Supreme Court in *Kenny*, it is not fully clear which rationale has replaced it. Clarke J discussed the "high constitutional value" to be attached both to ensuring that all potentially relevant evidence is considered at a criminal trial,[19] and to ensuring that investigative and enforcement agencies (including An Garda Síochána) operate within the limits of their powers in gathering evidence.[20] He concluded that there is a need to find a balance between these two competing matters. He acknowledged that in the past there may have been a tendency for trial courts to admit evidence obtained in breach of legal (not constitutional) rights, and that difficulties have, unfortunately, been found to exist in relation to the conduct of some elements of An Garda Síochána.[21] Clarke J concluded that the best approach to this is not to maintain an "almost absolute" exclusionary rule, but to

> define the law in terms which represent an appropriate balance of the constitutional rights and values at issue, to require trial courts to exercise vigilance to ensure that investigating agencies (such as An Garda Síochána) act in an appropriate fashion and

[18] Editorial, (2015) 25(2) Irish Criminal Law Journal 29.
[19] *JC* (n 1) *per* Clarke J at para 4.8.
[20] ibid *per* Clarke J at para 4.11.
[21] ibid *per* Clarke J at para 4.23.

> to enable trial judges, having carried out such vigilant scrutiny, to apply a properly defined constitutional balance to the situation which then emerges.[22]

He further noted the important role of the appellate courts in redressing any imbalance that might arise in the application of the law by trial courts, particularly in relation to any claim of "over-generous" admission of evidence.[23]

Rather than any deterrent rationale, O'Donnell J seemed primarily concerned with the administration of justice:

> A criminal or civil trial is the administration of justice. A central function of the administration of justice is fact finding, and truth finding. Anything that detracts from the courts' capacity to find out what occurred in fact, detracts from the truth finding function of the administration of the justice. As many courts have recognised, where cogent and compelling evidence of guilt is found but not admitted on the basis of trivial technical breach, the administration of justice far from being served, may be brought into disrepute. The question is at what point does the trial fall short of a trial in due course of law because of the manner in which evidence has been obtained? When does the admission of that evidence itself bring the administration of justice in to disrepute?[24]

Ultimately, like Clarke J, O'Donnell J concluded that a test requiring a balancing of interests is required. In analysing the varying approaches adopted in other jurisdictions,[25] he remarked that '[p]erhaps the most interesting analysis from an Irish perspective is that undertaken in New Zealand after the enactment of the New Zealand Bill of Rights Act 1990.'[26] O'Donnell J then looked at the New Zealand case law which brought about a change from the strictly-operated *prima facie* rule of exclusion[27] to the more flexible proportionality-balancing test.[28] He also observed that the latter test was placed on a statutory footing in that jurisdiction under s 30 of the Evidence Act 2006. He did not, however, note the fact that in the direct aftermath of the shift to the new rule in New Zealand, the courts struggled to apply the rule with any level of consistency and to carve out a clear jurisprudence thereunder.

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[22] ibid *per* Clarke J at para 4.25.
[23] ibid *per* Clarke J at para 4.25, referring to the judgment of O'Donnell J.
[24] ibid *per* O'Donnell J at para 97.
[25] Including the United States, United Kingdom, Canada, New Zealand, and South Africa.
[26] *JC* (n 1) *per* O'Donnell J at para 82.
[27] Established in *R v Butcher* [1992] 2 NZLR 257.
[28] *R v Shaheed* [2002] 2 NZLR 377.

2.3 The New Zealand proportionality-balancing test

It is helpful to examine the New Zealand proportionality-balancing test in more detail at this juncture, as it provides quite a clear outline of the sorts of factors which form part of any judicial decision-making on the admissibility of impugned evidence. This may be instructive in terms of the approach which judges in the Irish criminal process may adopt to the new exclusionary rule, particularly in the currently opaque context of reckless or grossly negligent breaches of rights.

Section 30 of the Evidence Act 2006 in New Zealand now provides that where the issue of improperly obtained evidence is raised the trial judge must find, on the balance of probabilities, whether or not the evidence was improperly obtained.[29] If the judge finds that it was, s/he must then determine whether the exclusion of the evidence is proportionate to the impropriety by carrying out a balancing process 'that gives appropriate weight to the impropriety and takes proper account of the need for an effective and credible system of justice.'[30] This resonates with the considerations on which Clarke J focused in his *JC* judgment. Of course, a notable difference is that the onus on the prosecution to prove the admissibility of the evidence under *JC* is to be discharged on the basis of facts proved to the higher standard of "beyond reasonable doubt".

A non-exhaustive list of factors, originating in *Shaheed*, which may be taken into account by a trial judge when making a determination on admissibility in New Zealand is provided in s 30(3):

> (a) the importance of any right breached by the impropriety and the seriousness of the intrusion on it:
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> (b) the nature of the impropriety, in particular, whether it was deliberate, reckless, or done in bad faith:
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> (c) the nature and quality of the improperly obtained evidence:
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> (d) the seriousness of the offence with which the defendant is charged:

[29] Evidence Act 2006, s.30(2)(a).
[30] Evidence Act 2006, s.30(2)(b), as amended by the Evidence Amendment Act 2016, s. 10.

(e) whether there were any other investigatory techniques not involving any breach of the rights that were known to be available but were not used:

(f) whether there are alternative remedies to exclusion of the evidence which can adequately provide redress to the defendant:

(g) whether the impropriety was necessary to avoid apprehended physical danger to the Police or others:

(h) whether there was any urgency in obtaining the improperly obtained evidence.

When these varying factors were first pronounced in *Shaheed*, the Court of Appeal provided no guidance as to the division of weight between those factors, how they should be balanced against one another or if each and every factor needed to be considered in every case. Furthermore, each factor was in and of itself substantially vague (e.g. the concept of a "serious" offence was undefined and the distinctions in police culpability were unclear) and difficult to apply without further direction. Later courts did little to rectify this weakness in the *Shaheed* test and, in fact, in many cases decisions on admissibility were made with little if any real reference to the *Shaheed* factors considered and the judicial balancing thereof. In *R v Lapham*,[31] for example, evidence obtained in breach of the accused's rights to silence[32] and counsel[33] was said to be admissible 'on any analysis of *Shaheed*'[34] though no such analysis was in fact carried out. This sort of casual approach to the application of the *Shaheed* test, and the use of additional seemingly irrelevant factors without clear justification, impeded the jurisprudential clarification of the test, to say nothing of its effect on admissibility decisions in individual cases.

While the *Shaheed* list of factors was not exhaustive most of the additional factors considered in subsequent cases seem to have been out of place in the context of the proportionality-balancing test. In *R v Allison*,[35] for example, where a driver had been stopped in breach of ss 18 and 20 NZBORA (the rights to freedom of movement and freedom from arbitrary detention) the New Zealand High Court considered that the principal factor of relevance to the admissibility decision under the *Shaheed* test was the fact that at the time the accused was stopped it appeared to him and would have appeared to any "disinterested observer" that the

[31] (2003) 20 CRNZ 286 (CA).
[32] Protected under s.23(4) NZBORA.
[33] Protected under s.23(1)(b) NZBORA.
[34] *Lapham* (n 31) at 291 (CA).
[35] HC Auckland, T 002481, April 9 2003, Williams J.

stop was being lawfully conducted. While it might have seemed that the vehicle had been properly stopped under the provisions of the Land Transport Act 1998, the real purpose was to delay the accused from returning to his residence so that listening devices could be installed there by the police. The fact that the encounter was carried out in such a way as to appear lawful to the accused or an observer ought surely not to be central to the question of admissibility where a deliberate breach of NZBORA rights had in fact been demonstrated; and it formed no part of the proportionality-balancing test as set out in *Shaheed*.

In other cases judges seemed selective in their choice of *Shaheed* factors on which to rely. An oft-omitted factor, for example, was the seriousness of the offence; this was particularly true where the decision was to exclude the impugned evidence and the seriousness of the offence would weigh against such a decision under the *Shaheed* test.[36] The failure of judges in certain cases to specify the reason for the non-application of certain factors where, on the facts, they might have appeared applicable resulted in a paucity of jurisprudential precedents on such issues for the guidance of future courts. Furthermore, the manner in which the *Shaheed* test at this time seemed to allow for judges to pick and choose what factors to apply in a given case no matter what the apparent pertinent issues gave rise to some concern. In this regard Optican warned that

> [...] selective and/or inadequate balancing under *Shaheed* risks the judicial institutionalisation of a slipshod approach to exclusion – a poor outcome for such a vital common law remedy dealing with evidence obtained by the police (or other state actors) in violation of the Bill of Rights.[37]

The "nature of the breach" provides yet another example of the potential for subjective judicial interpretation within the *Shaheed* factors: in *R v Vercoe*[38] the High Court considered that the right not to be arbitrarily detained under s 22 NZBORA had been breached in a less serious manner here where the accused had voluntarily attended at the police station than in the 'paradigm case in which police arrive on a man's doorstep, take him into custody and

[36] See, for example, *R v Kokiri* (2003) 20 CRNZ 1016 (a vehicular manslaughter case); *R v Pou* [2002] 3 NZLR 637(CA) (a multi-count burglary case); *R v Schutte* CA 178/03, September 22 2003 (a multi-count burglary case); and, *R v Zhu* HC Auckland, T 032562, October 22 2003 (a kidnapping case).
[37] Scott Optican, 'The New Exclusionary Rule: Interpretation and Application of R v Shaheed' (2004) New Zealand Law Review 451, 463.
[38] HC, Rotorua, 6 September 2002, Baragwanath J. Consedine describes *Vercoe* as the 'first decision on *Shaheed* where it can be confidently stated that the evidence in that case would not have been admitted under the prima facie exclusion rule'; Simon Consedine, 'R v Shaheed: The First Twenty Months' (2004) 10 Canterbury Law Review 77, 78.

interrogate him at the police station.' Accordingly the impugned evidence could be admitted. Drawing a distinction between differing types of breach of the same right, and using examples of hypothetically worse breaches allowed judges to effectively reduce the apparent seriousness of the breach in a specific case and to declare that the proportionality-balancing test from *Shaheed* favoured admission. Another judge might well have viewed matters otherwise, and, indeed, the lack of precision within the *Shaheed* factors themselves allowed for such differing views.

The fact that the *Shaheed* test allowed for each case to be decided on its own facts meant that judges were slow to engage in overt detailed reasoning or to apply precedents in the application of the test. Writing in 2004, Optican observed that no other *Shaheed* judgment was cited as precedent for the result in almost all of approximately 60 Court of Appeal and High Court cases wherein *Shaheed* was discussed and a written decision issued.[39] Accordingly, no clear approach to the correct and consistent application of the test became apparent in the first years of its existence and to a large extent individual judges were handing down individual decisions in individual cases. While this might be the whole point of the proportionality-balancing test, the absence of development of a clear jurisprudence on the proper application of the test was problematic and supported inconsistency. Optican and Sankoff suggested that the *Shaheed* test was operating as little more than a "judicial gut-check" on the exclusion or otherwise of evidence and was allowing for the personal predilections of judges to masquerade as principle.[40] Optican further suggested that the rule as it was then operating permitted '[...] Judges of varying ideologies, sympathies and political stripes to look into its mirror and see exactly what they want[ed] to see.'[41] While the majority of the Court of Appeal in *Shaheed* sought to introduce flexibility and discretion, this level of unprincipled decision-making cannot have been the desired result. Optican called for self-conscious judicial explication of the new exclusionary rule so as to address the confusions which it was creating in the New Zealand courts and he suggested that:

> if the law of exclusion under the Bill of Rights aspires to be something more than a repository for personal judicial preference, individual interpretive approaches, and

[39] Optican (n 37) 457.
[40] Scott Optican and Peter Sankoff, 'The New Exclusionary Rule: A Preliminary Assessment of R v Shaheed' [2003] 1 N.Z.L.R. 1, 28.
[41] Scott Optican, '*R v Shaheed*: The Demise of the Prima Facie Exclusionary Rule' (2003) N.Z.L.J. 103.

> innate ideological leanings, *Shaheed* must be tempered by some precision in its methodology and some measure of discipline in its approach.[42]

Such self-conscious judicial consideration and explication of the proportionality-balancing test was to follow, most notably in *R v Williams*,[43] but the legislature first stepped in, codifying the rule in statute.

In *Williams* the Court of Appeal made a concerted effort to offer guidance to future courts on the correct application of the *Shaheed*/s.30 proportionality-balancing test.[44] Glazebrook J, delivering the majority judgment in *Williams*, declared that '[t]he balancing exercise must be carried out conscientiously so that, even if the evidence is ultimately ruled admissible, it will be clear that the right has been taken seriously.'[45]

According to the Court of Appeal in *Williams*, the appropriate starting point for the application of the proportionality-balancing test is an examination of the seriousness of the breach which led to the impugned evidence. This entails a linked consideration of the nature of the right and the nature of the breach (i.e. the extent of the illegality; whether the police acted in breach of rights deliberately, recklessly or with gross negligence). Glazebrook J stated that '[t]he more fundamental the right and the more serious the breach, the less likely it is that the balancing test will result in the evidence being admitted.'[46] On the nature of the right, Clarke J in *JC* sought to remove the pre-*JC* definitive distinction between constitutional and mere legal rights, though he observed that

> Where evidence gathering might, in the absence of appropriate authority, give rise to a breach of constitutional, as opposed to legal, rights, then there is a greater obligation on those involved in gathering the evidence in question to ensure that they have proper legal authority for what they are doing. Given that greater obligation, a court might well more readily find fault beyond inadvertence in relation to a breach of constitutional

[42] Optican (n 37) 535.
[43] [2007] 3 NZLR 207.
[44] While the decision in *Williams* was handed down a few months before s.30 actually came into force, s.30 was on the statute-books at the time and Optican describes the approach of the Court of Appeal in *Williams* as a 'self-conscious response to the problems associated with proportionality-balancing' delivered at a time when 'the codification of the *Shaheed* exclusionary rule [was] poised to take place under s.30 of the Evidence Act': Scott Optican, '*R v Williams* and the Exclusionary Rule: Continuing Issues in the Application and Interpretation of Section 30 of the Evidence Act 2006' (2011) New Zealand Law Review 507 - 546, 510.
[45] *Williams* (n 43) 239 para. 104.
[46] ibid 239 para. 106.

> rights rather then legal rights, for the greater the obligation of care, the easier it will be to determine that an absence of care was more severe.[47]

Under the New Zealand test, a court should next consider any aggravating or mitigating factors.[48] Aggravating factors include non-compliance with a statutory code; conducting a search in an unreasonable manner; and, police misconduct.[49] Police misconduct in this context encompasses both "bad faith" and unknowing illegality or mistaken improper motives and, according to the Court it could also include a deliberate, reckless or grossly careless decision not to use alternative investigatory techniques which were available.[50] Politeness and good faith on the part of the police are not corresponding mitigating factors though as Glazebrook J. specified that such an approach is expected and its existence cannot therefore add weight to the admission side of the proportionality-balancing scales.[51] The absence of good faith may, however, add weight to the seriousness of the breach and resultantly to the exclusion side of the test. Mitigating factors were deemed to include, amongst others, where a search takes place in a situation of urgency; where the strength of the connection between the person and the evidence obtained is weak; and, where there has been attenuation of the link between the breach and the evidence.[52]

Having determined the seriousness of the breach, a court should then turn to examine the other side of the proportionality-balancing test: the "public interest" side. The factors on this side of the test militate in favour of the admission of the evidence and include the seriousness of the offence, the nature and quality of the evidence,[53] and the importance of that evidence to the prosecution case.[54] These factors must be balanced against the "seriousness of the breach" factors in order to assess whether exclusion of the evidence is a proportionate response to the particular breach.[55]

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[47] *JC* (n 1) *per* Clarke J at para 6.3.
[48] Not all of the factors adverted to by the Court in *Williams* are expressly included within s.30(3).
[49] *Williams* (n 43) 242 para. 116.
[50] ibid 244 para. 127.
[51] ibid 245 para. 130.
[52] ibid 243 para 122.
[53] 'The more cogent the evidence, the more likely it is that the accused committed the crime and the stronger the public interest in conviction': ibid 247 para. 140, *per* Glazebrook J.
[54] ibid 246 para. 134.
[55] ibid 246 para. 134.

The Court in *Williams* was most prescriptive in its approach, prescribing for future courts the appropriate manner in which to apply and assess all of the factors on the "seriousness of the breach" side of the proportionality-balancing test:

> The assessment of the seriousness of the breach should be conducted in a systematic manner ... All of the factors discussed above, to the extent they are relevant, should be enumerated and reasons given at each stage for the conclusion reached in relation to each factor and the effect that that factor has on the assessment of the seriousness of the breach. An overall conclusion would then be drawn, taking all of the factors in combination, as to the seriousness of the breach in relation to the particular individual and the particular items of evidence involved.[56]

Requiring the New Zealand courts to explicitly address the many factors involved in determining whether or not evidence should be admitted under s 30 shows respect for rights through their enunciation and consideration, allows for the development of clear precedents, and accordingly ensures that the law is predictable, an important aspect of the rule of law.

Following *Williams*, most courts dealing with admissibility issues centring on evidence obtained in breach of NZBORA rights adopted a step-by-step approach to the analysis, employing the approach suggested by Glazebrook J. and outlining clearly the reasons for admissibility decisions under the proportionality-balancing test. While certain inconsistencies of interpretation and application could still be identified across the case-law, Optican, surveying 30 relevant cases, observed that

> In comparison to the confused and unsatisfactory body of case law following the Court of Appeal's decision in *Shaheed*, the analytical schema promulgated by the Court in *Williams* – combined with the codification of the *Shaheed* exclusionary rule in s.30 of the Evidence Act 2006 – has brought much needed jurisprudential exactness to application of the proportionality-balancing test for the exclusion of improperly obtained evidence in a criminal proceeding.[57]

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[56] ibid 245 para. 132.

[57] Scott Optican, '*R v Williams* and the Exclusionary Rule: Continuing Issues in the Application and Interpretation of Section 30 of the Evidence Act 2006' (2011) 3 New Zealand Law Review 507, 543. Notably, the New Zealand Supreme Court considered the operation of s 30 in *R v Hamed* [2011] NZSC 101, but it did not endorse the *Williams* approach. Some commentators have characterised this as a missed opportunity (see, for example, Chris Gallivan and Justin Wall, '*Hamed*: Section 30' (2012) New Zealand Law Journal 116; and, Elisabeth MacDonald, *Principles of Evidence in Criminal Cases* (Brookers, Wellington, 2012) 242) while others have viewed it as a curtailment on the *Williams* dicta which 'reverts the exclusionary rule back to the initial, post-*Shaheed* era of judicial decision-making that led to the *Williams* case –that is, five years of idiosyncratic

The value of an overt discussion and application of the factors considered in handing down admissibility decisions, and the attendant development of clear precedents on this issue, is clear: police (including those working on the front-line and those in positions of authority) can be more certain of the parameters of their powers and actions; the prosecution can be more sure of the evidence which will be admitted by the trial court; the accused and his/her defence lawyers can predict with greater clarity the likelihood of any challenge to evidence being successful; and the judiciary can rely on an emerging body of case-law in order to make fair and consistent determinations on questions of admissibility. Furthermore, the extent and limitations of police powers on the one hand and individual rights on the other will be clarified for all.

While the Irish Supreme Court explicitly left the application of the principles set out in *JC* to be considered in subsequent, appropriate cases, it would have been helpful, in order to set the framework for ordered and consistent development of jurisprudence in this area, if a clearer methodology for the operation of the presumption against admission, particularly in the context of reckless or grossly negligent breaches of rights, had been provided.

3.1 Subsequent Case-Law

To date, little application of the *JC* principles has occurred within subsequent case law. Four cases which have arisen in the aftermath of *JC* and touch on the principles set out therein will be discussed hereunder; however, the three which arise most directly in the sphere of criminal procedure do not truly engage with *JC* in any significant way. The first, *People (DPP) v Colm Roche*,[58] relates to a claim that a member in charge who replaced another member in charge during the course of the detention of the accused had not satisfied himself of the lawfulness of the ongoing detention. In the second, *People (DPP) v Marcus Kirwan*,[59] a warrant for re-arrest which was issued by the District Court was so issued to a particular Detective Superintendent, but was executed by a particular Sergeant not named on the warrant. The third case, *DPP v Eamon Murphy*,[60] relates to the retention of DNA evidence beyond the period allowed under

and erratic applications of proportionality-balancing spurring the Court of Appeal's creation of the *Williams* analytical scheme' (see Scott Optican, 'Hamed, Williams and the Exclusionary Rule: Critiquing the Supreme Court's Approach to s 30 of the Evidence Act 2006' (2012) 4 New Zealand Law Review 605, 637).

[58] [2015] IESC 67 (July 23 2015)

[59] [2015] IECA 228 (October 27 2015)

[60] [2016] IECA 287 (October 12 2016).

relevant legislation. The fourth case, *Criminal Assets Bureau v Murphy*,[61] provides the closest analysis of *JC* but it involves a very new departure whereby the *JC* principles are applied to forfeiture of the alleged proceeds of crime.

3.2 Application of the *JC* rule

In *JC* itself O'Donnell J, while noting the applicability of the principles set out therein to evidence obtained consequent on arrest and detention, preferred to deal only with the issue of search warrants.[62] The decision of Clarke J was not quite as restrictive. Clarke J stated that the rule applies only where there is a question about the manner in which a relevant piece of evidence was gathered, as opposed to any question relating to the probative value of the evidence given the way in which it was obtained (e.g. in the context of a claim of an involuntary confession, or oppression leading to the making of a statement). In *Roche*, which came before the Supreme Court just three months after *JC* was decided, Clarke CJ, while not applying the *JC* rule in the instant case for a number of reasons, was of the view that the rule should apply in cases of this nature more generally. This case, which raised issues around the alleged failure of a member-in-charge who came on duty in the course of the accused's detention to satisfy himself as to the lawfulness of said detention, was a without prejudice appeal against acquittal. The Supreme Court ultimately held that there had been no unlawfulness in the accused's detention, therefore no question arose as to whether or not any evidence obtained ought to be admitted.

Hardiman J, dissenting in *Roche*, was very strong on the requirement, under *JC*, for the prosecution to establish the admissibility of any evidence in respect of which a legitimate question is raised. He considered that the prosecution had not done so in this case having failed, for example, to introduce the custody record into evidence. Hardiman J was very conscious of the fact that *Roche* was being decided just three months after *JC*. He noted the tendency in the pre-*JC* era for mere legal breaches to have no consequences in terms of the admissibility of evidence thereby obtained. In *Roche* the trial judge had acquitted the accused on the basis of his claim that evidence had been obtained while he was in unlawful custody due to the failure of the second member-in-charge to explicitly satisfy himself as to the lawfulness of that custody. Noting that this was one of the rare cases in which the judicial discretion had been

[61] [2018] IESC 12 (Feb 27 2018).
[62] *JC* (n 1) *per* O'Donnell J para 5.

exercised in favour of "an ordinary citizen" and evidence thus excluded, Hardiman J declared that he 'would be more than sorry to see this exercise of discretion overruled in a case shortly following that of JC.'[63]

3.3 Seeking a balance?

In the *Kirwan* case, an appeal against a murder conviction, it was held that the procedure whereby an arrest warrant was issued by the District Court to a particular Detective Superintendent but in fact executed by a particular sergeant was permissible under s 194 of the Criminal Justice Act 2006, and related provisions of the Petty Sessions (Ireland) Act 1851. Beyond those legislative provisions it was accepted by the court that this method was generally adopted by An Garda Síochána: it was said to be the "practice that had existed from time immemorial". In those circumstances Birmingham J in the Court of Appeal held that even if the legislation did not cover the practice, there was no deliberate and conscious violation of the accused's constitutional rights at play. He stated that

> [i]n those circumstances the case would fall four square within the pronouncements of the Supreme Court in the case of *DPP v JC* …In this case, to use the language of *JC*, there is a high constitutional value to be attached to ensuring that all potentially relevant evidence, including the visual identification evidence arising from the identification parade conducted while Mr Kirwan was in custody following on his arrest, was available to the jury. In following a long established practice, at worst the gardaí could be said to have been inadvertent. Indeed, many would feel that to describe their actions as inadvertent would be harsh in the extreme. However taking the view most favourable to the defence and so categorising the actions of the gardaí, there is still no basis for excluding the evidence of what occurred at the garda station.[64]

While not applying *JC* directly in this case, and any comments thereon accordingly being *obiter dicta* only, there is an air of balancing in the judgment. The learned Court of Appeal judge notes the "high constitutional value" to be attached to providing the jury with all potentially relevant evidence (as highlighted by Clarke J in *JC*), which clearly mitigates in favour of admission, and there is nothing on the other side of the scales to weigh in favour of exclusion, as not alone does the judge declare that the gardaí were at worst inadvertent, he cites the

[63] *Roche* (n 58) *per* Hardiman J para 8.
[64] *Kirwan* (n 59) *per* Birmingham J para 24.

possible view that it may even be harsh on the gardaí to describe their actions in that manner. This was, as noted above, an appeal against a murder conviction, and the evidence gathered subsequent to the impugned arrest was strong identification evidence from a formal ID parade. Although not very clearly alluded to, the fact that such a serious offence was involved and the nature of the evidence was so strong may have been further factors in the balance. If the Irish courts conducted a more methodological, step-by-step approach to their analysis of exclusionary rule cases, the pattern and precedents could become clearer. The Court in *Kirwan* is not to be admonished for this though, given that, again, this was *obiter dicta* due to the finding that the procedure was covered by legislation anyway.

Another observation which might be made in the context of this case is that the new exclusionary rule may discourage future policy-oriented claims being made before the courts. If gardaí have been operating a particular procedure from "time immemorial", for example, it seems unlikely that a court will exclude evidence obtained on the basis thereof, even if it considers the practice inappropriate, illegal or unconstitutional. As observed by Doyle and Feldman, in the context of statutory provisions allowing for searches of the dwelling

> [t[here is no longer any incentive for an accused person to challenge the constitutionality of any statutory provisions authorising searches, since a finding of unconstitutionality cannot result in the exclusion of evidence in that case. This may significantly retard the development of constitutional law governing the authorisation of searches.[65]

3.4 Distortion at the "Front End"?

In *DPP v Murphy* the Court of Appeal examined a conviction for aggravated burglary and unlawful use of a mechanically propelled vehicle which had been based, to a significant extent, on a DNA sample and related record from the appellant which had been retained beyond the statutorily allowable time frame. It was held here that at the time the sample was taken from the appellant there was no intention to retain it beyond the lawful period and accordingly no breach of constitutional rights occurred at that time. The fact that the sample was not disposed of in accordance with law thereafter did not retrospectively create a breach of the appellant's constitutional rights. It was observed also that an extension could have been sought on

[65] Oran Doyle and Estelle Feldman, 'Constitutional Law' (2015) Annual Review of Irish Law 156-224, 222.

application to the courts, though this was not in fact done. The Court of Appeal held that the breach occasioned in this case was one of legal rights only in that the sample and related record were not destroyed as required by statute. Accordingly, it was within the discretion of the trial judge to admit the evidence and the decision to admit was not an error of principle.

The finding that an unlawful retention of a DNA sample/record does not amount to a breach of constitutional rights is not indisputable. A note of caution might be sounded at this juncture, in the years before the move to the more flexible proportionality-balancing text in New Zealand, there appeared to be a tendency for courts to distort rights at the "front end" in order to avoid the strictness of the exclusionary rule at the "back end" of the process.[66] While the Irish courts have now arrived at the more flexible *JC* rule, and there was no suggestion of such distortion in the context of the stricter *Kenny* rule,[67] it is hoped that any concern around its usage or lack of clarity relating to its operation will not see courts attempting to side-step its application by avoiding direct consideration of claims that constitutional rights have been breached.

3.5 Novel application of *JC*

An interesting and rather unexpected application of *JC* came in the Supreme Court case of *Criminal Assets Bureau v Murphy* in February 2018. In fact, this is the case in which *JC* was scrutinised most closely since its pronouncement. It was held here that the principles on which the exclusionary rule of criminal evidence are based can be applied in the context of the forfeiture of the alleged proceeds of crime.

O'Malley J, delivering the majority judgment of the Court, set out the six principles enunciated by Clarke J in *JC*. She then looked back over the pre-*JC* case-law and determined that in *JC* '[a] new formulation of the test for the exclusion of evidence was established, more stringent than that adopted by the majority in *O'Brien* but not as absolute as the rule laid down in *Kenny*.'[68] O'Malley J examined the various rationales which have been considered throughout the pre-*JC* case-law, and in the judgments of the individual judges in *JC* itself. She examined a substantial number of decisions in non-criminal cases where the principles behind the exclusionary rule were applied, such as a number of Art 40.4.1 cases and others. The learned

[66] Scott Optican, ''Front-End'/'Back-End' adjudication (rights versus remedies) under section 21 of the New Zealand Bill of Rights Act 1990' (2008) 2 New Zealand Law Review 409.
[67] See Yvonne Marie Daly, 'Overruling the Protectionist Exclusionary Rule: DPP v JC' (2015) 19(4) International Journal of Evidence and Proof 270-280.
[68] *CAB v Murphy* (n 61) para 51.

judge also examined a number of precedents specific to the Proceeds of Crime Act. Drawing together the law on the exclusionary rule, O'Malley J stated that

> [h]aving regard to the range of Irish authorities… it seems clear that the exclusionary rule is not a free-standing rule that evolved or exists purely for the benefit of defendants in either criminal or civil proceedings. While it originated in the context of a criminal trial (O'Brien), its broader purpose is to protect important constitutional rights and values. It will have been seen that, at different times and dealing with different issues, individual judges have laid greater or lesser emphasis on particular aspects of those rights and values. However the common themes are the integrity of the administration of justice, the need to encourage agents of the State to comply with the law or deter them from breaking it, and the constitutional obligation to protect and vindicate the rights of individuals. These are all concepts of high constitutional importance. Each of them, or a combination thereof, has been seen as sufficient to ground a principle that is capable to denying to the State or its agents the benefit of a violation of rights carried out in the course of the exercise of a coercive legal power.[69]

She went on to hold that the rights and values which the exclusionary rule, in a broad sense, aims to protect, are not confined to criminal trials and their effect is not confined to the exclusion of evidence. O'Malley J recognised that the *JC* rule was not an exact fit for the circumstances before the Court, but she held that the general approach of the Court could be adapted to produce an appropriate response to the claim that rights had been breached in accessing some cash which was alleged by CAB to be the proceeds of crime. Notably this is at variance with the approach adopted to proceeds of crime proceedings in England and Wales.[70]

O'Malley J highlighted the constitutional values of the integrity of the administration of justice and the need to ensure compliance with the law by agents of the State as being of primary importance. Accordingly, she held that a court should refuse the order sought by the Criminal Assets Bureau (CAB) if the evidence established that the asset was seized in such circumstances that the court would be lending its process to action on the part of a State agent or agents involving a deliberate and conscious breach of constitutional rights, in the sense clarified in *JC*, i.e. knowing breach of rights. On further applying *JC* the learned judge

[69] ibid para 121.

[70] See *Serious Organised Crime Agency v Olden* [2009] EWHC 610 (QB), wherein Holroyde J stated at para 44: 'It seems to me that there is a clear distinction between the admission of evidence in criminal proceedings leading to imprisonment, and the admission of evidence in civil proceedings aimed at recovering property to which (if the application be made out) the respondent has never had any legitimate entitlement...'

suggested that a judicial discretion to refuse the application for the order would be created if the breach of constitutional rights was reckless or grossly negligent. She did not clarify if this would operate from the perspective of a presumption against admission, or was an open-ended discretion, though the distinction which might exist between the two (a presumption against admission and a general judicial discretion), in *JC* terms at least, remains to be clarified.

O'Malley J emphasised that it is for CAB, in seeking the order, to establish on the balance of probabilities that (i) the asset was not seized in circumstances of unconstitutionality, or (ii) that, if it was, it is appropriate nonetheless to make the order sought.[71] In all of this the judge noted, of course, that one has no entitlement to possession of the proceeds of crime. The case was remitted to the High Court for re-hearing.

4 Conclusion

The real impact of the new exclusionary rule in Ireland is yet to be seen, at least at an appellate level. It takes time, obviously, for disputes on the application of the law to make their way through the lower courts and, as noted in section 3.3 above, some of the incentive for challenging the manner in which evidence was obtained may have been removed by the decision in *JC*, as even a finding of unconstitutionality will not necessarily lead to exclusion of evidence.

Doyle and Feldman have suggested that it is likely that 'the values of *Kenny* have been so internalised by the legal profession, from which trial judges are drawn, that Clarke J's test will be applied strictly. But only time will tell.'[72] They may well be correct. What might be hoped for, in any event, is that both trial and appellate judges, in applying the *JC* rule would approach the matter in a methodical manner, setting out the nature of the relevant right, the nature of the breach, the factors seen as aggravating or mitigating the situation, and the balance arrived at taking all relevant matters into consideration. An open, transparent approach such as this will allow for clear development of precedent, will show respect for rights, and will breathe life into the new exclusionary rule.

[71] The approach adopted in *CAB v Murphy* is quite different to that adopted in the similar England and Wales case of *Serious Organised Crime Agency v Olden* [2009] EWHC 610 (QB),wherein Holroyde J stated at para 44: 'It seems to me that there is a clear distinction between the admission of evidence in criminal proceedings leading to imprisonment, and the admission of evidence in civil proceedings aimed at recovering property to which (if the application be made out) the respondent has never had any legitimate entitlement...'

[72] Doyle & Feldman (n 65) 221.