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RESEARCH ARTICLE

Discretion to exclude improperly obtained evidence in civil proceedings in England and Wales

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Abstract

Exclusion of improperly obtained evidence is often discussed in relation to criminal proceedings, but not civil proceedings, where concerns about wrongdoing of state actors and deprivation of liberty are not usually present. It is sometimes assumed that judges in civil proceedings in England and Wales had no discretion to exclude relevant and reliable evidence based on how it was obtained (as a distinct concern from exclusion of evidence of little probative value) prior to the enactment of the Civil Procedure Rules 1998. This paper seeks to demonstrate that this is wrong, arguing that a number of sources of power to exclude evidence on the basis of how that evidence was obtained have arisen in England and Wales, and that these are not attributable to the Civil Procedure Rules. There is a discretion which enables exclusion of evidence where this is 'in the interests of justice', and a discretion to do with the administration of justice. It may be possible to break these down further, to concerns over abuse of the court's own procedures, and executive illegality. Analysing the decisions leading to these developments reveals the importance of human rights concerns to recognition of exclusionary discretion in civil proceedings, and for informing the content of the discretion/s.

Keywords: law of evidence; improperly obtained evidence; human rights; civil procedure

Introduction

As recently as 2016, the existence of a discretion to exclude improperly obtained evidence in civil proceedings was a live issue in Aotearoa New Zealand. The New Zealand Court of Appeal held that no discretion existed, partly because 'the common law principle that the manner in which evidence is obtained, even if improper or illegal, does not bar its admission at trial … well established in the United Kingdom'[1] applied in New Zealand prior to enactment of the Evidence Act 2006.[2] In 2019,

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[1]The relevance of the English approach on this issue arose because of New Zealand's historical links to the English legal system. Prior to the creation of the New Zealand Supreme Court in 2004, New Zealand's Court of Appeal was bound to follow decisions of the Privy Council in New Zealand cases, and would 'differ from the decisions of [the House of Lords] slowly, reluctantly and only occasionally': R Cooke 'Divergences – England, Australia and New Zealand' [1983] NZLJ 297.

[2]*Commissioner of Police v Marwood* [2015] NZCA 608, [2016] 2 NZLR 733, at [38]. Although the New Zealand Supreme Court held that jurisdiction to exclude improperly obtained evidence (at least where such evidence has been obtained in breach of a right contained in the New Zealand Bill of Rights Act 1990) does exist (*Marwood v Commissioner of Police* [2016] NZSC 139, [2017] 1 NZLR 260), this has been the subject of criticism: S Optican 'Every silver lining has a cloud

the New Zealand Law Commission stated that 'we think it is at least arguable that there should be no jurisdiction to exclude improperly obtained evidence in civil proceedings involving only private parties'.[3] In 2021, the English Court of Appeal in *Ras Al Khaimah Investment Authority v Azima* was faced with an argument that an appeal should be allowed partly on the basis that the evidence relied on in the lower court had been unlawfully obtained.[4] Although acknowledging the existence of the power to control evidence contained in the Civil Procedure Rules (CPR),[5] the Court also repeated Lord Denning's statement that in civil proceedings, 'the judge has no discretion … The judge cannot refuse [evidence] on the ground that it may have been unlawfully obtained in the beginning'.[6] When this statement is still cited, it is no wonder that the existence of a jurisdiction enabling exclusion of relevant evidence continues to be seen as controversial, with the most recent edition of the *White Book* stating 'rule 32.1(2) rightly assumes that the court has no general power to exclude admissible evidence'.[7] The idea that there is no discretion outside the CPR enabling exclusion of improperly obtained evidence thus continues to be a pervasive one.[8] That being so, this paper challenges the view that CPR 32.1 (providing that the court may control evidence, and may 'use its power under this rule to exclude evidence that would otherwise be admissible'), as read in *Jones v University of Warwick*,[9] is the modern source of exclusionary discretion in civil proceedings.[10] It does so by untangling the threads of exclusionary discretion for English civil proceedings.[11] When the focus is taken

– the exclusion of improperly obtained evidence in civil proceedings: Marwood v Commissioner of Police [2016] NZSC 139, [2017] 1 NZLR 260' (2017) New Zealand Criminal Law Review 228; New Zealand Law Commission 'Second review of the Evidence Act 2006 – Te Arotake Tuarua i Te Evidence Act 2006' (NZLC IP42, 2018); New Zealand Law Commission 'The second review of the Evidence Act 2006 – Te Arotake Tuarua i Te Evidence Act 2006' (NZLC R142, 2019).

[3]NZLC R142, above n 2, para 7.80.

[4]*Ras Al Khaimah Investment Authority v Azima* [2021] EWCA Civ 349.

[5]Ibid, at [43].

[6]*Helliwell v Piggott-Sims* [1980] FSR 356 (CA), at 357 (cited in *Ras Al Khaimah Investment Authority v Azima*, above n 4, at [41]).

[7]P Coulson (ed) *Civil Procedure 2021*, vol 1 (Thomson Reuters, 2021) para [32.1.4].

[8]HL Ho 'On the obtaining and admissibility of incriminating statements' (2016) Singapore Journal of Legal Studies 249, at 274; R Glover *Murphy on Evidence* (Oxford: Oxford University Press, 15th edn, 2017) p 59; R Parkes et al *Gatley on Libel and Slander* (Sweet & Maxwell, 12th edn, 2017) para 33–11.

[9]*Jones v University of Warwick* [2003] EWCA Civ 151, [2003] 1 WLR 954.

[10]See HM Malek *Phipson on Evidence* (Thomson Reuters, 20th edn, 2022) para 39–33 but noting that there are exceptions when considering claims of public interest immunity or privilege; C Hollander *Documentary Evidence* (Sweet & Maxwell, 14th edn, 2021) para 27–01; I Dennis *The Law of Evidence* (Sweet & Maxwell, 7th edn, 2020) para 3–009, claiming that the CPR introduced a 'general exclusionary discretion into civil proceedings'; V Rijavec and T Keresteš 'Restrictions on the admissibility of evidence' in CH van Rhee and A Uzelac (eds) *Evidence in Contemporary Civil Procedure* (Intersentia, 2015) p 99, attributing power to exclude improperly obtained evidence to the CPR; A Keane and P McKeown *The Modern Law of Evidence* (Oxford University Press, 12th edn, 2018) pp 47, 61, stating that there was no discretion to exclude evidence obtained improperly or illegally prior to the enactment of the CPR; R Munday *Evidence* (Oxford University Press, 10th edn, 2019) para 1.79, claiming that 'the Civil Procedure Rules … have altered the position'; G Durston *Evidence: Text & Materials* (Oxford University Press, 2nd edn, 2011) p 63; M Iller *Civil Evidence: The Essential Guide* (Sweet & Maxwell, 2006) pp 1–40, claiming that following enactment of the CPR the court 'has now for the first time been given a specific discretion to exclude evidence that would otherwise be admissible'; *Silversafe Ltd (in liquidation) v Hood* [2006] EWHC 1849 (Ch), at [52].

[11]For the approach in Scotland, see M Ross et al *Walker and Walker: The Law of Evidence in Scotland* (Bloomsbury Professional, 5th edn, 2020) para 1.7.8; *In re the Baronetcy of Pringle of Stichill* [2016] UKPC 16, [2016] 1 WLR 2870, at [77] citing *Duke of Argyll v Duchess of Argyll (No 3)* 1963 SLT (Notes) 42 (OH) and *Martin v Mcguiness* 2003 SLT 1424 (OH). For an overview of the approaches taken in national laws of other European states, see Rijavec and Keresteš, above n 10. They classify the Republic of Croatia and Greece as applying a general principle of inadmissibility for illegally obtained evidence, on a constitutional level, applicable to all types of proceedings. In contrast, Slovenia, Austria, Germany, Denmark, Estonia, Switzerland, Finland, Poland, Sweden, Romania, Latvia, Hungary, Ireland and France are classified as states where either there are no express provisions restricting the admissibility of illegally/improperly obtained evidence, and/or a balancing of interests takes place in determining whether to admit/exclude. The countries with no, or limited, restrictions on evidence are said to be Bulgaria, Malta, the Netherlands, the Slovak Republic, and England. For criticism of the approach taken in Canada, where the judiciary has recognised a power to exclude evidence in civil proceedings, see P Sankoff and Z Wilson 'A jurisprudential "house of cards": the power to exclude improperly obtained evidence in civil proceedings' (2021) 99 The

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away from CPR 32.1, we see that there are at least three bases for exclusion of evidence in civil proceedings. Conceptually, these are either threads of one overarching general discretion, traceable to the Court of Appeal's 1913 decision in *Lord Ashburton v Pape*[12] albeit that this is now to be understood within a human rights framework; or these are independent (but sometimes overlapping) discretions, concerned respectively with abuse of the court's own processes, executive illegality, and human rights breaches. Whichever conception is preferred (general discretion or specific discretions), this untangling brings the importance of human rights considerations to the foreground.

This paper will take a roughly chronological approach, following the development of *Lord Ashburton v Pape*. It will be argued that that decision effectively resulted in exclusion of relevant and reliable evidence in an absolute manner, because of the way the evidence had been obtained (although the precise basis for this has been contested). After lying dormant for several decades, *Pape* was picked up in the 1980s and developed further. After discussing another common law development concerning evidence obtained via torture, which will be shown to ground a discretion to exclude evidence if its admission would 'dishonour the administration of justice',[13] we return to *Pape* with *Imerman v Imerman*.[14] In *Imerman*, Lord Neuberger MR (as he then was) recognised a discretion enabling exclusion of admissible evidence if a judge is 'satisfied that it is in the interests of justice to do so'.[15] This paper argues that this development is traceable to *Pape*. Neither common law jurisdiction has anything to do with the CPR, substantiating the claim that it is wrong to view CPR 32.1 as the only source of exclusionary discretion in civil proceedings.

Human rights law provides yet a third source. Considering the relevance of human rights concerns head on demonstrates that the recognition that CPR 32.1 could be used to exclude improperly obtained evidence in *Jones v University of Warwick* actually had nothing to do with CPR 32.1, and was wholly attributable to the Human Rights Act 1998.

Clarity as to the existence of power/s enabling exclusion in civil proceedings is important to enable consideration of when exercising those powers might be justified. It will be recalled that the Court of Appeal in *Ras Al Khaimah Investment Authority v Azima* seemingly doubted the existence of a power to exclude relevant evidence, referring to Lord Denning's view that there should be no discretion in civil proceedings. Nonetheless, it recognised the availability of CPR 32.1, asking 'if it established that one party has obtained evidence unlawfully, how is the court to exercise its discretionary power?'[16] The answer to the latter question will necessarily require the court to identify for what cause – interests of justice akin to an equitable remedy, executive illegality or human rights law – the evidence is sought to be excluded.

(a) Theoretical justifications for exclusion of evidence

Before discussing the development of *Pape,* it is necessary to say something about justifications for exclusion of evidence. The intuitive attraction of admitting all relevant evidence, no matter how obtained, in order to maximise the truth-finding capacity of litigation, means that the orthodox view is that exclusion of evidence must be justified.[17] As 'truth' is constrained by the boundaries of the material before the court, proponents of a 'truth at all costs'[18] view of litigation will endeavour to keep the boundaries of permissible material wide, rejecting restrictions which might otherwise

Canadian Bar Review 145. For Australia, see s 138 of the Evidence Act 1995 (Cth). For the approach taken in New Zealand, see the material cited in n 2 above.

[12]*Lord Ashburton v Pape* [1913] 2 Ch 469 (CA).

[13]*A v Secretary of State for the Home Department (No 2)* [2005] UKHL 71, [2006] 2 AC 221.

[14]*Imerman v Imerman* [2010] EWCA Civ 908, [2011] Fam 116.

[15]Imerman, n 14, at [171].

[16]*Ras Al Khaimah Investment Authority v Azima*, above n 4, at [43].

[17]W Twining *Rethinking Evidence: Exploratory Essays* (Cambridge: Cambridge University Press, 2nd edn, 2006) pp 203–204.

[18]CH van Rhee and A Uzelac (eds) *Truth and Efficiency in Civil Litigation: Fundamental Aspects of Fact-Finding and Evidence-Taking in a Comparative Context* (Intersentia, 2012) p 7.

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arise if we were to take into account the way that evidence is obtained for admissibility purposes.[19] This underpinned the historical approach in criminal proceedings in England and Wales, which was that there was no discretion to enable exclusion of evidence on the basis of how that evidence was obtained. This is no longer the case.[20] A number of theories have been developed which may justify exclusion of relevant and reliable[21] evidence in the context of criminal proceedings. These are deterrence, the protective principle, and the integrity principle. As will be seen from the discussion of developments in civil proceedings below, these themes are familiar and broadly recognisable in relation to civil litigation too.

The deterrence/discipline justification applies specifically to evidence which has been improperly obtained. The theory is that such evidence should be excluded to discipline the wrongdoer, and/or deter future misconduct.

Andrew Ashworth's protective principle (also called the rights thesis) provides that if an individual's rights have been infringed, the court should protect them from any disadvantage arising from that infringement.[22] The relevant disadvantage is use of evidence obtained as a result of the infringement against the individual. The theory holds that protecting an individual from that disadvantage requires that the evidence be presumptively[23] excluded. In 2003, Ashworth proposed an alternative formulation: 'the court should rule in such a way that the state and the citizen are placed in the positions they would have been in, had the [European Convention on Human Rights] not been violated'.[24]

Finally, the integrity justification claims that improperly obtained evidence should be excluded if taking it into account would undermine the integrity of the criminal process.[25] At its simplest the argument is that to rely on improperly obtained evidence in order to condemn an individual's actions involves unacceptable hypocrisy and moral incoherence on the part of the justice system through application of a double standard.[26] The possibility of an integrity principle which extends to civil proceedings has been briefly considered by Chau, who suggests an integrity principle 'based on the moral incoherence between admitting the evidence and the aim of doing justice which is the aim of every judicial proceeding[. This] would apply to any judicial proceedings'.[27]

Mirfield describes three forms of integrity principle: court-centred integrity; public conduct integrity; and public attitude integrity.[28] Public conduct integrity focuses on the reaction of the general

[19]For a similar point, see Sankoff and Wilson, above n 11, at 155–156, where the authors state that the 'first principle' of the law of evidence is that all relevant evidence is admissible until proven otherwise, and this principle's 'preference is for more available information for finders of fact even in the face of compelling countervailing interests'.

[20]Judges in English criminal proceedings may take into account the way that evidence was obtained when considering whether to exclude prosecution evidence pursuant to s 78 of the Police and Criminal Evidence Act 1984, and there exists a discretion at common law to exclude evidence where it has been obtained in contravention of the privilege against self-incrimination: *R v Sang* [1980] AC 402 (HL).

[21]Some commentators take the view that unreliable evidence should be excluded because its use at trial may increase the risk of error in decision making: JD Jackson and SJ Summers 'Fair trials and the use of improperly obtained evidence' in *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions* (Cambridge: Cambridge University Press, 2012) para [3–041]. There are exceptions. For example Twining, above n 16, records at p 67 that Charles F Chamberlayne was of the view that 'generally speaking, unreliable evidence is better than no evidence'. See also L Laudan *Truth, Error, and Criminal Law: An Essay in Legal Epistemology* (Cambridge: Cambridge University Press, 2006) p 121.

[22]A Ashworth 'Excluding evidence as protecting rights' [1977] Crim LR 723.

[23]Ibid, at 728. Ashworth continued to maintain that the protective principle justifies a presumption of exclusion, rather than automatic exclusion, in A Ashworth 'Exploring the integrity principle in evidence and procedure' in P Mirfield and R Smith (eds) *Essays for Colin Tapper* (LexisNexis, 2003).

[24]Ashworth, above n 22, p 112.

[25]Ibid, p 107.

[26]P Chau 'Excluding integrity? Revisiting non-consequentialist justifications for excluding improperly obtained evidence in criminal trials' in J Hunter et al (eds) *The Integrity of Criminal Process: From Theory into Practice* (Oxford: Hart Publishing, 2016) p 269; P Roberts and A Zuckerman *Criminal Evidence* (Oxford: Oxford University Press, 2nd edn, 2010) p 188.

[27]Chau, above n 25, fn 7.

[28]P Mirfield *Silence, Confessions and Improperly Obtained Evidence* (Oxford: Oxford University Press, 1998).

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public to the admission of the evidence, in terms of the public's likelihood to engage in future criminality. The idea is evident in Justice Brandeis' dissent in *Olmstead v United States*: 'if the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy'.[29] Here, it is assumed that admission of improperly obtained evidence is always bad.[30] This is different from public attitude integrity, where what matters is whether the public will lose respect for the administration of justice if evidence is admitted.[31] With public attitude integrity, we can imagine situations where the public (whoever the 'public' is) could lose respect for the administration of justice if the evidence is excluded,[32] because of a perception of acquittal of the guilty based on 'technicality'.[33] This explains some jurisdictions' focus on convicting the guilty, as part of judicial integrity.[34] We can imagine other situations where the public could lose respect if the evidence is admitted. In contrast, court-centred integrity involves the court applying its own standards of propriety and decency. Choo has called this the idea that 'irrespective of appearances, exclusion should be a moral duty of the court as a means of repudiating the impropriety and preserving the purity of the judiciary [and the criminal justice system]'.[35] We will return to court-centred integrity below, as it will be seen that it is this version of the integrity principle that has the most relevance to civil proceedings.

Development of a general discretion to exclude

(a) Lord Ashburton v Pape

Lord Ashburton was a creditor opposing Pape's discharge from bankruptcy.[36] Pape had obtained letters written by Lord Ashburton to his solicitor. He did this by serving on the solicitor's clerk a subpoena requiring the clerk to produce them. Although the time for operation of the subpoena had not arrived, the clerk nonetheless handed them over in court. The clerk then left, and Pape took copies of the letters and did not return the originals. There is some mention in the judgment of collusion between Pape and the clerk. Although Pape was unable to use the original letters as evidence because they were subject to legal professional privilege, he proposed to use copies as secondary evidence of their contents in the bankruptcy proceedings. Lord Ashburton sought an injunction to restrain Pape from doing so. This was granted, but with an exception permitting Pape to use copies of the letters in the bankruptcy proceedings he was facing. To do so was said to be permitted under the Court of Appeal's earlier decision in *Calcraft v Guest*[37] (holding that a person may adduce a copy of a privileged document as evidence of its contents but may not use the original). However, on appeal, Lord Ashburton was successful in having the injunction amended to restrain Pape's use of the copies and of the information gained from them in the bankruptcy proceedings. The Court of Appeal limited[38] *Calcraft*, so that a person in Pape's position could only use the copies in litigation if the owner of the documents had not demanded their return and applied to restrain use of the confidential information.

[29]*Olmstead v US* 277 US 438 (1928) at 485, cited in ibid, 24.

[30]ALT Choo 'Improperly obtained evidence: a reconsideration' (1989) 9 Legal Studies 261 at 278: 'Brandeis J in effect equated the "repute" rationale with a "deterrence of the public from crime" justification for exclusion'. See also RM Bloom and E Dewey 'When rights become empty promises: promoting an exclusionary rule that vindicates personal rights' (2011) 46 Irish Jurist 38 at 70.

[31]Mirfield, above n 27, p 24.

[32]KS Broun et al *McCormick on Evidence*, vol 1 (Robert P Mosteller ed, Thomson Reuters, 8th edn, 2020) S 165.

[33]C Slobogin 'Why liberals should chuck the exclusionary rule' (1999) 1999 University of Illinois Law Review 363 at 436.

[34]Bloom and Dewey, above n 29.

[35]ALT Choo 'A question of "desirability": balancing and improperly obtained evidence in comparative perspective' in A Roberts and J Gans (eds) *Critical Perspectives on the Uniform Evidence Law* (The Federation Press, 2017) pp 219–220.

[36]*Lord Ashburton v Pape*, above n 12.

[37]*Calcraft v Guest* [1898] 1 QB 759.

[38]J Auburn *Legal Professional Privilege: Law and Theory* (Bloomsbury Publishing, 2000) p 234.

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In terms of English authorities, *Pape* seems to have existed under the radar for decades: it was not until a line of cases in the 1980s that it was picked up in any substantial way.[39] This is perhaps due to the widely held belief that there was no discretion to exclude relevant evidence based on how that evidence had been obtained.[40] It may also be explained by the confusion which arose from the different interpretations of the judgment.[41]

In discussing the cases that started to build on *Pape,* it is simplest to start with the clarification of the effect of *Pape* which came from an obiter statement in *ITC Film Distributors Ltd v Video Exchange Ltd.*[42] In *ITC*, Warner J agreed with counsel that *Pape* stood for the general rule that 'where A has improperly obtained possession of a document belonging to B, the court will, at the suit of B, order A to return the document to B and to deliver up any copies of it that A has made, *and will restrain A from making any use of any such copies or of the information contained in the document*'.[43] This interpretation was confirmed by the Court of Appeal in *Goddard*,[44] where the court clarified that *Pape* and *Calcraft* mean that a litigant may adduce copies of privileged documents as secondary evidence of the content of the documents in litigation (*Calcraft*), but if the litigant has not yet used the documents, the fact that it intends to do so will not prevent the privilege holder succeeding in a claim for delivery up and restraining use of confidential information contained in the documents (*Pape*).[45] Although this quirk of timing was unsatisfactory, 'the proposition must hold unless and until revised by a higher authority'.[46] According to Nourse LJ, 'once it is established that a case is governed by [*Pape*] there is no discretion in the court to refuse to exercise the equitable jurisdiction according to its view of the materiality of the communication, the justice of admitting or excluding it or the like'.[47]

In terms of the facts of these cases, *ITC* concerned the obtaining of documents belonging to the claimants or their solicitors, by a defendant from the courtroom while a hearing was taking place. The judge found that the documents had been obtained by a trick, but made an order entitling the second defendant to retain and use copies. In argument over whether that order should stand, the second defendant relied on the principle that in civil proceedings the court has no power to exclude relevant evidence even if improperly obtained (citing *Helliwell v Piggott-Sims*).[48] The claimants relied on *Pape* and the need for the judge to 'balance the public interest that the truth should be ascertained … against the public interest that litigants should be able to bring their documents into court without

[39]It was distinguished in *Woodland Furniture (London) Ltd v Ministry of Works* (1956) 6 P & C R 1 (QB), at 8; *Butler v Board of Trade* [1971] Ch 680 (Ch), at 690; *Frank Truman Export Ltd v Metropolitan Police Commissioner* [1977] QB 952; and *Great Atlantic Insurance Co v Home Insurance Co* [1981] 1 WLR 529 (CA). In the other cases where *Pape* was relied on by a judge rather than just cited by counsel, the facts concerned injunctions to prevent newspaper publication of confidential information, rather than the issue of admissibility of confidential information/improperly obtained evidence in court proceedings: *Duchess of Argyll v Duke of Argyll* [1967] Ch 302 (Ch); *Distillers Co (Biochemicals) Ltd v Times Newspapers Ltd* [1975] QB 613. See C Tapper 'Privilege and confidence' (1972) 35 MLR 83, stating that *Pape* had being 'lying dormant for nearly sixty years'; D Vaver 'Keeping secrets, civilly speaking' (1992) 13(3) Advocates' Quarterly 334, offering reasons concerning aspects of legal culture to explain *Pape's* dormancy at fn 28.

[40]Support for this is found in the fact that in the seminal case of *Kuruma v R* [1955] AC 197 (PC) (establishing the fairness discretion for exclusion of evidence in criminal proceedings), *Calcraft* was referred to as supporting the proposition that the courts do not care how evidence is obtained but *Pape* was not mentioned.

[41]In particular concerning a statement of Cozens-Hardy MR at p 473. See Tapper, above n 37; JD Heydon 'Legal professional privilege and third parties' (1974) 37 MLR 601; P Matthews 'Breach of confidence and legal privilege' (1981) 1 Legal Studies 77; NH Andrews 'The influence of equity upon the doctrine of legal professional privilege' (1989) 105 LQR 608; Auburn, above n 37, p 235. I prefer the 'natural interpretation' that 'the court was preventing Pape from carrying out his intention to use the copy letters in evidence' of Dennis, above n 10, para [10–021].

[42]*ITC Film Distributors Ltd v Video Exchange Ltd* [1982] Ch 431.

[43]Ibid, at 438 (emphasis added).

[44]*Goddard v Nationwide Building Society* [1987] 1 QB 670 (CA).

[45]Ibid, at 683.

[46]Ibid, at 684.

[47]Ibid, at 685.

[48]*Helliwell v Piggott-Sims*, above n 6.

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fear that they may be filched by their opponents, whether by stealth or by trick, and then used by them in evidence'.[49]

There were problems in relying on *Pape*, as the documents had already been used in the proceedings (and *Pape* was said to turn on timing, as was later confirmed in *Goddard*). Nonetheless, the public policy argument succeeded. The second defendant's actions were 'probably contempt of court' and 'the court should not countenance it by admitting such documents in evidence'.[50] To the extent that the documents had not already been looked at by the judge, the evidence was excluded.[51] The concept of what the court cannot countenance raises the deterrence/discipline justification for exclusion, mentioned above. *ITC* also demonstrates the potential relevance of integrity concerns to exclusion in civil proceedings.[52]

ITC's relevance to *Pape* is limited, given the fact that *Pape* did not apply in *ITC*. Nonetheless, *ITC* is an important decision as it widened the grounds upon which evidence may be excluded in a civil proceeding from evidence obtained in breach of confidence, to evidence obtained in contempt of court.[53] It could be said that *ITC* was recognition of an exclusionary rule, mandating exclusion where evidence has been obtained in this specific way, making it quite limited. Alternatively, it could be said that it suggested the beginnings of an exclusionary discretion, which was not necessarily so limited to the 'filching' of documents from court.[54] For the purposes of this paper it is not necessary to form a final view on its relevance.

In *Goddard*, the defendant to a negligence action had acquired an attendance note from the claimants' solicitors recording conversations between the claimants and their solicitors. The claimants applied to strike out the passages in the defence which relied on the attendance note, and for an injunction restraining the defendant from using or relying on it. The first instance judge held that once the defendant had the note it was entitled to use it however it wished. The Court of Appeal allowed the claimants' appeal on the basis of *Pape*, as read with *Calcraft* (setting out its understanding of the effect of these two cases together, as outlined above).

Pape and *Goddard* related to improper obtaining of information from the physical confines of the courtroom or from an officer of the court. A different fact pattern emerged in *Naf Naf SA v Dickens (London) Ltd*, where the claimants had obtained evidence against the defendants through execution of an Anton Piller (search) order.[55] There had been insufficient evidence to grant the order, as well as

[49] *ITC Film Distributors Ltd v Video Exchange Ltd*, above n 41, at 440.

[50] Ibid, at 441.

[51] See also *Universal City Studios Inc v Hubbard* [1983] Ch 241, at 252–255 where Falconer J attempted to reconcile *ITC* with *Helliwell*. However, see *Universal City Studios Inc v Hubbard* [1984] Ch 225 (CA), at 237.

[52] Dennis, above n 10, para [8–006].

[53] *ITC Film Distributors Ltd v Video Exchange Ltd*, above n 41, at 440.

[54] In *Goddard v Nationwide Building Society*, above n 43, Nourse LJ approved of the availability of this public policy based exclusion (at 685–686). However, he said that *ITC* 'proceeded not on an exercise of the court's discretion but on grounds of public policy'. It is true that the decision was made for reasons of public policy, but that does not mean it cannot also be an example of the exercise of a discretion. Rosemary Pattenden, in *Judicial Discretion and Criminal Litigation* (Oxford: Oxford University Press, 1990) pp 2–3, calls *ITC* an example of a 'concealed' discretion, meaning a rule leaving 'the decision-maker with considerable freedom of choice … because they contain value-qualified precepts which require a personal assessment of the circumstances'. Pattenden's acceptance of *ITC* as representing an example of exercise of a discretion here can be contrasted with R Pattenden 'The discretionary exclusion of relevant evidence in English civil proceedings' (1997) 1 International Journal of Evidence & Proof 361. Writing prior to the inclusion of the power to control evidence in the CPR, Pattenden states that there is no discretion to exclude prejudicial evidence in civil proceedings (at 362), but that a judge can allow questions to a witness to go unanswered if the questioning is oppressive, or to avert a breach of confidence by a witness (at 364). She also says that 'there is some English authority for a discretion to exclude evidence to prevent procedural unfairness to a party' (at 365). While recognising that 'stealing an opponent's documents in the precincts of the court' (citing *ITC)* leads to 'the crude expedient of keeping out relevant evidence' (at 381), in an earlier passage she cited *ITC* in support of the proposition that 'the existence of a discretion to exclude improperly obtained evidence in civil proceedings has been repeatedly denied' (at 365). In my view, *ITC* does not support this claim, and Pattenden's reference appears to be to Warner J's summary of counsel's submissions rather than his Honour's own view.

[55] *Naf Naf SA v Dickens (London) Ltd* [1993] FSR 424 (Ch).

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material non-disclosure by the claimants in seeking it. The first defendant sought an order restraining the claimants from making any use of the evidence obtained via the Anton Piller order. Hoffmann J (as he then was) stated that as a matter of the law of evidence, the 'Anton Piller yield' was admissible, but 'admissibility of the information as evidence' was not the end of the matter: 'there is equally no doubt that the court has a jurisdiction in personam to make an order restraining a party from making use of information which he has gained in circumstances which the court considers make it inequitable that he should be able to do so'.[56] He said this was in reliance on 'a line of cases commencing with [*Pape*]'.

Hoffmann J considered that it was appropriate to prevent the claimants relying on the evidence, as at the stage that proceedings had reached it would not 'seriously affect the ability of the court to do justice in these proceedings' to prevent its use.[57] If there was anything in the evidence which would materially assist the claimants to prove their case, it was appropriate that they should go through ordinary discovery procedures to get that information, 'without at this stage being able to make use of information which has illegitimately been obtained before its time'.[58] Justice to the defendant, who would be 'entitled to feel aggrieved if he is told that the order ought never to have been made, that the [claimant] has obtained an illegitimate advantage by it, but is nevertheless entitled to use it' also meant that the order should be made.[59]

To return to the rationales which are said to justify exclusion of evidence discussed above, the exclusion of relevant and seemingly reliable evidence in these cases looks like a strong form of Ashworth's protective principle.[60] A strong version of the protective principle would lead to automatic exclusion once a rights breach is established. *Pape*, as confirmed in *Goddard*, rejected any balancing which might otherwise be carried out. In the later case of *Derby*, the court explained[61] that a balancing exercise between the public policy consideration of completeness of evidence before the court and of legal professional privilege is inappropriate, as the balancing act has occurred through creation of the rule of privilege.[62] This follows the same logic as Ashworth's alternative formulation of the protective principle, which (despite Ashworth's claims that it supports a presumption rather than automatic exclusion) seems to require automatic exclusion following breach of a constitutional or fundamental right, precisely because any balancing concerns have been determined through declaration of the right in legislative form.[63] A similarly absolute approach was taken in cases involving mistaken disclosure of privileged material.[64]

The inability of Pape, the defendants in *ITC* and *Goddard,* and the claimants in *Naf Naf,* to rely on the various documents that they had obtained is akin to exclusion of evidence in a civil proceeding based on the way that evidence was obtained. Putting aside *ITC,* the equating of an equitable power to restrain use of confidential information, and an exclusionary discretion within the law of evidence, may be seen by some as controversial.[65] This is exemplified by the way that Hoffmann J

[56]Ibid, at 427.

[57]Ibid, at 428.

[58]Ibid, at 429. See also *Sullivan v Sclanders* [2000] SASC 273, (2000) 77 SASR 419, at [68].

[59]*Naf Naf SA v Dickens (London) Ltd*, above n 54, at 429.

[60]Ashworth, above n 21; Ashworth, above n 22; P Roberts 'Excluding evidence as protecting constitutional or human rights?' in L Zedner and JV Roberts (eds) *Principles and Values in Criminal Law and Criminal Justice* (Oxford: Oxford University Press, 2012).

[61]Through citing *The Aegis Blaze* [1986] 1 Lloyd's Rep 203.

[62]*Derby Co Ltd v Weldon (No 8)* [1991] 1 WLR 73 (CA). See also *Istil Group Inc v Zahoor* [2003] EWHC 165 (Ch), [2003] CP Rep 39, at [93].

[63]Ashworth, above n 22, p 112.

[64]*Guinness Peat Properties Ltd v Fitzroy Robinson Partnership* [1987] 1 WLR 1027 (CA), at 1046. See also *Derby Co Ltd v Weldon (No 8)* [1991] 1 WLR 73 (CA); *Pizzey v Ford Motor Co Ltd* [1994] PIQR P15 (CA); *Hayes v Dowding* [1996] PNLR 578 (Ch).

[65]Matthews, above n 40, contains a close textual analysis of *Pape* to argue that breach of confidence is different from the law of evidence. The article is critical of the assumption that the effect of an injunction to restrain a breach of confidence is to prevent admissibility in evidence. For criticism of Matthews' analysis, see Andrews, above n 40. For more general criticism of

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attempted to contrast the law of evidence and 'admissibility of the information as evidence' with an equitable power to restrain use of the information obtained in *Naf Naf*. But it is argued here that any equitable rule which affects the admission of evidence is also a rule of evidence.[66] Other writers have referred to the rule from *Pape* in evidentiary terms.[67] Most significantly for the argument here, Ho has suggested that:[68]

> *Pape* ought to be seen as a manifestation of a larger principle … It concerns fairness in the use of evidence and it may be so stated: A party will be prevented from tendering admissible evidence of a matter, over which his opponent could have resisted disclosure by claiming privilege had compulsion been sought, if it would be unfair to allow the use of the evidence. If the evidence is tendered, the Court may exclude it or expunge it even though it is admissible.

In a footnote to this statement, Ho says that 'this is *in substance* a civil law rule corresponding to the criminal law discretion to exclude admissible evidence if its reception would operate unfairly against the accused'.[69] It is submitted that a focus on the substantive effect of the rule is more persuasive than a technical approach which turns on the equity label.[70] The substantive effect of *Pape* was that it enabled exclusion of relevant evidence in a civil proceeding, well before the fairness discretion was recognised in relation to criminal proceedings, and well before the enactment of the CPR. It applied in limited circumstances and was constrained by timing, and there has been a lot of confusion over *Pape*.[71] However, the importance of *Pape,* at least in the context of this paper, is the fact that it provided the foundation for a general discretion to exclude improperly obtained evidence in civil proceedings, as recognised in *Imerman v Imerman*.[72] This is discussed in section (c) below.

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the view that an equitable principle cannot also be considered a rule of evidence, see Vaver, above n 37. At 343, he states that 'technically, a combination of propositions is supposed to justify this schizophrenia – admissibility is a question of law, breach of confidence is a question of equity, and equity follows the law but does not mix with it' and argues at 344 that while there may be some good reasons for this, 'what is unsupportable is the doctrinal cleavage between enjoinability and admissibility'.

[66]Although obviously not determinative of the point, it is interesting that New Zealand's Evidence Act 2006 provides that 'all relevant evidence is admissible in a proceeding except evidence that is inadmissible under this Act … or excluded under this Act …' (s 7). Section 69 of the Act grants a judge a discretion to prevent disclosure of confidential information in a proceeding. If a judge exercises their discretion under s 69 and evidence is held to be inadmissible, the equitable relief which would be available under the rule in *Pape* is treated as part of the law of evidence. In its preliminary work leading to the Evidence Act 2006, the New Zealand Law Commission stated that 'although privilege and public interest immunity rules stem from … public and social policies, the practical impact which the rules have on the availability of evidence means that they are properly part of the law of evidence': New Zealand Law Commission 'Evidence law: principles for reform' (NZLC PP13, 1991) para [13].

[67]CB Robson 'Evidence – admissibility in civil actions of evidence illegally obtained by private persons' (1964–1965) 43 North Carolina Law Review 608, at 613, calling *Pape* an example of an 'exclusionary policy'; JJ Arvay 'Slavutych v Baker: privilege, confidence and illegally obtained evidence' (1977) 15 Osgoode Hall Law Journal 456, at 463, arguing that *Pape* (as read with the Canadian case *Slavutych*) had led to the emergence of a 'limited illegally obtained evidence rule' in Canada; Andrews, above n 39, at 608, calling reconciliation of *Calcraft* and *Pape* 'a long-standing controversy within the law of evidence'; C Tapper 'Evidential privilege in cases involving children' (1997) 9 Child and Family Law Quarterly 1, at 4, calling *Pape* a 'somewhat vague equitable exception [where] the rule of privilege is effectively converted into a rule of inadmissibility'.

[68]HL Ho 'Admissibility, privilege and the expunging of evidence' (1994) 6 SAcLJ 146, at 150.

[69]Emphasis in original.

[70]Cf Auburn, above n 37, p 245, arguing that *Pape* 'and the cases following it have given the equitable breach of confidence doctrine a status and effect it simply cannot have'.

[71]*Documentary Evidence* makes an absolute (and, it seems, correct) statement that 'injunctive relief was always available to prevent breach of confidence' (Hollander, above n 10, para 27–01). At the same time. Keane and McKeown's *Modern Law of Evidence* is less confident, stating that this exception 'arguably' existed (Keane and McKeown, above n 10, p 47). *Murphy on Evidence* refers to *Goddard* and *ITC* as '[leaving] the law in a rather unsatisfactory condition … This problem has never been resolved as a matter of common law' (Glover, above n 8, p 76). Likewise, Dennis comments that later authorities trying to pin down the basis of the *Pape* exception 'are in disarray': I Dennis *The Law of Evidence* (Sweet & Maxwell, 6th edn, 2017) para [10–022], although this comment has been removed from the 7th edition.

[72]*Imerman v Imerman*, above n 14.

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(b) Integrity and the common law

In terms of a chronological narrative of developments, it is necessary to comment here on another development, concerning evidence obtained through torture.

In *A v Secretary of State (No 2)*,[73] the applicants appealed against their detention pursuant to the Anti-terrorism, Crime and Security Act 2001, in part on the basis that in certifying that they should be detained, the Secretary of State had relied on evidence of a third party obtained through torture. The Special Immigration Appeals Commission held that if there was such material, it could examine it and decide what weight to attach to it. The House of Lords held that the evidence could not be admitted, overturning the Court of Appeal.

It is clear from the opinions in *A* that the inadmissibility of evidence obtained through torture applies to all proceedings.[74] This could be because of the 'special' nature of torture as a particularly heinous way of obtaining evidence. However, an additional explanation for the irrelevance of proceeding categorisation lies in exploring the integrity principle (in its court-centred version).[75] For example, Lord Bingham referred to use of evidence obtained via torture as 'incompatible with the principles which should animate a tribunal seeking to administer justice'.[76] Lord Hoffmann stated that in cases where the methods used to obtain evidence were 'such that it would compromise the integrity of the judicial process, dishonour the administration of justice, if … the evidence [was] admitted' then 'the evidence [may be] rejected on the ground that there would otherwise be an abuse of the processes of the court'.[77] It is impossible to escape the conclusion that the abuse of process doctrine, as developed in criminal proceedings from *Ex p Bennett* onwards, has been influential here.[78] If there was any doubt, Lord Hoffmann's comment that 'English law has developed a principle, illustrated by [*Bennett*], that the courts will not shut their eyes to the way the accused was brought before the court or the way the evidence of his guilt was obtained' makes this clear. As Choo and Nash argue (in the context of criminal proceedings):[79]

> The decision in *A and Others* represents an acknowledgement that there may be circumstances in which a court should be prepared, 'on moral grounds', to exclude reliable evidence because of the manner in which it was obtained. It may signify a recognition that the mismatch between the courts' divergent approaches to exclusion of improperly obtained evidence and stays for abuse of process has finally been laid to rest, and that integrity considerations do have a role to play in determinations of exclusion. *Yet what is remarkable is that the House of Lords has achieved this reconciliation by casually uncovering a common law principle of exclusion that had previously been thought not to exist*, and thereby extending the reach of *Ex p Bennett* into the realm of evidential exclusion.

While Choo and Nash are arguing that *A* is significant for exclusion in criminal proceedings, it is argued here that *A* may be significant for exclusion in civil proceedings also, beyond torture evidence. This is illustrated by the way *A* was used in *Serious Organised Crime Agency v Olden*.[80] In *Olden*, the issue was whether the Serious Organised Crime Agency could rely on evidence found to have been unlawfully obtained in a criminal proceeding, for the purposes of a civil application under the Proceeds of Crime Act 2002. Although strictly unnecessary given availability of CPR 32.1, the High

[73] *A v Secretary of State for the Home Department (No 2)*, above n 13.

[74] Ibid, at [35], [113]. This was confirmed in *Shagang Shipping Co Ltd (in liquidation) v HNA Group Co Ltd (Liberty intervening)* [2020] UKSC 34, [2020] 1 WLR 3549, at [105].

[75] Mirfield, above n 27, p 24.

[76] *A v Secretary of State for the Home Department (No 2)*, above n 13, at [52].

[77] Ibid, at [87].

[78] *R v Horseferry Road Magistrates' Court, ex p Bennett* [1994] 1 AC 42 (HL).

[79] ALT Choo and S Nash 'Improperly obtained evidence in the Commonwealth: lessons for England and Wales' (2007) 11 International Journal of Evidence & Proof 75 at 86 (emphasis added).

[80] *Serious Organised Crime Agency v Olden* [2010] EWCA Civ 143, [2010] CP Rep 29.

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Court recognised a power to exclude the evidence if 'its admission would dishonour the administration of justice, or compromise the integrity of the judicial process', in reliance on *A*.[81] Importantly, the Court of Appeal agreed, stating 'as Lord Hoffmann said in [*A*]: "there is a discretion *in all cases* to exclude admissible evidence if its admission would dishonour the administration of justice or compromise the integrity of the judicial process"'.[82] Although purporting to quote directly from Lord Hoffmann, this is not exactly what his Lordship said. It is worth quoting Lord Hoffmann in full to show the distinction:

> English law has developed a principle, illustrated by cases like [*Ex p Bennett*], that the courts will not shut their eyes to the way the accused was brought before the court or the evidence of his guilt was obtained. Those methods may be such that it would compromise the integrity of the judicial process, dishonour the administration of justice, if the proceedings were to be entertained or the evidence admitted. In such a case the proceedings may be stayed or the evidence rejected on the ground that there would otherwise be an abuse of the processes of the court.

The evidence was not ultimately excluded in *Olden*. However, the recognition of a discretion to exclude based on integrity concerns in civil proceedings (and extension of *A* beyond torture) is a significant departure from the previously understood orthodox position, which has received little attention.

It may be suggested that this extension of *A* was wrong: it utilised a misquote of what Lord Hoffmann actually said, and it represented a misunderstanding on the part of the Court of Appeal. In introducing Lord Hoffmann's words, the Court of Appeal had said that 'in civil proceedings the court looks to different criteria to decide whether to exclude evidence'. But Lord Hoffmann's discussion had been in respect of the development of discretion to exclude evidence in criminal proceedings, post *Kuruma*.[83] In any event, the High Court in *Olden* had decided the admissibility point based on CPR 32.1, and the Court of Appeal had affirmed the High Court's approach (although allowing the appeal on other grounds). It may therefore be said, based on the role of CPR 32.1, that the High Court's reference to *A* was obiter, as was the Court of Appeal's subsequent confirmation of the effect of *A*.

These are valid arguments. But it is not fanciful that a later court would rely on *A* as furnishing a discretion to exclude. *Olden* is simply an illustration of the potential reach of *A*, or at least the ideas of court-centred integrity that it represents, in civil proceedings. This brings us back to the question of whether the evidence was inadmissible in *A* because of the use of torture, or because of a harder to grasp idea of the integrity of the court. If it was the latter, this leaves open the possibility that there are other methods of obtaining of evidence which might have such an impact 'on the integrity of the judicial process, dishonour[ing] the administration of justice … in such a case … the evidence [may be] rejected on the ground that there would otherwise be an abuse of the processes of the court' in the words of Lord Hoffmann. Again, this is independent of the CPR.

(c) Imerman

It is now possible to return to the development[84] of *Pape* in *Imerman* (concerning a matrimonial property dispute). The first defendant had taken copies of information and documents (some 250,000) concerning the claimant's finances from the claimant's computer without consent. A contentious issue was whether the court had any power to prohibit the defendants making use of the information in ancillary relief proceedings. At first instance, Moylan J held that:[85]

[81] *Serious Organised Crime Agency v Olden* [2009] EWHC 610 (QB), at [26].

[82] *Serious Organised Crime Agency v Olden*, above n 79, at [41] (emphasis added).

[83] *Kuruma v R*, above n 39.

[84] Although *Primary Group (UK) Ltd v The Royal Bank of Scotland plc* [2014] EWHC 1082 (Ch), [2014] RPC 26 described *Imerman* as 'in essence … a straightforward application of [*Pape*] to the electronic era', at [224].

[85] *Imerman v Imerman* [2009] EWHC 3486 (Fam), at [133].

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> … the court's power to make these orders is derived from broader principles which … can now be framed within the rights and obligations created by articles 6 and 8 of the European Convention, but which can also be seen from English authorities predating the Human Rights Act.

The authorities that Moylan J was referring to included *Pape* and *ITC,* showing that the 'broader principles' in the *Pape* line of cases had coalesced around the terminology of the ECHR and the Human Rights Act 1998. Also demonstrating the connection between developments in *Pape* and general integrity ideas from *A v Secretary of State*, Moylan J referred to the High Court in *Olden* as an authority for existence of the court's power to control the use of irregularly obtained material.[86] The taking of material from the claimant's computer was an interference with his Article 8 right, so Moylan J ordered that the files be returned to the claimant for removal of any privileged material. However, any remaining material was to be handed back to the claimant's wife for use in the ancillary relief proceedings. The claimant appealed against the order to return the files.

In the Court of Appeal, Lord Neuberger MR agreed that the material was covered by the claimant's Article 8 right, and he was entitled to maintain a claim for breach of confidence in relation to it.[87] Like Moylan J, Lord Neuberger also said that the case could be analysed 'by reference to the equitable principles exemplified by such cases as [*Pape*]'.[88] The ordinary response of equity would be an injunction to restrain passing on or using the confidential information obtained, unless there was any good reason why equity should decline relief.[89] Under the *Hildebrand* rules, it had been thought that 'a spouse may profit from an unlawful breach of confidence (or tort) to the extent that, whilst she will be required to return originals and disclose the existence of the copies, she may retain those copies'.[90] However, this could no longer be condoned by the courts, so did not provide a good reason to decline relief.[91] There was no basis for special rules in family proceedings.[92] Mrs Imerman could not take the law into her own hands:[93]

> If she had sufficient evidence to obtain a search order from the court, *it cannot be right for a judge effectively to sanction her committing a legal wrong by by-passing the court's procedures* and hacking into her husband's computer records … If she did not have sufficient evidence to obtain a search order, it would be even more offensive if a judge effectively sanctioned her [actions].

These comments draw on court-centred integrity as a justification for exclusion,[94] underlining the potential universality of the integrity principle given the context here of private litigation.

Mrs Imerman was not permitted to retain copies. They were to be returned to Mr Imerman, with one set to remain with his solicitors, who would advise him as to his disclosure obligations when appropriate. Mrs Imerman was also restrained from using any of the information she had obtained, 'at least for the time being'.[95] When/if she sought to rely on her recollection of any of the unlawfully obtained information (perhaps to claim that Mr Imerman had made inadequate disclosure, for example) it would be admissible.[96] However, 'as a matter of common law, a judge often has the

[86]Ibid, at [136].
[87]*Imerman v Imerman*, above n 14, at [76], [79].
[88]Ibid, at [105].
[89]Ibid, at [72]–[74].
[90]Ibid, at [106].
[91]Ibid, at [107].
[92]Ibid, at [137].
[93]Ibid, at [142] (emphasis added).
[94]Mirfield, above n 27, p 24.
[95]*Imerman v Imerman*, above n 14, at [150].
[96]Ibid, at [170]. For an example of a party attempting to rely on recollection of improperly obtained information, see *Thum v Thum* [2019] EWFC 25.

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power to exclude admissible evidence if satisfied that it is in the interests of justice to do so'.[97] This is a broad claim. Lord Neuberger gave *Marcel v Commissioner of Police for the Metropolis* as authority for this proposition.[98] But, in *Marcel* we again find the influence of *Pape*, as the Court of Appeal recognised there that a court has a discretion to grant an injunction to prevent a breach of confidence, supported by *Pape*. Overall, this means that the broad exclusionary discretion recognised in *Imerman* is traceable to *Pape*. Regardless of *Pape*'s effect in the earlier cases, it now provides the foundation for a *general* discretion to exclude evidence in civil proceedings based on how that evidence was obtained. That discretion is broadly worded, and has nothing to do with the CPR.[99]

(d) Reconciling A/Olden and Imerman

Although *Olden* (High Court) was cited by Moylan J in *Imerman*, Lord Neuberger did not refer to it (or to *A*). It seems safe to conclude that the recognition of a general discretion in *Imerman* would have occurred regardless of what was going on in *A* as potentially expanded in *Olden*. We can see this from the long development of *Pape* itself. This raises the question of whether there are two discretions here (*Pape/Imerman*, and *A/Olden*), or one. To reconcile the *Imerman* discretionary exclusion if it is in the 'interests of justice' with the *A/Olden* 'discretion in all cases to exclude admissible evidence if its admission would dishonour the administration of justice or compromise the integrity of the judicial process', we could understand these as being the same general discretion (it being in the 'interests of justice' to exclude evidence 'if its admission would dishonour the administration of justice or compromise the integrity of the judicial process'). There may be benefits to recognition of a general discretionary power. However, it is possible to draw a distinction between the two (accepting that such a distinction was probably not in the minds of the judges deciding these cases). The *A/Olden* discretion could be understood as being concerned with executive illegality,[100] which would bring this aspect of exclusionary discretion in civil proceedings much closer to the understanding in criminal proceedings, which is preoccupied with official or state-sanctioned wrongdoing. The cases in the *Pape* line could be characterised as being concerned with abuse of the court's own processes (if we carve out privacy concerns, which are discussed in the next section). *Pape* itself could be said to have involved abuse of the subpoena procedure. *Naf Naf* also fits this characterisation, involving misuse of the court's Anton Piller jurisdiction. The discussion in *Imerman* also draws out the idea of abuse of the court's own processes through 'sanctioning' an omission to use those procedures through a litigant taking matters into their own hands. Although *ITC* was technically 'outside' the *Pape* line, it also fits this theme as the conduct in that case was characterised as 'probably contempt of court'. In terms of the common rationales said to justify exclusion of evidence in criminal proceedings, both *A/Olden* and *Pape/Imerman* align with the integrity principle and deterrence.

In summary, the above discussion has shown that there is at least one general discretion enabling exclusion of improperly obtained evidence in civil proceedings, with a long history. It may be possible to characterise these cases as supporting two independent discretions. In any event, the CPR have nothing to do with either. There is a further aspect which we will turn to now, which is the relevance of human rights.

2. Relevance of human rights

It is difficult to untangle human rights concerns from the general discretion(s) discussed above because it will already be obvious that there are human rights overlays to the cases discussed,

[97] *Imerman v Imerman*, above n 14, at [171].

[98] *Marcel v Commissioner of Police of the Metropolis* [1992] Ch 225 (CA), at 265. In *Lifely v Lifely* [2008] EWCA Civ 904, Ward LJ relied on the same page of *Marcel* to support the claim that 'even before the Human Rights Act was enacted, the court has had a discretion whether or not to admit evidence which was wrongfully obtained'.

[99] The CPR did not apply in *Imerman* per CPR 2.1(2). Rule 22.1 is the Family Procedure Rules 2010 equivalent to CPR 32.1, however this did not come into force until 6 April 2011, ie after *Imerman* had been decided.

[100] Even though *A* was about foreign torture, the general rule against admission of evidence obtained via torture depends in part on concerns over executive illegality (see *A v Secretary of State*, above n 13, at [97]).

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particularly post enactment of the Human Rights Act 1998 (HRA 1998).[101] However, it is necessary to draw human rights out in its own discussion. If we characterise *Imerman* and *A/Olden* as independent discretionary powers, then the fact that evidence may be obtained in breach of a person's human rights requires *independent* recognition of an exclusionary power, to capture cases where the abuse of the court's processes or executive illegality discretions would not apply. This is demonstrated by *Jones v University of Warwick*. Further, even if we characterise the *Imerman* and *A/Olden* examples as threads of a general discretion, human rights concerns (a) provide further external justification for the necessity of recognising some discretionary power and thereby rejecting the idea that there is or should be no discretion in civil proceedings once and for all; and (b) provide content for the exercise of the discretion.

(a) Recognition of a discretion enabling exclusion where evidence has been obtained in breach of a Convention right is necessary

Section 6 of the HRA 1998 states that it is unlawful for a public authority to act in a way which is incompatible with a Convention right, and defines 'public authority' as including a court or tribunal. This means that Convention rights have remedial horizontal effect,[102] as it is unlawful for a court to exercise its discretionary powers to grant remedies in a manner contrary to Convention rights.[103] As is well known from the way the tort of misuse of private information has evolved,[104] 'enforcing [Convention rights] may require a court to modify the common law'.[105] This provides context for Moylan J's comment in *Imerman* that:[106]

> … the court is entitled, and in appropriate circumstances *will be required*, to control the use of information irregularly obtained for the purposes of the proceedings if it is necessary to effect a fair trial and/or to protect one party's rights under Article 8.

It is clear from the European Court of Human Rights' reasoning in the criminal case of *Khan* that refusal to recognise a discretion enabling exclusion of evidence on the basis of how that evidence had been obtained in civil proceedings would have raised issues under Article 6 of the Convention.[107] In *Khan*, Mr Khan claimed that his Article 6 (right to fair trial) and Article 8 (right to respect for private life) rights had been breached, because he had been convicted of offending following a trial where the prosecution had relied on evidence obtained in violation of his privacy. Although the European Court agreed that Mr Khan's Article 8 right had been violated, this did not mean there was automatically a breach of Article 6. This was because Mr Khan had had the chance to challenge the authenticity and use of the evidence in the domestic courts pursuant to section 78 of the Police and Criminal Evidence Act 1984, which permits a judge to exclude evidence if satisfied that its admission would have such an adverse effect on the fairness of the proceedings that it ought not to be admitted. The significance is that if the criminal court had had no discretion to consider exclusion, there would have been a violation of Article 6. It was the fact that a source of exclusionary power was available that was important, not whether the power was ultimately used to exclude. The

[101] *A v Secretary of State* involved the right to be free from torture and the right to a fair trial, and *Imerman* involved the right to respect for a private life (and that particular right, and the transformation of breach of confidence into the tort of misuse of private information, gives us language to deal with some, if not all, of the *Pape* line, as recognised by Moylan J).

[102] AL Young 'Mapping horizontal effect' in D Hoffman (ed) *The Impact of the UK Human Rights Act on Private Law* (Cambridge: Cambridge University Press, 2011).

[103] *St Merryn Meat Ltd v Hawkins* [2001] C P Rep 116 (Ch); *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40, [2004] 1 AC 816, at [174].

[104] *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457.

[105] *Wilson v First County Trust Ltd (No 2)*, above n 102, at [180].

[106] *Imerman v Imerman*, above n 83, at [134] (emphasis added).

[107] *Khan v United Kingdom* (2001) 31 EHRR 45 (ECtHR).

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right to a fair trial also covers civil proceedings, so transposing this reasoning to civil proceedings leads to the conclusion that there would be issues under Article 6 if English judges disclaimed any discretion to exclude evidence in civil proceedings where that evidence was obtained in violation of Convention right/s, so that a discretion must be recognised (even if its use is rarer in civil proceedings than in criminal proceedings).

This is confirmed by *López Ribalda v Spain*.[108] That case concerned an allegation by the applicants that their employer's decision to dismiss them had been based on video surveillance implemented in breach of Article 8 ECHR. They complained that admission of the evidence in unfair dismissal proceedings had been a breach of Article 6. The Grand Chamber found that although Article 8 was engaged, it had not been breached. Nonetheless, it considered the Article 6 issue.

The Grand Chamber reiterated the principles which it had developed in a criminal law context. These included the fact that the question under Article 6 is whether the proceedings as a whole were fair. In relation to Article 8 cases, fairness under Article 6:[109]

> has to be determined with regard to all the circumstances of the case, including respect for the applicant's defence rights, and the quality and importance of the evidence … it must be examined whether the applicant was given an opportunity to challenge the authenticity of the evidence and oppose its use.

These principles were relevant to civil cases as:[110]

> while the "fair trial" guarantees are not necessarily the same in criminal-law and civil-law proceedings, the States having greater latitude when dealing with civil cases, [the Court] may nevertheless draw inspiration, when examining the fairness of civil-law proceedings, from the principles developed under the criminal limb of Article 6.

Applying these principles, the Grand Chamber found no violation of Article 6. The applicants had been able to oppose the use of the evidence in the domestic proceedings, as the domestic law provided that evidence obtained in breach of a fundamental right had to be excluded. The Employment Tribunal therefore directly addressed whether the evidence had been obtained in breach of Article 8 and found that it had not been (a conclusion supported by the Grand Chamber).[111] This emphasises the importance of existence of a power enabling consideration of exclusion, as suggested above in reliance on *Khan*.

(b) Reappraisal of Jones v University of Warwick

Jones v University of Warwick is credited with clarifying that CPR 32.1 could be used for excluding improperly obtained evidence. However, what *Jones* actually does is demonstrate the importance of human rights concerns to the recognition of powers of discretionary exclusion, within the framework of the HRA 1998.

The facts were that Jones was suing the University (her employer) for damages arising from an injury. An inquiry agent, acting for the University's insurers, accessed Jones' home by posing as a market researcher and filmed her with a hidden camera. Based on the footage, an expert opined that Jones was not suffering from a continuing disability. The University applied for leave to adduce the video. Jones argued it should be excluded under CPR 32.1(2), because of trespass and infringement of her privacy. The first instance judge had excluded the evidence. However, on appeal, the High Court gave the University permission to adduce the video – it was relevant evidence, Jones had been

[108] *López Ribalda v Spain* (2020) 71 EHRR 7 (ECtHR).
[109] Ibid, at [151].
[110] Ibid, at [152].
[111] Ibid, at [154].

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provided with copies of the recording and had not been ambushed, and in general the fact that evidence had been obtained illegally or improperly did not render it inadmissible as a rule.

Jones appealed to the Court of Appeal. Lord Woolf gave the judgment, stating that the High Court's approach was 'consistent with the approach which would have been adopted in both criminal and civil proceedings prior to the coming into force of the [CPR] and the [HRA 1998]'.[112] That approach was one where 'if evidence was available, the court did not concern itself with how it was obtained'.[113] However, the approach now had 'to be modified *as a result of the changes that have taken place in the law*'.[114] Clearly, these changes were the enactment of the CPR, as well as the HRA 1998.

Taking the CPR first, the wording of CPR 32.1(2) (the court may 'use its power [to control evidence] to exclude evidence that would otherwise be admissible') is broad enough to encapsulate improperly obtained evidence. But seen in the light of the background to the CPR, using CPR 32.1 in this way becomes contentious.[115] The Woolf Reports placed the need for judicial control of evidence very much in the context of controlling evidence to reduce costs and delays. A few extracts from the Reports demonstrate the point:[116]

> The inappropriate use of experts to bolster cases leads to additional cost and delay. It arises and is allowed to continue because parties at present have complete control over the scope and management and presentation of their case …[117]

> The legal profession will … be performing its traditional adversarial role in a managed environment governed by the courts and by the rules which will focus effort on the key issues rather than allowing every issue to be pursued regardless of expense and time …[118]

> The powers which the new rules will give to judges to control and limit evidence will result in far greater judicial control over the pace, scope and ordering of litigation.[119]

There is no discussion in the Woolf Reports of use of case management powers to prevent use of evidence because it was improperly obtained.[120] Although in *Less v Benedict*, Warren J stated that 'it should be remembered that the CPR were drafted with the ECHR in the background and were clearly intended to be compliant with it',[121] the Woolf Reports contain no overt discussion of the ECHR or effect that reliance on evidence obtained in breach of a Convention right may have on the litigants' Article 6 right to a fair trial.

Coming back to the discussion in *Jones*, Lord Woolf stated that a judge exercising the discretion contained in CPR 32.1 in accordance with the CPR's overriding objective needed to 'consider the effect of his decision on litigation generally'.[122] As an example of this wider approach, Lord Woolf referred to the fact that resource allocation decisions in an individual case had to be made with reference to

[112]*Jones v University of Warwick*, above n 9, at [21].

[113]Ibid.

[114]Ibid, at [24] (emphasis added).

[115]A Zuckerman *Zuckerman on Civil Procedure: Principles of Practice* (Sweet & Maxwell, 4th edn, 2021) para 11.92: 'Give[n] that it is a case management tool, CPR 32.1(2) ought not to be seen as a basis upon which to deal with questions of principle that have nothing to do with case management. … [it] was not intended to confer on the court the discretion to exclude improperly obtained evidence'.

[116]See also Sir Harry Woolf 'Access to justice: interim report of the Lord Chancellor on the civil justice system in England and Wales' (1995) ch 5; Sir Harry Woolf, 'Access to Justice: Final Report' (1996) ch 5, para 29; ch 15.

[117]Woolf, Interim Report, above n 115, ch 23.

[118]Woolf, Final Report, above n 115, ch 1, para 3.

[119]Ibid, ch 17, para 84.

[120]K Grevling 'CPR r 32.1(2): case management tool or broad exclusionary power?' in D Dwyer (ed) *The Civil Procedure Rules Ten Years On* (Oxford: Oxford University Press, 2009) p 254.

[121]*Less v Benedict* [2005] EWHC 1643 (Ch), [2005] 4 Costs LR 688.

[122]*Jones v University of Warwick*, above n 9, at [25].

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their impact on allocation in other cases. He then said that 'proactive management of civil proceedings, which is at the heart of the [CPR], is not only concerned with an individual piece of litigation which is before the court, it is also concerned with litigation as a whole'.[123] So far this supports the view that CPR 32.1 is about evidence which is of limited relevance or case management regarding resource concerns, and falls short of application to highly relevant evidence.

Lord Woolf went on to say:[124]

> So the fact that … the defendant's insurers … have been responsible for the trespass … and infringing her privacy contrary to Article 8(1) [ECHR] is a relevant circumstance for the court to weigh in the balance when coming to a decision as to how it should properly exercise its discretion in making orders as to the management of the proceedings.

This is a subtle extrapolation from the text of the overriding objective which focuses on proportionality (resource management), to a general principle of 'proactive management' concerned with 'litigation as a whole', capable of encapsulating HRA concerns. In exercising its discretion:[125]

> The court must try to give effect to … the two conflicting public interests. The weight to be attached to each will vary according to the circumstances. The significance of the evidence will differ as will the gravity of the breach of Article 8, according to the facts of the particular case. The decision will depend on all the circumstances.

The background to the CPR demonstrates that it was the HRA 1998 which did the heavy lifting in prompting recognition that it was possible to exclude the evidence *on the basis that it had been improperly obtained* as distinct from case management (resource) concerns. Although *Jones* was not written in this way (and it must be acknowledged that the parties agreed that there was an ability to exclude pursuant to CPR 32.1) the recognition that CPR 32.1 could be used in order to exclude improperly obtained evidence in that case should be understood as an application of section 3 of the HRA 1998. That provision states that 'so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention rights'. It was argued above that the European Court of Human Rights' reasoning in *Khan* (and, later, *Ribalda*) means that refusal to recognise a discretion enabling exclusion of evidence on the basis of how that evidence had been obtained in civil proceedings (whether through CPR 32.1 or otherwise) would have raised issues under Article 6. In that sense, the recognition of discretion in *Jones* was inevitable. Even if the wording in CPR 32.1 had not been available, the later developments in *Imerman* and *Olden* demonstrate that the law was already on this path. This undermines the academic and sometimes judicial focus on the CPR as the source of the discretionary power to exclude evidence in civil proceedings, and instead emphasises the importance of Convention rights.

Understood in this way, *Jones* is either an example of the human rights-based thread of the general exclusionary discretion, or an example of a third discretion (alongside the *Imerman* and the *A/Olden* discretions). But either way, CPR 32.1 is about resource management, and it is very unlikely that a court would exclude evidence pursuant to CPR 32.1 in a case where cost and time concerns did not apply, unless the facts were such that it was in the interests of justice to do so (in the words of *Imerman*) or where admission would dishonour the administration of justice (in the words of *A/Olden*). This suggests that Zuckerman's view, that CPR 32.1 should not be used for 'questions of principle that have nothing to do with case management', was right all along,[126] and CPR 32.1 is not a distinct source of exclusionary power (when considering improperly obtained evidence, rather than

[123]Ibid.
[124]Ibid (emphasis added).
[125]Ibid, at [28].
[126]Zuckerman, above n 114, 11.92.

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costly or time-consuming evidence). The text of the rule is convenient, but without CPR 32.1, the courts would have recognised an exclusionary discretion regardless. We see this from the developments of *Pape*, occurring well before the enactment of the CPR, and the culmination of these developments in *Imerman* (where the CPR did not apply). That a discretion would be recognised was also necessary applying the jurisprudence of the European Court of Human Rights. Of itself, this is a significant untangling of the scant authorities on exclusion of improperly obtained evidence in civil proceedings.

(c) Content of human rights based discretionary exclusion

Aside from human rights concerns requiring recognition of a discretion, the ECHR human rights framework is also important because it informs the content of the discretionary exercise. *Jones* and *Imerman* provide examples.

In *Jones*, Lord Woolf considered that the insurer's conduct was not 'so outrageous' that the defence should be struck out, and 'it would be artificial and undesirable for the actual evidence, which is relevant and admissible, not to be placed before the judge'.[127] This represents a disappointing return to the traditional view that there should be no discretion, even while recognising that exclusion was possible. To exclude the evidence would mean each side would need to instruct fresh experts, and 'evidence which is relevant would have to be concealed from them … it would not be possible to cross-examine [Jones] appropriately'.[128] Although not using this language, these are Article 6 concerns. As a result, Lord Woolf would not interfere with the High Court's decision. However, it was 'appropriate to make clear that the conduct of the insurers was improper and not justified',[129] raising deterrence ideas. Lord Woolf proposed to order the defendant to pay the costs of the admissibility proceedings, and indicated to the trial judge that in determining costs 'he may consider the costs of the inquiry agent should not be recovered'.[130] Further, if it turned out Jones had an innocent explanation for her movements in the videos, 'this is a matter which should be reflected in costs, perhaps by ordering the defendant to pay the costs throughout on an indemnity basis'.[131] This was not a 'perfect reconciliation of the conflicting public interests', but was 'at least [a] solution [which] does not ignore the insurers' conduct'.[132]

In *Imerman*, the human rights framework meant that in determining whether to admit evidence of Mrs Imerman's unlawfully obtained recollection of the contents of the documents, the court would have to balance her Article 6 right to a fair trial with all available evidence, against Mr Imerman's Article 8 right. The balancing exercise may also involve Article 10, and Mr Imerman's Article 6 right 'on the basis that he might say the trial was unfair if it extended to evidence which had been wrongly, even illegally, obtained from him'.[133]

Conclusion

Putting CPR 32.1 in its place reveals either one general discretion to exclude when it is in the interests of justice to do so (using this as a catch-all phrase to encompass *Imerman, A/Olden* and human rights concerns), or potentially three discretions: the *Pape/Imerman* line, which permits exclusion when a party to litigation has abused the court's own processes, perhaps aligning with deterrence/discipline and court-centred integrity rationales borrowed from the literature concerning criminal proceedings;

[127] *Jones v University of Warwick*, above n 9.
[128] Ibid.
[129] Ibid, at [29].
[130] Ibid, at [30].
[131] Ibid.
[132] Ibid.
[133] *Imerman v Imerman*, above n 14, at [176]. See *The Commissioner of Police of the Metropolis v Times Newspapers Ltd* [2011] EWHC 2705 (QB), [2014] EMLR 1 for an example of this balancing in practice, in relation to reference to 'leaked' information in a statement of defence.

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the *A/Olden* discretion to exclude where there has been executive illegality (with differing outcomes depending on the seriousness of the illegality), more clearly aligned with the integrity rationale as related to criminal proceedings; and a discretion to exclude where evidence has been obtained in breach of a person's human rights, which will sometimes overlap with facts giving rise to the previous two, and will sometimes be distinct.[134] It may be that it is most pragmatic to recognise one general discretion, reflecting the practical realities of judicial decision making, and reserving the more specific categories identified here as tools for academic commentary and critique.

To the extent that the exclusionary discretion in civil proceedings has been the subject of any detailed discussion, the view has been expressed that the approach in civil proceedings is now much closer to that applying in criminal proceedings.[135] One judge has called the approach under CPR 32.1 and under section 78 of the Police and Criminal Evidence Act 'broadly the same'.[136] This is not true if CPR 32.1 is understood as related to resource management concerns, but is true if CPR 32.1 is understood as a stand-in for the human rights discretion in the way explained in section 3(b) above. When taking the latter view, it is interesting to observe that this position has been reached through a process of slow, obscure development, in contrast to the very visible maturation of section 78 jurisprudence. Section 78 was a late addition to the Police and Criminal Evidence Bill, but was the subject of considerable debate in the Commons and Lords. While the text of section 78 may be criticised, along with the way the provision has been used, the issue of exclusion in criminal proceedings is very much in the open. In contrast, the overlapping developments leading to recognition of discretion/s to exclude in civil proceedings have been largely ignored in the conversation over exclusion of improperly obtained evidence, and there has been no statutory intervention.

The messy development here is not necessarily a bad thing, and it is a proxy for development of the common law generally. But going forward, it is time to definitively reject the view that there is no discretion to exclude evidence in civil proceedings based on how the evidence was obtained. As Hollander suggests, 'that was always simplistic, if not misleading'.[137] Court-centred integrity concerns were starting to emerge in the *Pape* line of cases, and are now of further relevance following *A* (perhaps extended in *Olden*). Further, the fact that a court is a public authority under the HRA 1998 requires recognition of a power to exclude evidence to uphold the right to a fair trial contained in Article 6 ECHR. It is also time to recognise that CPR 32.1 is not responsible for the existence of the discretionary power to exclude evidence based on how the evidence was obtained.

An advantage of untangling the authorities concerning exclusion of improperly obtained evidence in civil proceedings is that this enables us to move into consideration of how and why exclusion in civil proceedings may be more or less desirable than exclusion in criminal proceedings, as well as facing head on the desirability of having one general discretion or many discretions. There are a whole range of issues of principle which deserve attention. Sankoff and Wilson draw attention to many of these in their article on the position in Canada, with a particular focus on the pursuit of truth.[138] Other issues include what improperly obtained evidence means for the purposes of civil procedure (do we only care about evidence obtained in breach of a person's human rights, as the most serious subset of improperly obtained evidence, so that the *Imerman* and *A/Olden* limbs are actually narrower examples of a broader principle concerned with human rights, rather than independent discretions? Do we define human rights only as Convention rights, or does this apply more widely, for example to statutory data protection rights?); the extent to which the identity of the party wrongfully obtaining the evidence matters (if we are concerned about judicial integrity, is this limited to actors who have some kind of state sanctioned role, or is it more general?); the extent to which it matters whether it is a claimant or defendant seeking to rely on improperly obtained evidence in a civil proceeding,

[134] *Imerman* itself is a good example of overlap – there was both a concern about misuse of the court or involvement of the court in sanctioning wrongdoing, and the distinct fact of interference with Mr Imerman's Art 8 rights.

[135] ALT Choo *Evidence* (Oxford: Oxford University Press, 5th edn, 2018) p 180.

[136] *Egeneonu v Egeneonu* [2018] EWHC 1392 (Fam), at [15].

[137] Hollander, above n 10, para [27–01].

[138] Sankoff and Wilson, above n 11, at 166, 170–171.

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given that section 78 of the Police and Criminal Evidence Act 1984 applies only to prosecution evidence, not defence evidence; and the relevance of disclosure obligations and 'inevitable discovery' of evidence alongside the *Imerman* concern with abuse of the court's own processes.

Some jurisdictions include express reference to exclusion in civil proceedings in their evidence legislation,[139] or have grappled with admissibility of improperly obtained evidence at the highest levels of the court system.[140] It may be that we are content to sit back and allow the judiciary to continue to develop the law. To come back to the position in Aotearoa New Zealand which opened this paper, this is the view which has been taken by the New Zealand Law Commission, which recently considered whether amendment of New Zealand's Evidence Act 2006 was required to make express reference to powers to exclude improperly obtained evidence in civil proceedings. In concluding not to amend, the Law Commission stated, '[framing] a test for exclusion of improperly obtained evidence in civil proceedings without the benefit of judicial decisions or extensive engagement from submitters is likely to create more problems than it would solve'.[141] However, the attempt at untangling English authorities which has been made in this paper, and the untangling of Canadian authorities in Sankoff and Wilson's article,[142] suggests that the New Zealand Law Commission's hope that the incremental development of the common law will solve the issue of exclusionary discretion in civil proceedings is perhaps overly optimistic.

[139]See for example s 138 of the Evidence Act 1995 (Cth, Australia), which provides that evidence that was obtained improperly 'must not be admitted unless the desirability of admitting … outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained', applying to both criminal and civil proceedings.

[140]*Marwood v Commissioner of Police*, above n 2.

[141]NZLC R142, above n 2, para 7.83.

[142]Sankoff and Wilson, above n 11.

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