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# Exclusion of Evidence under Section 78 of the Police and Criminal Evidence Act: Practice and Principles

by

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## **Summary**

Section 78 of PACE gives the courts a discretion to exclude from a criminal trial evidence which has been obtained unfairly. The section has resulted in much case law. This article is an attempt to analyse the principles which the courts use to decide whether or not to exercise the discretion to exclude. It starts by examining the decisions of the appellate courts in order to try to identify the factors which the judges regard as relevant to this discretion. Secondly, it examines the possible policies which might underlie a discretion to exclude. It then attempts to match the practice to the policies, and concludes that 'fairness as fair play' is the dominant policy currently being used. The conclusion considers how the changes in the rights of the suspect (in particular the right to remain silent) introduced by the Criminal Justice and Public Order Act 1994 are likely to impact on the operation of s 78.

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## **Contents**

[Introduction](#)

[The Practice](#)

- [1. Bad Faith](#)
- [2. Impropriety](#)
- [3. Effect of the Impropriety](#)
- [4. Relationship between the three factors](#)

[The Policies](#)

- [1. Unreliability](#)
- [2. Fairness](#)
- [3. Deterrence.](#)
- [4. Repute](#)

[The Policies in Practice](#)

- [1. Bad faith](#)
- [2. Impropriety](#)

## Introduction

Section 78 of PACE has produced much case law over the past nine years.<sup>1</sup> So much so, that at times it has proved difficult to discern any coherent pattern to the decisions on it. The purpose of this article is first, to attempt to identify the factors that the courts profess to look for in exercising the discretion to exclude, and the policies which might underpin such a discretion. Secondly, in the light of this, the article tries to identify the dominant policy which in fact lies behind the decision to exclude. The conclusion considers whether the changes in the rights of the suspect introduced by the Criminal Justice and Public Order Act 1994 are likely to effect the operation of s 78, and, if so, what this tells us about the advantages or disadvantages of the current policy.

Before tackling these issues, however, it is necessary to outline briefly the context into which s 78 fits, in terms of the common law framework for an exclusionary rule.

The common law is still governed by the 1980 House of Lords' decision in *R v Sang* [1980] AC 402. The case concerned an *agent provocateur*, but their Lordships took the opportunity to give their considered views on the whole area of the court's power to exclude evidence. Their overall view is summarised in the speech of Lord Diplock where he stated two propositions:

"(1) A trial judge in a criminal trial has always a discretion to refuse to admit evidence if in his opinion its prejudicial effect outweighs its probative value. (2) Save with regard to admissions and confessions and generally with regard to evidence obtained from the accused after commission of the offence, he has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means." (at p 437)

Applying these propositions, the House upheld the view of the lower courts that the judge would have had no power to exclude evidence simply because it emanated from the activities of an *agent provocateur*.<sup>2</sup>

As a more general guide for other courts, however, the case has always been problematic, in that their lordships disagreed over the precise scope to be given to the rather limited discretion to exclude recognised in Lord Diplock's second proposition (that is in relation to confessions, and other evidence obtained from the accused after the commission of the offence). Lord Diplock himself, and Viscount Dilhorne, appeared to recognise very little scope for the operation of the

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<sup>1</sup> Hunter (1994) analyses 84 cases dealt with by the Court of Appeal alone.

<sup>2</sup> That this is still the position post-PACE was confirmed by the Court of Appeal in *R v Smurthwaite*; *R v Gill* [1994] 1 All ER 898. It was accepted, however, that the fact that evidence had been obtained in this way might be a factor to be considered by a judge in deciding whether to exercise the discretion to exclude under s 78: *ibid*, at p 902.

discretion, other than where the evidence was obtained as a result of a trick, or improper pressure. Lord Salmon, however, thought that a judge always has a discretion to reject evidence on the ground that it would make the trial unfair (at p 445). Lord Fraser (at p 456) felt that judges should be left to exercise their discretion "in accordance with their individual views of what is unfair or oppressive or morally reprehensible". And Lord Scarman was similarly unwilling to tie the hands of the trial judge, stating that

"the principle of fairness, though concerned exclusively with the use of evidence at trial, is not susceptible to categorisation or classification, and is wide enough in some circumstances to embrace the way in which after the crime, evidence has been obtained from the accused."

The majority were therefore not prepared to give a detailed description of the precise limits on the judge's discretion, nor were they prepared to go very far in providing examples of situations in which they considered the discretion should be exercised in favour of the accused. The test appears to be one of 'fairness', but this concept is not further defined. All this uncertainty makes *Sang* an unsatisfactory authority. It may still need to be referred to, however, in that s 82(3) of PACE states that

"Nothing in this Part of this Act shall prejudice any power of a court to exclude evidence (whether by preventing questions from being put, or otherwise) at its discretion."

This has been taken to mean that the common law rule in *Sang* is preserved insofar as it might result in a wider exclusionary rule than that to be found in s 78. Thus, in *R v Nadir* [1993] 4 All ER 513, at 517, Lord Taylor CJ explained the position as follows. He said that, if a judge

"considers evidence the Crown wish to lead would have an adverse effect on the fairness of the trial, he can exclude it under s 78 of the Police and Criminal Evidence Act 1984....He also has a general discretion to exclude evidence which was preserved by s.82(3) of the 1984 Act which would allow the judge to exclude evidence he considers more prejudicial than probative."

Subsequently, however, in *R v Khan* [1994] 4 All ER 426, Lord Taylor has taken a more restrictive view of the likely relevance of the common law. Having noted the wording of s 82(3) he commented (at p 435):

"Since, on any view, the discretion conferred on the judge by s 78 is at least as wide as that identified in *R v Sang* it is only necessary to consider the question of the exercise of discretion under s 78 - which is what the judge did."

The position thus seems to be that although in theory it is possible for evidence to be excluded on the basis of the common law rule rather than s 78, in practice this is unlikely.

Turning now to the statutory provision, this was inserted at a fairly late stage in the Parliamentary proceedings on the Act. It was put forward by the Government in the face of a concerted attempt by the Lords, led by Lord Scarman, to insert a rather stronger exclusionary provision. The section states:

"(1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

How wide is the discretion given by this provision? In *R v Mason* [1987] 3 All ER 481, one of the first cases under the Act, Watkins LJ expressed the view (at p 484) that s 78 "does no more than to restate the power which judges had at common law before the 1984 Act was passed". In *R v Samuel* [1988] 2 All ER 135, however, the Court of Appeal treated s 78 as a self-contained provision, to be interpreted within its own terms. It is this view which has prevailed in subsequent case law, and it is to the decisions on s 78 which we now turn.

## The Practice

There are three main factors which recur in the decisions under s 78, viz:

1. 'bad faith' on the part of the police;
2. impropriety, often in the form of breaches of PACE or its Codes of Practice;
3. the effect of such impropriety on the outcome of the case.

The first two of these have had explicit and widespread recognition from commentators on s 78 as forming an important part of the decision to exclude. It is submitted, however, that the third has tended to be overlooked. Each factor will be considered separately to start with, and then some attempt will be made to point out the relationship between them.

### 1. Bad Faith

One type of bad faith which may well lead to exclusion is where the police are deliberately deceitful. A clear example of this is the case of *R v Mason* [1987] 3 All ER 481. M was arrested on suspicion of committing the offence of arson. The police had no direct evidence linking him with the crime. Nevertheless they told M, and his solicitor that they had found fragments of glass from a bottle of inflammable liquid near the scene of the crime, and that M's fingerprints were on the fragments. This was quite untrue. However, in the face of this allegation M confessed, and the judge allowed the evidence of the confession to be convicted. M appealed. The Court of Appeal held that deceit practised on M and his solicitor was reprehensible, and affected M's chance of getting a fair trial. Since this confession was the only prosecution evidence, the conviction had to be quashed.<sup>3</sup>

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<sup>3</sup> As has been noted above, in the course of his judgment, Watkins LJ expressed the view that section 78 "does no more than to restate the power which at common law before the 1984 Act was passed" (ie under *Sang* [1980] AC 402). Since later decisions, however, have treated section 78 as self-contained, and not bound by the common law rules, the view of Watkins LJ should no longer be regarded as expressing the correct approach to section 78.

This blatant trick might have probably led to exclusion even under the common law rules as stated in *Sang* [1980] AC 402. Other cases, however, have suggested that the simple fact that the police are aware that they are acting beyond their lawful powers may in itself constitute sufficient bad faith to justify exclusion. In *Matto v DPP* [1987] Crim LR 641, M, who was in his car, was followed home by police officers who suspected that he had been drinking. He swerved into the driveway of his house. The police followed him in order to try to administer a breath test. M protested that they were on private property. The police officers, while indicating that they were aware that they had no power to demand a breath test in this situation, insisted that M should undergo one. They said that if M was wrongfully arrested, he could sue for false imprisonment. M gave a sample of breath which proved positive. He was arrested and taken to the police station where a second breath test also proved positive. He was charged with and convicted of driving with excess alcohol. He appealed by way of case stated. Quashing the conviction, the Divisional Court held that the Crown Court had found that the police officers were aware at the time of the first breath test that they were acting beyond their powers. This bad faith tainted all that followed. The unfairness of the procedures at M's house meant that the evidence obtained thereafter should have been excluded.<sup>4</sup> The awareness of the police officers that they were acting in excess of their powers was the reason for distinguishing this case from the pre-Act House of Lords decision in *Fox v Gwent* [1986] AC 281, where a similar unlawful breath test was held not to affect the legality of subsequent procedures.

In *Mason and Matto* the bad faith led to exclusion. In *R v Alladice* [1988] Crim LR 608 a confession was admitted, despite wrongful refusal of access to a solicitor. In confirming that the evidence was admissible, however, Lord Lane noted that there was no evidence of bad faith, and commented that "if the police had acted in bad faith, the Court would have had little difficulty in ruling any confession inadmissible under s 78".<sup>5</sup> It is clear, then that bad faith, in terms of either deliberate deceit, or an awareness of wrongdoing, is an important factor in favour of exclusion.

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<sup>4</sup> The Divisional Court in *Thomas* [1990] Crim LR 269 assumed that, following *Matto*, there *must* be bad faith to exclude evidence of a breath test. This is surely too restrictive, given the approach to the scope of section 78 in other areas. See the commentary by Birch ([1990] Crim LR 270) on this case. In *McGladrigan* [1991] Crim LR 851, another Divisional Court expressed the view that bad faith is not necessary for exclusion in breathalyser cases, though on the facts the evidence was allowed.

<sup>5</sup> A similar lack of bad faith was noted in *Kerawalla* [1991] Crim LR 451 as relevant to a decision to admit evidence of interviews held in breach of section 30 of PACE. And cf *Canale* [1990] 2 All ER 187, where Lord Lane's difficulty in believing that the police were unaware of the importance of following the procedures in PACE and its codes appeared to influence his decision in favour of exclusion.

Not every trick, however, which will be regarded as justifying exclusion. In *R v Christou* [1992] 3 WLR 228 police undercover officers set up a shop called Stardust Jewellers where they purported to buy and sell jewellery. All transactions were secretly recorded on video. The defendant was recorded dealing with stolen goods, and making incriminating statements. It was held by the Court of Appeal that the evidence was admissible. The police had not acted as *agents provocateurs*, nor incited the offences, and there was no unfairness.<sup>6</sup> In *R v Bailey*; *R v Smith* (*The Times*, 22 March 1993) an even more blatant piece of play acting was approved. The investigating officers and the custody officer played out a conversation in front of the defendants, in which the custody officer, appearing to act against the wishes of the investigating officers, insisted in placing the two defendants in the same cell. In fact, the investigating officers wanted the defendants together, as the cell was bugged. The defendants, lulled into a false sense of security, engaged in a conversation which contained a number of damaging admissions, and was recorded. The Court of Appeal found nothing wrong in what the police had done, even though it was clearly a means of circumventing the fact that they could not question the defendants further (because they had both already been charged).<sup>7</sup>

The most recent consideration of the approach to evidence obtained by police undercover activity was in *R v Smurthwaite*; *R v Gill* [1994] 1 All ER 898 (but see also, *R v Dixon*; *R v Mann*, *The Times*, 31 December 1994). The police in both these cases were alleged to have acted as *agent provocateurs*, in inciting the accused to solicit the murder of his or her spouse. The judges allowed tape-recorded conversations between the undercover officers, who were posing as 'contract' killers, and the accused to be admitted in evidence. The Court of Appeal confirmed that there was no substantive defence of 'entrapment.' On the evidential issue, the fact that evidence had been obtained by an agent provocateur should not automatically lead to exclusion under s 78, but was a relevant factor:

"...the fact that the evidence has been obtained by entrapment, or by an agent provocateur, or by a trick, does not of itself require the judge to exclude it. If, however,

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<sup>6</sup> Cf *Williams v DPP* [1993] 3 All ER 365 - the police left a lorry apparently unattended on the street, containing cartons of cigarettes, which the accused 'stole'; again there was no unfairness. Cf also *R v Bryce* [1992] Crim LR 728, where an alleged unrecorded conversation between a plain clothes police officer and the defendant about a car which the defendant was selling was excluded. The conversation had been designed to extract incriminating statements, and should have been preceded by a caution. The basis of the exclusion here, however, was a failure to comply with the Code, rather than 'bad faith'.

<sup>7</sup> The Court followed the earlier similar decision of the Court of Appeal in *R v Shaikat Ali*, *The Times*, 19 February 1991, where the defendant's conversations with his family in an interview room were surreptitiously recorded. Cf also *R v Effik*, *R v Mitchell* [1992] Crim LR 580 - evidence of intercepted telephone conversation allowed. This may raise doubts about the correctness of the judge's decision in *R v H* [1987] Crim LR 47 to refuse to admit a taped telephone conversation between an alleged rape victim and the defendant, on the basis that it was a trap, and therefore unfair.

he considers that in all the circumstances the obtaining of the evidence in that way would have the adverse effect described in the statute, then he will exclude it."

On the facts of the cases, the Court of Appeal rejected the suggestion that the police officers had acted as agents provocateurs, and held that the evidence had been properly admitted.

It seems, therefore, that 'bad faith' in this context has a very particular meaning. It covers wilfully, or knowingly, exceeding powers (*Matto*), or failing to meet the requirements of PACE and its Codes (*Alladice*). As far as deceitful behaviour is concerned, however, it now appears that the crucial factor in *Mason* was that the deceit was practised not only against the accused, but also against his solicitor. Later case law suggests that trickery in relation to the accused alone, even if it has the effect of inducing incriminating statements, will not be regarded as 'bad faith' of a kind justifying exclusion of the evidence obtained by it.

We must now consider the extent to which exclusion under s 78 will be allowed even in the absence of bad faith.

## 2. Impropriety

The fact that the police, while not acting in bad faith, have obtained evidence as a result of some 'impropriety' will be a relevant factor in the exercise of the discretion under s 78. This impropriety may take the form of a breach of criminal or civil law, or simply a failure to follow the procedures laid down by PACE and its Codes in relation to detention, questioning, identity parades, etc. The mere fact that evidence has been obtained as a result of such impropriety does not, however, automatically lead to exclusion. In *R v Khan* [1994] 4 All ER 426, evidence had been obtained from surveillance devices which had been placed on the premises of the suspect. This must have involved the tort of trespass, and, probably, the offence of criminal damage. Nevertheless, the Court of Appeal upheld the judge's decision to admit the evidence. The basis on which impropriety will lead to exclusion must therefore be explored further.

Much of the case law in this area involves the admissibility of confessions, or other incriminating statements. The reliability of confessions is, of course, largely governed by s 76. It was, however, recognised early on in the life of the Act that s 76 did not provide the sole argument for exclusion: s 78 could be used as well (see, eg, *Birch* (1989)). The two failures to comply with the correct procedures which have most frequently led to evidence being excluded under s 78, are the failure to allow access to legal advice, and the failure to comply with the requirements of Code C as regards contemporaneous recording of interviews, or incriminating statements. An early, and significant, example of this is *R v Samuel* [1988] 2 All ER 135. Samuel had been arrested in connection with a burglary, and held at a police station for questioning. After having been charged with one offence of burglary he was denied access to a solicitor. He was then interviewed again and confessed to an offence of robbery. He appealed against his conviction for this offence. The Court of Appeal held that refusal of access to a solicitor after the first charge was in breach of s 58 of PACE and of the Code of Practice on Detention and Questioning. Access to legal advice was described by the Court of

Appeal (at p. 147) as 'one of the most important and fundamental rights of the citizen'. The judge should therefore have considered whether to exclude the evidence of the confession under s 78. Since he had failed to do so, the conviction for robbery should be quashed.

It is clear that in *Samuel*, the reliability of the confession was not in issue. Even if it was reliable the breach of s 58 could have rendered its use unfair, and the judge should therefore have considered whether or not to exclude.

In *Samuel*, the Court of Appeal did not say that the breach in fact rendered the confession inadmissible, simply that the judge should have considered this issue. In other cases the courts have been prepared to say that breaches of the Act and Code do lead to such unfairness as to mean that the evidence should be excluded. In *R v Keenan* [1989] 3 All ER 599, for example, K was charged with possessing an offensive weapon. He challenged the admissibility of statements made in the course of interviews with the police, relating to his awareness that the weapon was in his car. Initially his challenge was on the basis that no proper record of these interviews had been kept, as required by paras 11 and 12 of the Code of Practice, though eventually his defence was to be that the statements were a complete fabrication. The judge ruled that, although the police were in breach, K could balance that by giving evidence himself. K chose not to give evidence, and was convicted. He appealed. Quashing the conviction, the Court of Appeal held that there were 'significant and substantial' breaches of the Code of Practice, which arose, apparently, from police ignorance of the proper procedures. Any resulting unfairness could not be cured by K going into the witness box, because if he intended to exercise his right to remain silent he would be unfairly prejudiced for exercising that right. If he did give evidence that the statements had been concocted, he would be putting his own character in issue, by attacking the police. The evidence should therefore have been excluded.

In this case, unlike *Samuel*, the judge had addressed the issue of the admissibility of the statements, and had exercised his discretion to allow them. Nevertheless, the Court of Appeal was prepared to overturn that exercise of discretion and to rule that the evidence should not have been admitted.

*Keenan* is also important in that it confirmed that a 'significant and substantial' breach of a Code of Practice could be sufficient to justify exclusion, even if there were no breach of a statutory provision.

In *Samuel*, the Court of Appeal expressed the view that it was undesirable to try to provide any general guidance as to the exercise of discretion under s 78. Subsequent cases (eg *R v Keenan* (1989) 90 Cr App Rep 1), however, have taken as a starting point the fact that breaches of the Act or Code must be 'significant and substantial' to provide a basis for exclusion. This was developed by the Court of Appeal in *R v Walsh* (1989) 91 Cr App Rep 161, where it was stated (at p.163) that "if there are significant and substantial breaches of s 58 or the provisions of the Code, then prima facie at least the standards of fairness set by Parliament have not been met." Such breaches will have some adverse effect on the fairness of proceedings, but not necessarily *such* an adverse effect that justice requires the evidence to be excluded. The judge still has to exercise a discretion on the facts of the particular case. The Court did not feel able, however, to give any more specific guidance as to how the judge should exercise that discretion, other than commenting that the fact that the police officers were acting in good faith did not stop the breaches being significant and substantial.

It appears then, to be a necessary, but not sufficient, condition for exclusion that any impropriety has been significant and substantial. This means that breaches of the provisions of Code C concerning the frequency of breaks in interrogation, and the provision of meals, are unlikely in themselves to give rise to a case for exclusion under s 78 (as, for example in *R v Brine* [1992] Crim LR 122).

### 3. Effect of the impropriety

In a number of cases where there has been clear impropriety in the form breaches of the Act or Code, the courts have thought it relevant to consider the effect of the police's conduct. That is, they have taken note of the extent to which the breaches were instrumental in obtaining the evidence, or whether the outcome of the case would have been any different if the evidence had been excluded.

In *R v Alladice* [1988] Crim LR 608, for example, the defendant had been convicted of robbery. He appealed on the basis that he had made a confession after wrongly being refused access to a solicitor. The Court of Appeal accepted that there had been a breach of s 58, but nevertheless held that the confession was admissible. An important element in this decision was that the court thought that there was no reason to suppose that the confession would not have occurred if access had been granted. Alladice's own evidence made it clear that he was well aware of the right to remain silent, and that a solicitor might well have advised him not to say anything. Similarly in *R v Dunford* (1990) 91 Cr App Rep 150 the Court of Appeal accepted that the trial judge was entitled to take into account whether the presence of a solicitor would have affected the answers given. Since it seemed that the defendant was aware of his rights, and had indeed initially answered 'no comment' to many questions, the judge was entitled to admit the evidence despite the breach of s 58.

In *Dunn* (1990) Cr App Rep 237 the breach involved the failure to make a contemporaneous note of a confession alleged to have been made during a conversation at the end of an interview, or to show any note of it to the defendant. A solicitor's clerk had been present at the relevant time, however, and the Court of Appeal thought that this was a relevant factor which the judge was entitled to feel tipped the balance in favour of admissibility. The breaches were counterbalanced by the fact that the clerk could

- (a) intervene during the conversation;
- (b) by her mere presence inhibit fabrication;
- (c) give evidence in support of the defendant's contentions.

Thus, these decisions make it clear that it is not the fact of the breach itself that justifies exclusion, but the *effect* of that breach on the proceedings. This was made explicit in *R v White* [1991] Crim LR 770, where an admission of liability was made during the course of a police search of the defendant's house. The evidence was challenged on the basis of a lack of a contemporaneous note, and the fact that the judge's admission of the evidence compelled the defendant to give evidence. The Court of Appeal, however, took the view that the strength of the prosecution's case was such that the defendant would in any case have felt obliged to give evidence, so that there was in the end no unfairness.

## 4. Relationship between the three factors

How do these three factors of 'bad faith', 'impropriety', and 'effect of the breach' relate to one another? A person wishing to challenge the admissibility of evidence may well first seek to establish a 'significant and substantial' impropriety, for example in the form of a breach of the Act or Codes. Such an impropriety can in itself justify exclusion. However, even if it is significant and substantial it will not be regarded as justifying exclusion if it is thought that it made no difference to the outcome of the proceedings. In that situation, the only possibility will be to argue for the trump card of 'bad faith'. If it can be established that the police officers concerned were acting in bad faith it will override the argument that an impropriety made 'no difference.' Indeed, it may even justify exclusion where there has been no impropriety (in the sense of a breach of the civil or criminal law, or of PACE and its Codes) at all by the police.

The 'hierarchy' of the three factors identified is thus as follows. Of first importance is the issue of bad faith. Whether or not there has been impropriety (as defined above), evidence obtained as a result of police conduct undertaken in bad faith should be excluded. It is automatically 'unfair' evidence.

Second, perhaps surprisingly, comes the effect on the outcome. If the police have acted improperly, evidence obtained as a result will be admissible if the court thinks that this did not affect the outcome. Impropriety thus only gives rise to 'unfairness' if the defendant has in some way suffered as a result of them.

Third, and in some ways least significant, is the impropriety itself. Evidence obtained as a result of this, if significant and substantial will be inadmissible, even if there is no evidence of bad faith, if it would disadvantage the defendant. If the defendant was not in practice prejudiced by the impropriety, however, it will not be 'unfair' to allow the evidence.

## The Policies

We have now identified, and examined, the various factors which the courts look to in exercising the discretion under s 78. We must next consider the policy reasons which might justify excluding evidence. In his article "Improperly obtained evidence: a reconsideration" (1989), Andrew Choo argued that there were three possible rationales for the exclusion of such evidence, namely 'compensation', 'deterrence' and 'repute'. Subsequently he has suggested that the third of these could be reformulated as a principle of 'judicial legitimacy' (Choo 1993, pp 98-103), which he regards as the most satisfactory basis for a discretionary power to exclude evidence. Andrew Ashworth, on the other hand, has referred to three slightly different principles for exclusion: discipline, reliability, and protection (Ashworth 1977).<sup>8</sup> This categorisation was adopted by

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<sup>8</sup> Ashworth argues for the 'protective' principle as the basis for a discretionary exclusionary rule. It is submitted, however, that this principle can be encompassed

Mary Hunter in a recent empirical study of the area (Hunter 1994). 'Discipline' is very close to 'deterrence', and the protective principle has links with 'compensation'. There is, however, no general agreement on the possible policies, or how they should be categorised. It is argued here that there are in fact four possible policy bases for decisions on exclusion: unreliability, fairness, deterrence, and repute. What is meant by these four concepts must now be explained in more detail.

## 1. Unreliability

Any legal system which involves taking decisions on the basis of evidence will have some means of testing its reliability. The policy here is thus the avoidance of the use of unreliable evidence. Note, however, that although reliability is inevitably an issue to which the courts must pay attention, it does not necessarily lead to an exclusionary rule. A system could have the rule that unreliable evidence should simply be treated with caution rather than excluded altogether. Moreover, the degree of caution could vary with the degree of unreliability.

This 'unreliability' policy has operated most frequently in English law in relation to confessions.<sup>9</sup> Section 76 of PACE embodies the current rules whereby confessions may be excluded on the basis that they have been obtained by oppression, etc. The underlying policy here is clearly that of unreliability. The policy may be, and probably is, however, operative in other areas. It is presumably the policy which underpins the hearsay rule, and it may also be relevant in relation to evidence of identification of people or things. A good example of the latter is provided by *R v Gannell*, *The Times*, 16 August 1989. This concerned the identification of a car used in a burglary. The witness had previously said that the car was brown in colour. The witness was shown three cars, and asked to identify the one she had seen. She picked out the defendant's car. The judge, however, excluded this evidence, because, of the three cars she was shown one was blue, one was green, and only that belonging to the defendant was brown!

## 2. Fairness

As noted above, Choo refers to a principle of 'compensation' and Ashworth to one of 'protection'. These are both defined as relating to the situation in which a defendant's rights have been infringed, so that it is "the responsibility of the court to protect him from any disadvantage flowing from the infringement" (Choo 1989, at p 268). This principle could also be stated, however, without significant distortion, as a requirement that the evidence should be excluded because it would be 'unfair' to allow it to be used. This is the language of s 78, under which

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within the 'fairness' category, defined in the broad way suggested here. See also, Bailey, Harris & Jones, *Civil Liberties Cases and Materials*, 3rd ed, pp 130-131.

<sup>9</sup> Perhaps for this reason it is not given much consideration in Choo's article (Choo (1989)) since he is specifically concerned with non-confessional evidence.

evidence can be excluded if the court feels that its admission 'would have such an adverse affect on the fairness of the proceedings that the court ought not to admit it.' On what basis is the admission of evidence 'unfair'? One answer would be, using the compensatory approach, that the defendant's rights have been infringed and it is 'unfair' if he or she has no means of redress.

Another possibility is that fairness could be taken to relate to the requirements of 'fair play' (see, eg, May 1988), so that if someone has broken 'the rules of the game' (eg PACE and its codes) then fairness requires that they should not be allowed to take advantage of this. The analogy here is with competitive sport, which is perhaps reinforced by the adversarial nature of our criminal justice system. Two sides are in opposition, and 'playing' in accordance to a set of rules. Those who break the rules, particularly if they do so in a deliberate and serious way, will not be allowed to gain an advantage thereby. Cheating, is particularly frowned upon, as is 'unsportsmanlike' conduct. The latter may not necessarily involve any breach of any specific rule of the game.

Yet another analysis could place the concept of fairness in the context of a requirement of 'balance', that is the need to provide a fair balance between the powers of the police, and those of the defendant.<sup>10</sup> Because the police have far greater power and authority than the individual defendant, there is a need to ensure that they do not abuse their position, and take unfair advantage of it.

The concept of 'fairness' is thus somewhat nebulous. Further discussion of its meaning as far as the English courts are concerned will be attempted below. The three approaches outlined above will be referred to by the convenient shorthand of:

- (i) fairness as compensation;
- (ii) fairness as fair play; and
- (iii) fairness as balance.

### 3. Deterrence.

'Deterrence' as a justification for the exclusion of evidence is based on the idea of using the exclusion as a means of penalising the police, and thereby encouraging them to make sure that in future correct procedures are followed. As Choo notes, this approach has been a dominant one in the United States' jurisprudence on exclusion. In order to protect the Fourth Amendment, and to deter the police from acting in contravention of its safeguards for the individual, the courts have refused to allow the admission of evidence which has been obtained improperly.<sup>11</sup> This approach has the potential to operate in a very mechanistic way: once there is any

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<sup>10</sup> This comes close to, but does not precisely match, Choo's concept of judicial legitimacy, which also requires a 'balance': in his case, however, the balance is between the 'public interest in the conviction of the guilty', and 'the public interest in the moral integrity of the criminal process' - Choo (1993), at p 100.

<sup>11</sup> See, for example, *US v Calandra* 414 US 338 (1974), and *Stone v Powell* 428 US 465 (1976); both cited in Choo (1989) at p 270.

breach of procedure by the police, then the evidence is to be excluded. The effect of the breach on the outcome of the trial, and the issues of reliability and fairness, will all be irrelevant. The question is purely one of procedure. In practice, of course, the seriousness of the breach may well effect the court's decision. The exclusion is primarily based, however, on the effect that a refusal to admit the evidence may have on police behaviour in general (and therefore the fair treatment of suspects in general) rather than on any issues arising out of the particular case. For that reason it may be seen as rather a blunt instrument.

## 4. Repute

The fourth approach is perhaps best exemplified by the Canadian Charter of Rights and Freedoms, which allows evidence to be excluded if 'having regard to all the circumstances, the admission of it would bring the administration of justice into disrepute' (Section 24). I shall refer to this as the 'repute' approach. Like 'deterrence' it is not concerned with the effects on the particular case, but with the more general administration of justice. It clearly supports the exclusion of unreliable evidence, but it is a 'double-edged' sword in relation to improperly obtained evidence. On the one hand, the admission of evidence that the police have obtained through oppression, trickery, or trespass, may bring the administration of justice into disrepute. As Choo puts it, the judiciary "becomes, in a sense, an accomplice to the improper...action" (Choo 1989 at p 276). On the other hand, the perception that a guilty person may well have been acquitted of a serious offence because reliable evidence could not be used may have a similar effect. It may be characterised as the 'guilty' being acquitted on a 'technicality' (cf, for example, *R v Smurthwaite* [1994] 1 All ER 898, at pp 902-903 - "Fairness of the proceedings' involves a consideration not only of fairness to the accused but also...of fairness to the public"). The 'repute' principle, for this reason, is likely to leave much to the discretion of the judge in the particular case, who will have to weigh these two considerations, both of which are concerned with maintaining the reputation of the trial process. (Cf Choo's advocacy of the principle of judicial legitimacy (Choo 1993)).

## The Policies in Practice

We are now in a position to put the two parts of the previous discussions together. Having identified the factors which lead courts to exclude under s 78, and also the possible policy reasons for such exclusion, we can consider which policy or policies in fact form the basis of the decisions. Overtly the courts profess to be concerned with the 'fairness of the proceedings'. This, however, simply reflects the wording of s 78 itself. The courts will inevitably claim to be working within the limits imposed by a statute. It does not necessarily mean, however, that the policy identified above as 'fairness' is the one being used. In any case, as has already been pointed out, the concept of 'fairness' can have a number of different meanings. The courts' own statements of their reasons for acting cannot, therefore, be taken as conclusive of the policies in operation, though, of course, they will be a factor to consider. The approach will be to take each of the factors identified above in turn, and to consider with which policy or policies it is most consistent. An attempt will then be made to draw some conclusions.

# 1. Bad faith

The fact that bad faith is a very important factor in the decision to exclude indicates that reliability is not the dominant policy. In *Matto's* case, for example, there was no question that the breath tests were reliable, but the bad faith of the officers whose actions had led to the tests being taken meant that they should be excluded.

Bad faith seems to relate most closely to the policy of deterrence. Where the police have knowingly acted in contravention of the rules, they should not have the benefit of evidence acquired as a result. The problem with this is that the courts have consistently stated throughout the cases on PACE (from *Mason* [1987] 3 All ER 481, to *Hughes* [1994] 1 WLR 876) that disciplining the police is not their function. As Lord Taylor put it in *Hughes* (at p.879):

"It has been said more than once in this court that the object of a judge in considering the application of section 78 is not to discipline or punish police officers or customs officers for breaches of the code. There are other procedures for doing that."

Although, as noted above, we should not necessarily take such statements as ruling out the deterrent policy entirely, it must encourage us to look for alternative explanations for the relevance of 'bad faith'.

The concept of 'unfairness' can certainly be defined in a way which would encompass bad faith as a relevant factor. Fairness as meeting the need for compensation for the breach of the defendant's rights, which would otherwise be left without redress, does not go far enough here, however. This is because bad faith is a factor which leads to exclusion even where there is no breach of the defendant's rights under the Act or Codes (as in *Mason* [1987] 3 All ER 481). Nor does 'fairness as balance' satisfactorily explain the way in which bad faith can act as a trump card, automatically rendering evidence inadmissible, with no question of a 'weighing' process being necessary. 'Fairness as fair play' can, however, easily accommodate bad faith. Cheating and deception are classic examples of 'unfair play', and once the perpetrator has overstepped the mark of acceptable behaviour, penalties will automatically follow. Gains and advantages achieved by it will have to be given up. In this context, the evidence acquired as a result of the 'cheating' will be inadmissible.

'Bad faith' can also be accommodated within the 'repute' policy. To allow prejudicial evidence which has been acquired in such a way to be admissible may reflect adversely on the criminal justice system as a whole. If the prosecution were allowed to gain a conviction on the back of evidence acquired as result of knowingly wrongful actions this would adversely affect its reputation. The fact that such behaviour was condoned by the courts would reduce respect for the system, and thereby weaken it.

The reliance on bad faith as an element in the decision under s 78 can therefore be explained on the basis of 'fairness as fair play', or 'repute'. It might also be

explained by deterrence if this were not specifically ruled out by a number of judicial statements to this effect.

## 2. Impropriety

Why should impropriety, such as significant and substantial breaches of PACE or its Codes, in itself justify exclusion? Reliability could be the policy here. It might be argued, for example, that confessions obtained without the benefit of legal advice, were inherently unreliable. The argument becomes even stronger where the breach involves the failure to make a contemporaneous record of statements. Reliability could also lie behind decisions to exclude identification evidence on the basis of breaches of Code D (eg *R v Nagah* [1991] Crim LR 55), and is consistent with a reluctance to exclude physical evidence. One argument against this in fact being the policy underlying the decisions, is that the courts do not talk in these terms. The exclusion of confessions obtained after a breach of s 58, for example, is generally based not on questions of reliability, but on the fact that the defendant, if properly advised, might have exercised the right to remain silent. (The consequences to this of the changes made by the Criminal Justice and Public Order Act 1994 are discussed below). Moreover, not all types of impropriety will raise reliability issues. Given that a policy centred on reliability is also ruled out by the fact that bad faith is considered relevant, it is probably better to look elsewhere for the policy behind exclusion on the grounds of breaches of the Act or Codes.

'Deterrence' does not provide the answer, however. If this were the policy being followed, then *any* breach of the Act or Codes should lead to exclusion, and this factor specifically requires significant and substantial breaches.

It is in this area that 'fairness as compensation' might be thought to have a role to play. Breaches of the Act or Codes are clearly infringements of the defendant's rights, and so the use of exclusion could be regarded as a means of compensating for this. Moreover, the more frequent use of exclusion in relation to confessions and incriminating statements, as opposed to physical evidence, could be explained by the fact that in relation to the latter there may well be other legal actions available (such as trespass or assault), whereas in relation to breaches of s 58 or the requirement to keep records, the only other remedy is a formal complaint against the officers' concerned. (Note also that s 67(10) of PACE excludes the taking of any civil action simply on the basis of a breach of the Codes).

The argument for 'fairness as compensation' as explaining this factor in the decision to exclude breaks down on two grounds, however. First, not all improprieties will lead to exclusion. If the approach was based on there having been a breach of a right, one would have expected a remedy to follow automatically. But, as we have seen, only certain breaches of a Code will justify exclusion. Breaches which the court considers minor fall outside this category (eg *Brine* [1992] Crim LR 122). Even a breach of a statutory requirement (eg to take an arrested person to a police station) may not be sufficient in itself to justify exclusion (*Kerawalla* [1991] Crim LR 451). Secondly, if the decision to exclude were rights-based, the question of the *effect* of the breach should be irrelevant.

This argument against s 78 being based on 'fairness as compensation' is considered further in the next section.

The existence of the Codes can in some ways be seen as an attempt to provide a counterweight to the wider powers which were given to the police under PACE. This would suggest that 'fairness as balance' is a possible candidate to explain the exclusionary discretion. The element of 'weighing' of factors which is a necessary part of the 'balance' approach would explain the fact that only certain breaches are regarded as sufficiently serious to justify exclusion. The fact that the issue of whether the breach is significant and substantial is treated as important means that the 'fairness as balance' approach must be treated seriously as the guiding policy for the use of the s 78 discretion. As we have seen above, however, the importance of bad faith, acting as a 'trump card', suggests that fairness as balance does not explain the whole picture.

This objection does not, however, have the same force in relation to the 'repute' principle, which is also to some extent based on 'balance'. Here the balance is concerned with the effect of the decision to exclude or admit on the administration of justice in general, rather than on the defence or prosecution in the particular case. In this context, it is possible, as has been noted above, to accept that 'bad faith' should always operate to require exclusion. To this extent, therefore, repute is a more satisfactory explanation than 'fairness as balance'. It provides a basis for giving more weight to some breaches of the Act or Codes than to others, and thus the fact that courts ask whether a breach is 'significant and substantial' is consistent with repute being the underlying principle for determining whether or not to exclude.

Finally, 'fairness as fair play' can also explain the importance of this factor. The concept of 'fair play' will always have inherent in it the fact that trivial breaches of the rules can be ignored. The footballer who 'steals' half a yard at a throw-in, or in placing a free kick, will in all likelihood not be penalised; the one who attempts to steal ten yards almost certainly will be. Fair play is thus a sufficiently flexible concept to accommodate an insistence on improprieties being serious before they will lead to exclusion.

In summary, the relevance of significant and substantial breaches to the decision to exclude is consistent with an underlying policy based on fairness as balance, fairness as fair play, or repute.

### 3. Effect on the outcome

Neither reliability nor deterrence are capable of explaining the importance of this factor. The focus here is on the use that has been made of the evidence, not on how it was obtained. Thus circumstances which may have rendered it unreliable are not relevant. On the other hand, if deterrence were the dominant policy, all impropriety should be punished, and the fact that it has not affected the outcome of the case should be neither here nor there. Similarly if 'fairness as compensation' lies behind the decision, the outcome should not matter. The infringement of the suspect's rights is the same, whether or not evidence that would not otherwise have become available is obtained thereby.

That the outcome of the impropriety is regarded as significant is probably also inconsistent with 'fairness as balance'. If the idea is to attempt a general equalisation of the position between the police in general on the one hand, and suspects in general on the other, then the fact that in a particular case a failing on the part of the police has not led to any significant advantage to them should not be relevant. It is also questionable whether a 'repute' policy should take account of this factor. Does the effect on the reputation of the criminal justice system depend on the, perhaps fortuitous, question of whether the police have obtained an advantage, or not? The answer must surely be no.

It is submitted then, that the only policy which is clearly consistent with this factor is that of 'fairness as fair play'. The concept of fair play embodies the idea of 'unfair advantage'. In games, it is quite usual for a player who has broken the rules not to be punished if the other side has nevertheless gained an advantage. This is particularly likely to be the case where the breach is neither serious nor deliberate. The policy of fair play thus focuses on the particular case, and the position of the parties to it, rather than on any broader considerations.

## Conclusions

The results of the above analysis can be represented in tabular form as follows, with the crosses indicating that the policy and the factor are inconsistent with each other:

<b>FACTORS</b>	Bad Faith	Impropriety (significant and substantial)	Effect on outcome
<b>POLICIES</b>			
Reliability	<b>X</b>		<b>X</b>
Deterrence		<b>X</b>	<b>X</b>
Fairness as compensation	<b>X</b>	<b>X</b>	<b>X</b>
Fairness as balance	<b>X</b>		<b>X</b>
Fairness as fair play			
Repute			<b>X</b>

From this it will be seen that the only policy which is consistent with all three factors on which the courts place importance is that of 'fairness as fair play'. All the others, apart from 'repute' are inconsistent with at least two factors. 'Repute', on the other hand, is ruled out only by the fact that the effect on the outcome is regarded as important. It is also true, however, that the focus of the courts' consideration of the exclusion issue under s 78 tends to be on the individual case, the achievement of justice (or 'fairness') on the particular facts, rather than on the

message which a decision one way or the other would give about the administration of justice in general. We can conclude, therefore, that the dominant policy behind the application of s 78 is simply to prevent the prosecution gaining an advantage *in a particular case* as a result of impropriety. The implementation of this policy may, of course, also incidentally serve the policy of maintaining the reputation of the administration of justice (or, in Choo's terms, 'judicial integrity'), but it seems that if the two are in conflict it is fair play as regards the individual that should prevail.

The argument here is that fair play is the *dominant* policy. It is not contended, however, that it is exclusive. It is quite possible that in particular cases other policies will be seen to operate. In *R v Khan* [1994] 4 All ER 426, for example, Lord Taylor (at p 437) presents the argument for and against exclusion as being determined by balancing the police impropriety (trespass, criminal damage) and infringement of the defendant's privacy, against the fact that:

"no crime was incited; no deliberate deceit was practised on the appellant; no misleading information was advanced or pressure placed upon him to induce him to speak; the police did not act oppressively towards him; at the time the conversation was taped the appellant had neither been arrested, interviewed nor charged; the tape provided a clear record of what was admittedly said by the defendant; and no question arose of the breach of any Codes of Practice...."

The conclusion was that the impropriety and intrusion on privacy were insufficient gravity to outweigh the factors listed, "all of which militated in favour of concluding that fairness to both sides required the admission of the evidence." This way of presenting the issue suggests that 'fairness as balance' is the policy being employed. At the same time, it is clear that a major reason for not excluding was that the impropriety was not regarded as particularly serious. The argument for using s 78 thus fell, in the absence of bad faith, at the 'significant and substantial' impropriety hurdle. This is also consistent with fairness as fair play.

If fair play is the dominant policy that is being employed, what is the significance for the operation of s 78 of the changes to the right of silence introduced by the Criminal Justice and Public Order Act 1994? This Act, by virtue of ss 34-39, allows inferences to be drawn from the failure of a suspect to answer questions, or give information. The intention of this, and the probable result, is that solicitors will less frequently advise their clients to refuse to answer questions put to them during police questioning. A significant number of cases where exclusion under s 78 has been approved have involved a breach of the entitlement under s 58 of PACE to legal advice. This is because the suspect has made statements which he or she would probably not have made if legal advice had been available. If, however, the presence of the legal adviser is less likely to result in silence, and since the *outcome of the impropriety* is an important factor in the decision whether to exclude, the effect is likely to be a reduced number of occasions where evidence obtained following a breach of s 78 will be excluded. The police will not have gained an unfair advantage in the particular case, and so the policy of fair play will not require exclusion.

This conclusion shows the limitations of fair play as the basis for a discretionary exclusionary rule. It is largely dependent on the rules of the game which the parties are playing. If those rules change, as they have done with regard to the right to silence, then this may affect significantly what will be regarded as 'fair play', and, as a consequence, the result of any exercise of discretion. This is reinforced by the concentration on the position of the individual parties, and the issue of fairness as between them. Broader based policies, such as repute, or deterrence, would not be so much affected by what has happened in the individual case, and would allow a more detached approach to the development of an exclusionary rule. As far as English law is concerned, however, it may well be that we have already passed the high-water mark of the use of s 78. If so, this development will not be the result of any considered view that the section has, as a matter of policy, been used too much to exclude evidence, but rather a side-wind from the change in the rules relating to the right to silence. This cannot be regarded as a satisfactory process for the development of such an important aspect of the criminal justice system.

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