

Irregularly obtained real evidence: The Scottish solution?

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Abstract. In determining whether to admit improperly obtained real evidence, the Scottish courts have engaged in a balancing act for over 50 years, weighing the public interest in the conviction of the guilty against the rights of the accused and the civil liberties of the citizenry. The Appeal Court's approach to this issue has not been particularly satisfactory and the result is an incoherent mass of detailed and often almost irreconcilable case law, rather than a principled framework to guide the trial courts in the exercise of this power.

The admissibility of improperly acquired real evidence is a difficult issue in most jurisdictions. Solutions have ranged from almost always admitting such evidence—the historical position in England—to almost always excluding it—the approach in the United States throughout the latter half of last century. More recently, most jurisdictions have attempted to find something of a compromise between these two positions. This latter approach was adopted in Scotland in the middle of last century as a result of the leading case of *Lawrie v Muir* where, paraphrasing roughly, Lord Cooper stated that the court must determine whether such evidence should be admitted depending on the balance between the need to preserve civil liberties and the need to ensure that justice is done.¹ Until then in Scotland, real evidence which had been obtained irregularly was always in practice admitted.² At the time, *Lawrie* was perceived to be something of a pioneering decision, both in Scotland and elsewhere. For instance, in 1955 Glanville Williams, after reviewing the competing English and American positions, concluded:

As a compromise between the opposing considerations of policy the Scottish doctrine has, it is submitted, much to commend it.³

1 1950 JC 19 at 26.

2 M. Ross, *Walker and Walker: The Law of Evidence in Scotland* (T & T Clark: Edinburgh, 2000) 7.

3 G. Williams, 'Evidence Obtained by Illegal Means' [1955] Crim LR 339 at 349.

Similarly, Cross, in the first edition of *Evidence*, quoted at length from *Lawrie*, observing with a note of regret that there had been no such examination of the relevant principles in England, despite the fact that these were of ‘the highest significance’.⁴ He observed with approval that ‘recent Scots decisions have gone far towards providing a compromise between the two conflicting interests by according a large measure of discretion to the trial judge’, noting some pages later that ‘the difference from English law is striking’.⁵ More recently, Yeo granted ‘full honours’ to the Scottish courts for their approach,⁶ and Dennis approvingly notes that the Police and Criminal Evidence Act 1984 brought England into line with the Scottish position.⁷ Mirfield observes that *Lawrie* has been ‘of great influence’ in England and other common law jurisdictions and has been followed in Australia.⁸ This approval has extended to the judiciary also, Lord Scarman, for instance, in *Sang*, stating that in formulating his views, he was ‘encouraged’ by the fact that Scots law recognised the ‘discretionary principle of fairness to the accused’ (the latter phrase he quoted from Lord Cooper’s words in *Lawrie*).⁹

The purpose of this article is to trace the history of this judicial capacity to exclude improperly obtained real evidence since its introduction, through the decision in *Lawrie*, to the law of Scotland. I shall show that, unfortunately, for a number of reasons, no clear framework has evolved to guide judges in this task. First, the various, traditional rationales for excluding improperly obtained evidence have all frequently been cited: the ‘reliability principle’ (i.e. ensuring the reliability of the evidence); the ‘disciplinary principle’ (i.e. controlling the police and prosecution authorities); the ‘vindicatory principle’ (i.e. protecting or vindicating the rights of the accused).¹⁰ As is the situation elsewhere, it is not clear which of these rationales motivates the decisions of the Scottish courts and this has led to inconsistencies in the application of the law. As we shall see, in one case the court will cite one of these three principles, leading to a particular result, and in another similar case the court will cite another, leading to a different result. Elsewhere, I have argued that the Scottish courts would be best advised to adopt the ‘moral legitimacy principle’ (the need to maintain the legitimacy of the verdict and legal system), identified by recent theorists,¹¹ although, again, this does not satisfactorily explain or justify all the Scottish decisions.¹²

4 R. Cross, *Evidence* (Butterworths: London, 1958) 259, 268.

5 *Ibid.* at 268. C. Tapper, *Cross and Tapper on Evidence*, 9th edn (Butterworths: London, 1999) 494–5 still introduces the topic of improperly obtained evidence with Lord Cooper’s dicta from *Lawrie*.

6 M. Yeo, ‘Inclusionary Discretion over Unfairly Obtained Evidence’ (1982) 31 ICLQ 392.

7 I. Dennis, *The Law of Evidence*, 2nd edn (Sweet & Maxwell: London, 2002) 76.

8 P. Mirfield, *Silence, Confessions and Improperly Obtained Evidence* (OUP: Oxford, 1997) 339, 354.

9 *R v Sang* [1980] AC 402 at 457.

10 See Dennis, above n. 7 at ch. 8; and Tapper, above n. 5 at 495–509.

11 *Ibid.*

12 P. Duff, ‘Admissibility of Improperly Obtained Evidence in the Scottish Criminal Trial: The Search for Principle’ 2004 ELR (forthcoming).

Secondly, and to some degree related to the first reason, there is some confusion as to what factors are relevant in determining whether evidence should be admitted and the weight to be attributed to these. Among the issues which have been taken into account by the Scottish courts are: the gravity of the crime; the extent of the irregularity; the urgency of the investigation; the need to preserve evidence; the authority and identity of those who obtained the evidence; the motive of those responsible for the impropriety; the extent of the infringement of the accused's rights; and the issue of fairness to the accused.¹³ The judiciary has tended to 'pick and mix' from this list, sometimes being heavily influenced by a particular factor and, on other occasions, dismissing the same factor as of no account. This has led to considerable inconsistency and uncertainty in the law. Thirdly, the courts have often seemed reluctant to use their broad, but rather vague, power under the *Lawrie* formula to determine whether evidence should be admitted, seemingly preferring to seek refuge in the apparent certainties of technical and procedural issues, a device which runs counter to the spirit of Lord Cooper's famous dicta. Sometimes, this has led to almost nonsensical results as will be demonstrated below by the case of *Singh*.¹⁴

A final factor, and one which is often overlooked by those who have admired the Scottish approach, is that the trial judge has no 'discretion', in the true sense of the word, whether to admit improperly obtained evidence.¹⁵ The decision is dictated purely by the law and, ultimately, the Appeal Court will determine whether the trial judge got it right or wrong in legal terms, either in admitting the evidence or, very occasionally, in excluding it where there has been a prosecution appeal on a point of law.¹⁶ This is unlike the position which has developed in England under s. 78 of the Police and Criminal Evidence Act 1984 (PACE) where the trial judge truly does have a discretion whether to admit improperly obtained evidence. The exercise of this discretion can only be reviewed on *Wednesbury* principles; thus, as Dennis explains: "The Court of Appeal will not substitute its own judgment for that of the trial judge simply because it takes a different view of the case."¹⁷ In other words, the trial judge must be shown to have erred in principle or reached a wholly unreasonable decision before the Court of Appeal will interfere.

13 See Ross, above n. 2 at 7.

14 *Singh and Singh v HMA* 2001 SCCR 348.

15 J. Gray, "The Admissibility of Evidence Illegally Obtained in Scotland" 1966 JR 89 at 104, made this point quite some time ago, but it is equally true today.

16 Such appeals are rare and have no bearing on the outcome of the instant case. One such case, *Lord Advocate's Reference No. 1 of 2002* 2002 SCCR 743, is discussed below.

17 Dennis, above n. 7 at 263.

In Scotland, on the other hand, although the matter has never been expressly considered by the courts,¹⁸ the Appeal Court generally does not seem to take the view that the trial judge makes a discretionary decision which should not be interfered with unless the decision was wholly unreasonable. On the contrary, it seems to be only too willing to attempt to ‘fine-tune’ the decisions on admissibility reached in the courts below and thus the trial judge cannot be said to have any real discretion on the matter at all. He or she is generally perceived to be making a legal decision which is always liable to be overruled by the Appeal Court, often on very narrow grounds. Certainly, the Scottish Law Commission recently took the view that the Scottish judiciary probably does not have a ‘discretion’ to determine the admissibility of criminal evidence in any significant area.¹⁹ This, I think, has been unfortunate because, oddly enough, it has probably exacerbated the uncertainty in the law inevitably caused by Lord Cooper’s balancing act.²⁰ First, if a trial judge comes to a decision over which reasonable people (or judges) could disagree, then in Scotland the matter is still open and an appeal court may or may not ratify the original decision. Secondly, and consequently, the Appeal Court has tended to consider the minutiae of each and every case and draw very narrow distinctions in reaching its decisions, rather than setting out a principled and coherent framework to guide trial judges in the exercise of their capacity to determine whether evidence is admissible. This has not helped the law develop in a clear and consistent fashion.

The original triptych of cases

While *Lawrie v Muir*²¹ was clearly the landmark case, it is significant that two other leading Scottish cases on this issue were decided within mere months of that decision: *McGovern v HMA*²² and *Fairley v The Wardens and Commonalty of the Fishmongers of the City of London and Another*.²³ All three were decided by the High Court of Justiciary sitting in appeal mode (henceforth the ‘Appeal Court’), the highest criminal court in matters of Scottish criminal law and procedure. *Lawrie* itself was decided by a ‘Full Bench’, an appeal court comprising more than the normal three judges which is convened either to overrule a previous decision or

18 There is only one case where this issue seems to have been expressly raised. In *Lord Advocate’s Reference No. 1 of 2002* 2002 SCCR 743, the judgment indicates that there was a suggestion from the defence that it is only where the trial judge has exercised his discretion unreasonably that the Appeal Court should step in (at para. 12). The point did not need to be decided and was not referred to again in the judgment.

19 Scottish Law Commission, *Evidence: Report on Hearsay Evidence in Criminal Proceedings*, Report No. 149 (HMSO: Edinburgh, 1995) para. 4.37.

20 The Scottish Law Commission (ibid. at para. 4.35) was persuaded by the more obvious argument that inconsistency and lack of clarity are caused by the existence of a discretion, not by its lack.

21 1950 JC 19.

22 1950 JC 33.

23 1951 JC 14.

where the matter raised is particularly novel and weighty. In all three cases, the court's judgment was given by Lord Justice General Cooper, to grant him his full title as the most senior member of the Scottish judiciary, who is generally regarded as the most influential judge of the 20th century in terms of the development of Scots law, both civil and criminal.²⁴ It is worth noting that Lord Carmont was also on the bench on all three cases but he restricted himself simply to concurring with the Lord Justice General. At the outset, it is useful to examine these three cases in some detail because such an analysis provides a foretaste of the inconsistencies and problems which were to come.

Lawrie

This case arose out of the prosecution of the owner of a dairy for selling milk in bottles belonging to others and, ironically in the light of its subsequent importance, Lord Cooper thought it 'singularly unsuitable as a test case' because of its extreme triviality.²⁵ The offence had come to light as a result of two inspectors from the Scottish Milk Marketing Board searching the appellant's shop. In doing so, they had unwittingly exceeded their powers but the Sheriff admitted their evidence because he was satisfied that they had acted in good faith and did not consider that their lack of authority 'justified the exclusion of the evidence'. As a result of the lack of direct authority on the point, the initial hearing in the Appeal Court referred the matter to a full bench of seven judges which took a contrary view from the Sheriff. Here, Lord Cooper famously summarised the dilemma facing the court:

from the standpoint of principle ... the law must strive to reconcile two highly important interests which are liable to come into conflict— (a) the interest of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities, and (b) the interest of the State to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from Courts of law on any merely formal or technical ground.²⁶

As regards the former interest, the Lord Justice General emphasised the protection of the citizen against 'unwarranted, wrongful and perhaps high-handed interference',²⁷ although he did note that 'the common sanction' is one of

²⁴ In civil matters, the Lord Justice General is known as the Lord President (and the High Court of Justiciary becomes the Court of Session, although the composition of the two courts is identical). For praise of Lord Cooper, see T. B. Smith, 'The Contribution of Lord Cooper of Culross to Scottish Law' 1955 JR 249.

²⁵ 1950 JC 19 at 28.

²⁶ *Ibid.* at 26.

²⁷ *Ibid.*

damages. As well as these references to what looks very like a vindictory rationale, he also referred to the dangers of ‘offering a positive inducement to the authorities to proceed by irregular methods’ which looks like a disciplinary rationale. Balancing these factors against the interest of the state in ensuring that justice is done, he concluded that the rule in Scots law was that an irregularity in the collection of evidence did not necessarily render the evidence inadmissible²⁸ but it did need to be ‘excused’ before the evidence could be admitted. Whether an irregularity could be excused depended upon its nature, the circumstances and ‘in particular, the discretionary principle of fairness to the accused’ which, Lord Cooper noted, had been ‘developed so fully’ as regards the admission of confession evidence. In his view, the fairness to the accused would clearly be relevant where the irregularity amounted to an ‘unfair trick’ by the police (a disciplinary rationale?) or was in relation to the many statutory offences where a special procedure had been prescribed for obtaining evidence (a protective or vindictory rationale?). In the present case, which fell into this latter category, the irregularity could not be excused and thus the evidence of the inspectors should have been excluded.

McGovern

Unfortunately, the lack of clarity of the framework for determining whether improperly obtained evidence should be admitted became apparent in *McGovern*, which was heard by the Appeal Court a mere two months later. In this case, scrapings were taken from the accused’s nails at the police station just before he was arrested and charged with safe-blowing, and subsequent chemical analysis of the sample confirmed the presence of explosives. He appealed against conviction on the basis that the evidence relating to the scrapings from his fingernails had been improperly obtained and should not have been admitted. The Crown claimed that the irregularity was very minor—if the sample had been taken after his arrest a few minutes later, it would have been properly obtained—and thus, under *Lawrie*, the impropriety should be excused and the evidence admitted. The Appeal Court rejected this argument and quashed the conviction but its reasoning is not particularly satisfactory.

In a very short opinion—it is less than one page and comprises only four paragraphs—with which the other judges simply concurred, Lord Cooper, having alluded to the recent decision in *Lawrie*, observed:

Where evidence has been wrongly admitted and is of such a nature

²⁸ In reaching this conclusion, he adopted dicta from *HMA v McGuigan* 1936 JC 16, where the trial judge, Lord Justice Clerk Aitchison, had appeared to accept that a particularly egregious impropriety might render evidence inadmissible.

as to prejudice the fair trial of the applicant, it cannot easily be said that there has been no miscarriage of justice.²⁹

One could hardly disagree with this sentiment but it rather begs the question because, first, Lord Cooper seems simply to assume that the evidence had been wrongly admitted. Surely the precise point at issue before the Appeal Court was to establish whether this was indeed so, or, alternatively, whether the evidence was correctly admitted because the irregularity could be excused. Further, he surely could not conclude that the evidence was ‘prejudicial’, in that it unjustifiably influenced the decision, without further explanation. Certainly, it was inculpatory but in this instance, where there was no question of its reliability, it would surely only be ‘prejudicial’ if it was unfairly admitted, which is what the court was supposed to be deciding.³⁰ Again, Lord Cooper appeared to pre-judge the issue which the court was supposed to determine.

In any event, Lord Cooper was not ‘disposed’ to excuse the conduct of the police because it was not difficult or impractical for them to follow the proper procedure and, thus, he concluded ‘with some regret, for the matter was never properly raised in the Court below’ that there was no option but to quash the conviction. Again, quite what ‘matter’ was not properly discussed in the trial court is not clear, although I suspect he was referring to the fact that it was not known why the police departed from normal procedure. Thus, the High Court’s ‘regret’ at having to quash the conviction may have stemmed from the failure of the prosecution to advance a good reason for ‘excusing’ the impropriety. As we shall see, this type of scenario certainly occurred in several later cases. Finally, it is worth noting that Lord Cooper’s initial comments about the ‘prejudice’ caused to the accused by the use of the evidence at trial suggest he was influenced by the need to protect the accused’s rights because there was no question over its reliability. Thus, this comment seems to be founded in a vindictory rationale but Lord Cooper concluded his opinion, with what appears to be a reference to a disciplinary rationale, by stating that the appeal had to be upheld because:

unless the principles under which police investigations are carried out are adhered to with reasonable strictness, the anchor of the entire system for the protection of the public will very soon begin to drag.³¹

²⁹ 1950 JC 33 at 135.

³⁰ I have commented elsewhere, above n. 12, on the tendency of the Scottish judiciary to merge the words ‘prejudicial’ or ‘unfair’ and ‘incriminative’ in this context. See also *Singh and Singh v HMA* 2001 SCCR 348 but cf. *Webley v Ritchie* 1997 SLT 1241.

³¹ 1951 JC 14 at 135.

Fairley

One can contrast Lord Cooper's views in *McGovern* and *Lawrie* with those expressed a few months later by a sheriff and by Lord Cooper himself in the Appeal Court in the case of *Fairley*. What is odd about this case is that, while reference is made to *Lawrie*, there is no mention of *McGovern* whatsoever.³² The facts in *Fairley* were remarkably similar to *Lawrie*, in that *Fairley* also involved two inspectors, in this instance employed respectively by the respondents and by the Ministry of Food, who exceeded their statutory powers, entirely inadvertently, in securing evidence from a cold store, namely salmon, which had been caught out of season. The Sheriff in *Fairley* distinguished *Lawrie*, on the fairly narrow ground of a difference between the precise status of inspectors in each case, and went on to state:

What they did was to obtain by irregular means evidence which could easily have been obtained regularly. In my opinion, the appellant suffered no real prejudice, and I did not see that the mistakes which were made could be said to have operated against the appellant so unfairly as to withdraw the evidence from the court.³³

Thus, unlike Lord Cooper in *McGovern*, the Sheriff was very clear that the mere fact that the evidence had been improperly obtained and was highly incriminative did not automatically mean that the accused's position was prejudiced and that he could not get a fair trial. In other words, he did not treat the words 'incriminative' and 'prejudicial' as synonymous.

On appeal, Lord Cooper accepted that the way in which the evidence was obtained was not 'strictly in accordance with any statutory or other authority' but emphasised that the inspectors had acted in good faith. Further, he took the view that 'the appellant's assumption of the guise of a champion of the liberties of the subject failed to elicit my sympathies'.³⁴ Consequently, Lord Cooper agreed with the Sheriff that the irregularity ought to be excused and the evidence admitted, the other two judges simply concurring with his opinion. Unlike the Sheriff, Lord Cooper gave no explanation as to how he distinguished this case from *Lawrie*, apart from the fact that the accused, a hotel owner, failed to attract his sympathy. Both cases involved an inadvertent breach of statutory regulations—in the instant case, of the Salmon Fisheries (Scotland) Act 1868—by non-police enforcement

³² Lord Cooper possibly forgot about his decision in *McGovern* because nearly nine months had elapsed since he had made it at the end of January, although this seems unlikely. However, defence counsel should surely have cited it because the report was published in the Scots Law Times fairly soon after the decision (1950 SLT 113) and well before *Fairley* was heard in the Sheriff Court in July and the High Court in October.

³³ 1951 JC 14 at 19.

³⁴ *Ibid.* at 24.

agencies acting in good faith, yet in one case the evidence was admissible and in the other it was not. The decision to admit the evidence in *Fairley* is particularly odd when one remembers Lord Cooper's remarks in *Lawrie* about the particular need to safeguard the interest of fairness where special procedures are set up for particular statutory offences.

It is also difficult to reconcile the decision in *Fairley* with that in *McGovern*. If the owner of a hotel in possession of salmon caught out of season was not a suitable recipient of Lord Cooper's 'sympathies' as 'a champion' of the citizenry's rights, it is difficult to see why a professional safe-cracker was. Further, one would have thought the public interest in securing the conviction of the accused was much more likely to outweigh the need to protect his civil liberties in the case of *McGovern* than *Fairley*: a safe-blower is surely a greater public menace than a hotelier who serves out-of-season salmon! It is also odd that, in *McGovern*, Lord Cooper was not prepared to excuse the conduct of the police on the ground that it would have been very easy for them to follow the correct procedure whereas, in *Fairley*, the main reason for admitting the evidence given by the Sheriff, and this point was also emphasised by Lord Cooper, was that it would have been very easy for the inspectors to get the appropriate warrant. Thus, this factor was used to support the argument to exclude the evidence in *McGovern* but was used, a few months later, to support the argument to admit it in *Fairley*, on both occasions by Lords Cooper and Carmont.

Contemporary Scottish comment

In the wake of these cases, it is hardly surprising that, despite the praise for the Scottish position from south of the border, Scottish commentators on these developments argued that this bold attempt to steer something of a middle course between the automatic exclusion or inclusion of improperly obtained evidence was not entirely satisfactory.³⁵ Writing in the mid 1960s, Gray observed that the reference to the 'sympathies' of the court in *Fairley* was a 'clear indication of the subjective nature of (the Appeal Court's) approach'.³⁶ In his view, this had inevitably led to an 'ad hoc' approach to the cases and he argued, with considerable justification, that this has led to 'uncertainty' and 'confusion' in the law.³⁷

³⁵ English readers must bear in mind that there has traditionally been very little written on the law of evidence in Scotland. However, almost 20 years after the decision in *Lawrie*, two major articles on this topic did appear: J. Gray, 'The Admissibility of Evidence Illegally Obtained in Scotland' 1966 JR 89; and JTC, 'Evidence Obtained by Means Considered Irregular' 1969 JR 55 (the use of initials indicates the latter author was probably an advocate).

³⁶ Gray, above n. 35 at 99.

³⁷ *Ibid.* at 100.

As well as analysing in detail the difficulties involved in reconciling the original three cases discussed above,³⁸ Gray further illustrated his argument with a detailed comparison of the two subsequent authorities in this area, both decisions by the same trial judge (Lord Guthrie) in the High Court, although seven years apart.³⁹ Very briefly, in both *Turnbull*⁴⁰ and *Hepper*,⁴¹ the police were searching premises with full authority in connection with one suspected crime and, coming across evidence of other possible crimes, removed this as well. In *Turnbull*, the latter evidence was held to be inadmissible while in *Hepper*, it was held to be admissible. Gray questioned Lord Guthrie's view that there was any valid distinction between the two cases. He then concluded his article by arguing that as a result of the 'extreme uncertainty ... and needless complexity of the Scottish "doctrine", so called ...'⁴² as regards improperly obtained real evidence, it would be better to adopt either the inclusionary rule of England (at the time) or the exclusionary approach of the United States, although he preferred the former principle.⁴³

Similarly, in 1969, JTC penned a critique of both the English and Scottish approach to irregularly obtained evidence.⁴⁴ His main aims were to show, first, that recent utterances in the Judicial Committee of the Privy Council about the similarities in the Scottish and English positions were misfounded and, secondly, that it made no sense to base the law on a 'reliability principle', as he argued the English courts were doing.⁴⁵ While more critical of the English position, JTC was clearly not happy with the approach taken by the Scottish courts, which he thought incorporated a disciplinary rationale as well, resulting, in his view, in 'greater subjectivity', 'vagueness' and 'emotionalism'. This had led to a failure to develop 'tests of sufficient objectivity' to provide coherence in the law and had resulted in 'inconsistency'.⁴⁶ In JTC's view, if the courts focused their view solely on the impact of an irregularity on an *innocent* suspect (thus adopting something akin to a vindicatory rationale), this would provide the necessary objective principle and certainty in the law. Thus, the only two Scottish commentators around the time were agreed that the application of Lord Cooper's dicta had led to uncertainty

38 *Ibid.* at 97–105.

39 *Ibid.* at 105–11. The only other case in this entire period which raised the same issue was *HMA v McKay* 1960 JC 47 where Lord Wheatley held that even if the search was irregular, which he did not accept, he would admit the evidence under the principle expressed in *Lawrie*.

40 *Turnbull v HMA* 1951 SLT 409.

41 *Hepper v HMA* 1958 JC 39.

42 Gray, above n. 35 at 112.

43 See *Burke v Wilson* 1988 SCCR 363 for a further and more recent example of this type of judicial hair-splitting. The court thought the circumstances were more similar to *Hepper*, thus the search was deemed regular and the evidence admissible.

44 JTC, above n. 35.

45 His discussion centred around *Deokinanan v The Queen* [1968] 3 WLR 38 and *King v The Queen* [1968] 3 WLR 391.

46 JTC, above n. 35 at 76.

and inconsistency in the law but disagreed about the solution, Gray advocating an abandonment of the attempt to steer a middle course between automatic inclusion or exclusion and JTC favouring the adoption of a firm principle to act as a compass and guide the courts in the exercise of their power.

A reluctance to excuse irregularities?

As will be seen, the concerns of the above commentators about potential uncertainty in the law and inconsistency of decision making have been amply borne out over the last 40 years. However, what is surprising, I think, is the lack of cases where the courts have held, on the application of the *Lawrie* test, that they are prepared to excuse an irregularity and admit the relevant evidence, whereas there are many cases where such attempts have failed. A cautionary note must be sounded here because it is impossible to ascertain what actually happens at the trial court level. There might be a large number of cases where a High Court judge or sheriff has determined that evidence was obtained improperly but was prepared to excuse the irregularity. I suspect this is unlikely because, first, such decisions are likely to be appealed and thus reported and, secondly, their intrinsically problematic nature, whether there is an appeal or not, will lead to their appearance among reported cases. Following *Fairley*, the next case where an irregularity was excused, *Walsh v MacPhail*,⁴⁷ did not arise until nearly 30 years later in 1978, and its circumstances were described by the Sheriff before whom the trial took place as ‘very unusual’.⁴⁸

In *Walsh*, the accused was a US airman stationed at an RAF base where it was suspected drugs were present. A sniffer dog was brought in and, as a result, a warrant was issued by a senior US officer to authorise a search of the accused’s quarters. Drugs were discovered but it transpired that the warrant was not valid according to American military law. The defence objected to the admission of the drugs as evidence but the Sheriff repelled that objection because by the time a Scottish warrant had been obtained, there would have been ample opportunity for the accused to have disposed of the evidence. The Appeal Court seemed to agree that the urgency of the situation justified excusing the irregularity and, in addition, particularly emphasised, following *Fairley*, that the military authorities were acting in good faith in that they thought the warrant was valid.

Almost a decade after that came the case of *McNeill* where the charges related to the importation of large quantities of cannabis.⁴⁹ The trial judge, Lord Hunter,

⁴⁷ 1978 SLT (Notes of Recent Decisions) 29.

⁴⁸ *Ibid.* at 30.

⁴⁹ *McNeill and Others v HMA* 1986 SCCR 280.

was not persuaded that a particular piece of evidence had been irregularly seized but expressed an opinion that even if the search had been irregular, he would have been prepared to admit the evidence because ‘the interests of the public in the due administration of justice’ outweighed ‘the rights of the . . . [accused] . . . as an individual’.⁵⁰ The Appeal Court opted to ‘assume, without deciding, that these articles . . . were irregularly obtained’ and went on to express the view that the ‘sheer urgency of the situation excuses any irregularity there may have been’. In its opinion, in the context of the importance of the investigation and the serious nature of the charges, ‘the interests of the public in the due administration of justice heavily outweighed those of the appellant . . . as an individual’.⁵¹ Without expanding upon this in any way, it thus upheld the trial judge’s decision to admit the evidence.

In the mid 1990s, there came three further cases where irregularly obtained evidence was admitted under the *Lawrie* formula and it is perhaps significant that there was considerable overlapping of the individual judges across them.⁵² These were *Namyslak v HMA*,⁵³ *Webley v Ritchie*⁵⁴ and *Hepburn v Brown*.⁵⁵ It is worth summarising *Hepburn v Brown* because I intend to refer to its facts again below. Here, police officers from Strathclyde, acting on information from another police force, obtained a warrant to search a house in Strathclyde. A member of the latter police force was involved in the search and found drugs and associated paraphernalia, immediately passing them to a colleague from Strathclyde. The accused argued that that evidence should not be admitted because the warrant was granted only to members of Strathclyde police force. The Sheriff thought that the search was not irregular but added that, even if it were, there was no unfairness to the accused and, following *Lawrie*, he would have excused the irregularity.⁵⁶

The Appeal Court, however, was very clear that the search was irregular but equally convinced that the irregularity was one which could be excused under the *Lawrie* formula and thus the Sheriff had been entitled to admit the evidence. In the court’s opinion, the critical factors were that there was no element of trickery or misrepresentation in gaining access to the premises, that the search would have been carried out anyway, and that it might well have been the Strathclyde officers who discovered the drugs.⁵⁷ As we shall see, the fact that the search was in good

50 *Ibid.* at 301.

51 *Ibid.* at 313.

52 Lords Justice General Rodger, Allanbridge and Cowie each sat in two of the three cases.

53 1995 SLT 528.

54 1997 SLT 1241.

55 1997 JC 63.

56 *Ibid.* at 64–5.

57 *Ibid.* at 66.

faith and would have taken place anyway has carried little weight with the Appeal Court in various other cases.⁵⁸

Thus, there have been very few cases where the Appeal Court has been prepared either to approve the exercise by a trial judge of his capacity, under *Lawrie*, to excuse an irregularity in the gathering of physical evidence or exercise this power on its own account where the trial judge has mistakenly held that there was no impropriety. It is perhaps worth mentioning that there are a few cases where, as in *Hepburn* and *McNeill*, a trial judge has held that evidence was regularly obtained but has gone on to state that, even if the conduct complained of did constitute an irregularity, the trial court would have been prepared to excuse it. For instance, in the early case of *HMA v Hepper*,⁵⁹ Lord Guthrie concluded that the police were entitled to remove a briefcase, containing the name and address of another person, from the accused's house while searching it in connection with another matter. However, he also opined that even if the police were thought to be acting irregularly, the evidence was nevertheless admissible 'in view of the interest of society in the detection of crime'.⁶⁰ Similarly, in *HMA v McKay*, Lord Wheatley held at trial that the seizure of various documents under a search warrant was regular but added that, even if the search were irregular, he would have excused the irregularity because there was no suggestion of an 'unfair trick' and there was an element of urgency.⁶¹

In this context, it is also worth examining the rather odd events in the recent case of *McAnea and Others v HMA*.⁶² In this case, the trial judge held that a warrant was invalid and, consequently, that certain vital evidence was inadmissible. After an overnight adjournment, requested by the prosecution to determine whether and how to proceed, the prosecution argued that the irregularity should be excused on the basis of *Lawrie* and the trial judge accepted that submission, thus admitting the evidence. The accused were convicted but succeeded on appeal because the High Court held that a trial judge was not free to reconsider and, if appropriate, to alter a ruling on a defence objection. What is interesting about the case is that it seems that it did not occur to the prosecution until the next day to argue that even if there were an irregularity with regard to the warrant, this should be excused under the *Lawrie* formula. The fact that this possibility was not uppermost in the mind of the prosecution perhaps indicates the

58 For instance, *Singh and Singh v HMA* 2001 SCCR 348 which is discussed below.

59 1958 JC 39.

60 *Ibid.* at 40. This was one of the two conflicting cases upon which Gray, above n. 35, based his critique of *Lawrie*.

61 1961 JC 47 at 50-1.

62 2000 SCCR 779. I am obliged to my colleague, James Chalmers, for a helpful discussion we had about this case.

infrequent use made of *Lawrie* by the courts to enable them to admit evidence which was improperly obtained.

Avoidance techniques

An examination of judicial decisions in this area leaves one with an impression that the courts are somewhat reluctant to embark on the balancing exercise involved in the application of the *Lawrie* test. Instead, they often prefer to resolve the issue of the admissibility of irregularly obtained real evidence through various ploys before reaching this stage of the process. One common device has been to reject the trial court's view that a search was improper. This is usually done by holding that the urgency of the situation or the technicality of the flaw in the procedure means that the seizure of the evidence was not irregular. A case falling into this category is *Burke v Wilson* where the Sheriff had excused an irregular seizure of obscene videotapes but in the Appeal Court Lords Ross and Wylie held that the seizure was regular, thus avoiding the need to determine whether it should be excused.⁶³ Another such case is *Lord Advocate's Reference No. 1 of 2002* which will be discussed below.⁶⁴

Sometimes, this sort of practice can seem highly artificial, whether adopted by the Appeal Court or the trial court. In *Devlin v Normand*,⁶⁵ a prison officer suspected that the accused, who was visiting a friend in prison, had something in her mouth. He asked her if she did and she denied it. He then asked her to open her mouth and she complied. The officer saw a package under her tongue and asked her to hand it over, which she did. This contained cannabis. At her trial, the Sheriff held that there was no irregularity, despite the fact that no caution had been administered to the accused, and admitted the evidence. On appeal, the defence argued that there had been an irregular search and, further, that this had not been excused by the Sheriff. The Appeal Court neatly side-stepped the latter issue by holding that there was no 'search ... within the proper meaning of that expression' because the accused had cooperated with the prison officer entirely 'voluntarily'.⁶⁶ It is thus fair to say that the decision hinged on a narrow definition of the word 'search' and a wide definition of the word 'voluntarily'. Further, as Gordon pointed out in his commentary on the case, no reference is made to the leading case of *McGovern* (see above) which suggests that consent given without a

63 1988 SCCR 363. Lord Dunpark, who gave the leading opinion, did not make it clear whether he thought that evidence was properly seized or whether this was a situation where an irregularity could be excused (at 367-8).

64 2002 SCCR 743. See also *HMA v Foulis and Young* 2002 SCCR 429 which is discussed below.

65 1992 SCCR 875.

66 *Ibid.* at 877.

warning that it may be withheld is worthless.⁶⁷ In any event, the way in which the Appeal Court decided the case meant that the *Lawrie* test did not have to be applied because there was no irregularity to be considered.⁶⁸

In my view, the most questionable device adopted by the courts to avoid the need to carry out the *Lawrie*-type balancing act is illustrated beautifully by the case of *Singh*.⁶⁹ Here the Crown had argued that a search was regular and the trial Sheriff had agreed with this submission. On appeal the Crown conceded that the search was irregular, and the Appeal Court expressed agreement with this view. The latter then went on to observe: 'In any event, standing the admitted irregularity, it was for the Crown to excuse it ... No attempt was made before the sheriff to do so.'⁷⁰ The Appeal Court thus concluded that the evidence was inadmissible. One wonders just how the Crown could have been expected to argue before the Sheriff that an irregularity was excusable when its position at the time was that there was no irregularity and the Sheriff had already ruled in its favour. This decision would appear to require the Crown in every case where the regularity of a search is at issue, and perhaps even where it is not, to demonstrate, regardless of the decision reached by the trial court, that any purely hypothetical irregularity which might later be found by an Appeal Court was excusable in the circumstances. This does not seem particularly sensible or logical.

The reluctance of the judiciary to apply the *Lawrie* test is rarely admitted but it does come through in the recent case of *Foulis and Young*⁷¹ which involved a search warrant dated 'November 2000' with no specification of any more precise date. The Sheriff took the view that the resulting evidence was inadmissible because there were certain basic formalities essential to the validity of a warrant. In his view, to decide that this defect was potentially excusable would be to introduce 'an element of uncertainty' to the law should there be similar failures in the future. In other words, he was not prepared to apply Lord Cooper's test on the ground, it seems, that the irregularity was too serious for it to be excused, although his reasoning was not entirely clear. The Crown appealed and the Appeal Court, without commenting on the Sheriff's observations, simply held that the lack of a

⁶⁷ *Ibid.*

⁶⁸ See also *Davidson v Brown* 1990 SCCR 730 and *Brown v Glen* 1997 SCCR 636. In the latter case, the Sheriff excluded evidence because the accused had not been told that he could refuse to comply with the search but, following a prosecution appeal, the Appeal Court held that the search was not irregular and distinguished the case from *McGovern* 1950 JC 33.

⁶⁹ 2001 SCCR 348. This case is further discussed below.

⁷⁰ *Ibid.* at 358. The court cited *Mowbray v Valentine* 1991 SCCR 494 and *Hepburn v Vannet* 1997 SCCR 698 (also cited as *Hepburn v Brown* 1998 JC 63) to support its view. The latter case does not seem to be a particularly good authority for this proposition because it is not at all clear from the report that the court required the prosecution to demonstrate why the irregularity should be excused (1998 JC 63 at 65A and 66A-C).

⁷¹ *HMA v Foulis and Young* 2002 SCCR 429.

precise date did not render a common law warrant invalid and thus that there was no irregularity at all. As we just saw, this is the approach the Appeal Court adopted in *Burke and Singh*, rather than accept that there was an irregularity and then apply the *Lawrie* test to determine whether it could be excused.⁷² Whether intentionally or not, this decision had the effect of relieving the Appeal Court of the task of applying Lord Cooper's test and thus having to exercise its discretion in weighing the public interest against fairness to the accused.

Returning to the Sheriff's comments, however, it is worth observing, first, that his fears of creating uncertainty were not particularly well founded because it is not at all clear from the authorities in this area exactly what comprises an 'irregularity' in a warrant in the first place, thus a degree of uncertainty is inevitable. The fact that the Sheriff thought the search warrant was irregular and that the Appeal Court took a different view illustrates this point perfectly. Secondly, the Sheriff had also observed that 'it was an unattractive proposition' that a court would have to engage in 'an exercise of discretion' to determine whether an error made by another member of the judiciary was excusable.⁷³ One might respond that determining the regularity or otherwise of a search usually involves reviewing an error by an actor within the criminal justice system, whether that is a police officer, prosecutor, or judge. There seems no reason in principle why the latter's decision to grant a warrant in a particular form should be immune from such a review.

Conflating the tests

Another factor, which has reduced the need of the courts to grapple with the *Lawrie* test, has been a tendency to conflate the issues of (1) whether there was an irregularity and, if so, (2) whether it can be excused. These two questions are, of course, analytically separate but the courts do not always treat them accordingly and, in such cases, the *ratio* for a decision can become rather confusing. A good example of this occurs in *Bell v Hogg*,⁷⁴ which I shall dissect at some length in order to demonstrate my point. Here Bell and his co-accused were suspected of the theft of copper wire and taken to a police station. Before they were arrested or charged, they were asked by the police to provide rubbings from their hands but were not told they were entitled to refuse to do so. At trial, objection was taken to the leading of evidence that the hand-rubbings contained a substance

⁷² There are a few cases where, having concluded that the evidence was regularly obtained, the court has gone on to state that even if it were not, the court would be prepared to excuse the irregularity, e.g. *Hepper v HMA* 1958 JC 39.

⁷³ *HMA v Foulis and Young* 2002 SCCR 429 at 430.

⁷⁴ 1967 JC 49.

identical to that on the wire. The police sergeant involved stated that if he had delayed the taking of the rubbings, the accused might have asked to use the lavatory and washed their hands, and the Sheriff held that the urgency of the situation ‘excus[ed] the admitted irregularity’⁷⁵ of the sergeant’s actions. Thus, the Sheriff seems to have been perfectly clear that there were two separate questions to be addressed: whether there was an irregularity; and, if there were, whether it could be excused.

On appeal, the Lord Justice General Clyde, who gave the leading opinion, concluded that the evidence was admissible but his reasoning is not at all clear. Initially, he appears to suggest that there was no irregularity, observing that the police took a ‘perfectly proper and legitimate step’ in securing the evidence in view of the urgency of the situation.⁷⁶ That conforms to the pattern noted above—of deciding that what the trial court thought was irregular was not irregular at all. He went on, however, to distinguish the case from *McGovern* where it was accepted that there was an irregularity, which was not excused because there had been no element of urgency. Finally, Lord Clyde quoted with approval Lord Wheatley’s recent dicta in *Miln v Cullen*⁷⁷ (a confession case) about the need to balance ‘fairness to the accused’ against ‘fairness to the public’.⁷⁸ Thus, latterly, he appears to depart from his earlier position that there was no irregularity by implying that there was but that it could be excused. Thus, it is clear that Lord Clyde thought that the urgency of the situation rendered the evidence admissible but it is entirely unclear whether his view was that (a) there was no irregularity because the police sergeant was ‘well entitled’⁷⁹ to act as he did or (b) there was an irregularity but that it could be excused under the *Lawrie* formula as reiterated in *Miln*.

Lord Migdale was clear that there were two separate issues to be considered. In his view, the Sheriff could have held that the sergeant acted properly but ‘[e]ven if this is wrong’, he thought that the action of the police was ‘justified’ under the test set out in *Lawrie*. However, he went on to observe that whether the sergeant’s actions were proper or whether they required to be excused, ‘the question still remains whether it was fair to the accused to allow this evidence to be used in court’. In his opinion, this question was answered by ‘balancing the interests of the appellants as individuals against the interest of the public, which requires that guilty persons should be convicted’. Thus, Lord Migdale was clear that there were two separate issues involved: (a) whether the evidence was obtained

75 *Ibid.* at 53.

76 *Ibid.* at 56.

77 *Miln v Cullen* 1967 JC 21.

78 *Bell v Hogg* 1967 JC 49 at 57. The phrases quoted are those of Lord Wheatley in *Miln*.

79 *Ibid.*

irregularly and (b) if so, whether such irregularity could be excused—but implied that the answers to both questions are determined by exactly the same test.⁸⁰ Lord Cameron too seemed to conflate the two questions, starting by concluding that the police action was ‘lawful and proper’ because there was no unfairness to the accused, and concluding by justifying the police action under the *Lawrie* test on the grounds of the urgency of the situation.⁸¹

The problem with conflating the two issues in this way is that the latter issue, i.e. the question as to whether an irregularity can be excused, becomes superfluous in most cases. It is difficult to see how a court could determine (a) that the police did behave in an irregular manner but (b) that irregularity could be excused, unless the two relevant factors—‘fairness to the accused’ and the ‘public interest’—are given different weights at each stage of the process. This latter possibility has never been suggested, of course. Put another way, whether one applies the *Lawrie* test at the first or second analytical stage should make very little, if any, difference to the final outcome. In practice, however, as we have seen, the courts have on occasion held that evidence was improperly obtained but, nevertheless, that the irregularity can be excused. Perhaps one reason for the apparent rarity of such decisions, i.e. to excuse an irregularity, is the tendency to conflate the two tests and apply similar criteria at each stage of the process, meaning that if there was an impropriety on the part of the police, it is unlikely the irregularity can be excused. It is important to note that this argument does not apply where the alleged impropriety has been perpetrated by someone other than a police officer because the courts are clearly not prepared to grant the same degree of latitude to civilians in determining whether they have behaved irregularly. This perhaps explains why so many of the cases in which the court has considered whether an irregularity can be excused involve agencies other than the police.⁸²

Similarly, in the more recent case of *Edgley v Barbour*,⁸³ where the Appeal Court upheld the decision of the Sheriff at trial to admit certain evidence seized by the police, it is not at all clear, either from the Sheriff’s or Appeal Court’s judgment, which was given by the Lord Justice General, whether (a) the urgency of the situation meant that the police were entitled to act as they did and thus that

80 *Ibid.* at 59.

81 *Ibid.* at 60–1.

82 For instance, two of the original three cases: *Lawrie* itself; and *Fairley*. More recently, there have been *Singh* and *Devlin* (also see above). If these were cases of alleged police irregularities, the courts would have been more likely to hold that, in the circumstances, the police were acting properly. As the Appeal Court noted in *Lawrie*, the courts are not prepared to construe the powers of non-police agencies in quite such a generous fashion. See also the recent contrasting cases of *Wilson v Brown* 1996 SLT 686 and *Mackintosh v Stott* 1999 SCCR 291, both of which involved the seizure of drugs from accused by club doormen.

83 1994 SCCR 789.

there was no irregularity or (b) there was an irregularity but it was excused by the urgency of the circumstances.⁸⁴ In this context, it is interesting to note that the Appeal Court cited *Bell v Hogg* in the crucial part of its judgment, as well as *McGuigan*, where the urgency of the situation meant the seizure of the evidence was not irregular, and *Lawrie*, where the irregularity was excused.⁸⁵ Another case illustrating such judicial ambiguity is *Burke v Wilson*⁸⁶ where Lord Dunpark, giving the leading opinion in the Appeal Court, stated, on the one hand, that the search warrant ‘entitled’ the police to remove suspicious videos, also observing that this evidence was ‘lawfully removed’, but, on the other hand, then immediately went on to state that as it is competent to charge persons on the basis of ‘irregularly obtained’ evidence, and here he cited *Fairley*, the tapes could form the basis of the prosecution case. Thus his reasoning is somewhat opaque.⁸⁷

Further inconsistencies

As I think I have already demonstrated, the Scottish case law on the admissibility of irregularly obtained real evidence is somewhat inconsistent and lacking any coherent approach. Before drawing this piece to a conclusion, however, it is worth highlighting a couple more instances of this problem. First, one can contrast the recent cases of *Hepburn*⁸⁸ and *Singh*,⁸⁹ both of which were discussed above. In *Hepburn*, it will be remembered that an unauthorised person—a police officer from another force—took part in a search and actually discovered the evidence before handing it to one of his authorised colleagues. The irregularity was excused, essentially because there was no element of trickery and the search would have taken place anyway.⁹⁰ In *Singh*, a warrant authorised four customs officers to search premises but eight officers attended (although the Crown attempted to claim that only four conducted the search while the others interviewed the accused). The irregularity was not excused although again there was no element of trickery and the search would have taken place anyway, although perhaps if the prosecution had actually advanced this argument the court might have been

⁸⁴ *Ibid.* at 792–3.

⁸⁵ It is fair to say that, having pointed out that in the former case it was decided that the search was regular, the Appeal Court then cited Lord Aitchison’s dicta to the effect that an irregularity does not always mean the evidence cannot be admitted (1994 SCCR 789 at 793). Overall, however, the impression is one of some ambiguity about the court’s precise reasons for determining that the evidence was properly admitted.

⁸⁶ *Burke v Wilson* 1988 SCCR 361. This was discussed above.

⁸⁷ The Sheriff was similarly ambiguous about his grounds for admitting the evidence (at 364) but in the Appeal Court, the Lord Justice Clerk, in a supporting judgment, was perfectly clear that the seizure was regular (1988 SCCR 361 at 368–9), an opinion with which the third judge, Lord Wylie, simply concurred.

⁸⁸ 1998 JC 63.

⁸⁹ 2001 SCCR 348.

⁹⁰ See also *Namyslak* 1995 SLT 528 where the court excused the irregularity essentially because it made no difference in terms of outcome.

more sympathetic to this point of view.⁹¹ It is clear, however, that in *Singh* the Appeal Court thought it critical that there was no indication that the Singhs knew, or could have known, of the restriction in the warrant, whereas its terms ought to have been known to the customs officers.⁹² Yet, in *Hepburn*, there was also no evidence to show that the accused knew or could have known of the restriction in the warrant, whereas presumably its terms ought to have been known to the police. Thus, one wonders how the Appeal Court could take such a different attitude to the cases, particularly when one could argue that the offence in *Singh*—large-scale and long-term VAT fraud—was more serious than the offence in *Hepburn*—possession of a small amount of drugs.

The problems in this area can be further illustrated by the recent case of *HMA v Aspinall*.⁹³ Here the police searched the house of a suspected paedophile and recovered a computer on which the accused had allegedly stored over 7,500 pornographic images of children. The warrant authorised police officers to conduct the search but a civilian employee joined them in the later stages to help to take away the computer. The Sheriff took the view that the search was irregular and that he was not prepared to excuse the irregularity, thus he excluded all the evidence acquired in the course of the search. The fact that the search was taking place anyway appeared to carry little or no weight with the Sheriff, as in *Singh* but in contrast to *Hepburn*.⁹⁴ After this ruling, the prosecution led no evidence, the civilian employee having been the first witness, and the accused was acquitted which, quite understandably, caused an outcry in the press.⁹⁵ This led to a Lord Advocate's reference (a form of appeal by the prosecution brought to clarify the law), which resulted in the Appeal Court holding that the search was not irregular because the civilian was not actively involved in the search and was under the direction of a police officer at all times. This decision that the evidence should have been admitted did not, of course, affect the accused's acquittal. The Appeal Court distinguished *Hepburn*, where the search was deemed irregular, but did not explain how this situation could be distinguished from *Singh*, where the search was also deemed irregular.

It is worth citing one further example of the morass of detail and inconsistency in which the Appeal Court has got itself bogged down, largely as a result of the

91 It will be remembered that the appeal was decided on the point that the prosecution had made no attempt to excuse the irregularity at trial, although at that time the Sheriff had decided the search was not improper.

92 *Singh and Singh v HMA* 2001 SCCR 348 at 358.

93 This led to *Lord Advocate's Reference No. 1 of 2002*—a form of prosecution appeal—2002 SCCR 743, under which citation the case was reported. Further details of the trial can be obtained from a long and critical feature of the law in the *Sunday Herald*, 18 November 2001.

94 1998 JC 63 at para. 10.

95 See *Sunday Herald*, 18 November 2001.

approach taken to the *Lawrie* formula. This involves the situation where an authorised search for evidence of one crime throws up evidence of another and unconnected crime. We have already seen that Gray questions whether a distinction really can be drawn between the first two cases on this point, *Turnbull* and *Hepper*, in which Lord Guthrie came to different conclusions.⁹⁶ This type of judicial hair-splitting became even more imaginative in the subsequent case of *Drummond v HMA*.⁹⁷ Here two police officers searched the accused's house for property stolen from a furniture store. They opened a wardrobe and found stolen garments which led to the accused being charged with theft by housebreaking from entirely separate premises. At trial, the first officer stated that when the wardrobe was opened he was looking for those latter items, hence the Sheriff upheld an objection to his evidence on the basis that the search was irregular. When the second officer subsequently gave evidence, he (unsurprisingly) stated that at the relevant time he had been looking for some of the smaller items of furniture referred to in the warrant, hence the Sheriff held his evidence about finding the clothing admissible.

The Appeal Court agreed with the Sheriff that a deliberate attempt to search for material beyond the scope of a warrant precluded the admission of that material as evidence in a future prosecution for an unconnected crime but, as shown in *Hepper*, if the police simply happened to come across such material, that did not render it inadmissible as the product of an irregular search. Again, this appears to be a very fine distinction, turning, as it does, on the precise state of mind of a police officer at the time of the seizure of the evidence.⁹⁸ In contrast to this subjective approach to police intention, a mere six years later, in *Houston v Carnegie* the Appeal Court held that in determining whether a police officer had 'reasonable grounds' for detaining and subsequently searching someone the test was an 'objective one'.⁹⁹ Thus, where a senior officer had 'applied [his] mind' to the matter and was suspicious of the accused, it did not matter that the junior officer, who had possession of the same information, and who was instructed by the senior officer to detain the accused, had not considered whether there were 'reasonable grounds' for suspicion. The Appeal Court's earlier decision in *Drummond* was not cited in this case.

⁹⁶ See text above n. 37.

⁹⁷ 1993 SLT 476.

⁹⁸ Brown observes, somewhat ironically I suspect, that this carries the significance of the individual circumstances of the search 'perhaps as far as it can get': A. Brown, *Criminal Evidence and Procedure*, 2nd edn (Butterworths: Edinburgh, 2002) at 46.

⁹⁹ 1999 SCCR 604 at 608.

Conclusion

The ground-breaking decision in *Lawrie v Muir* gave the Scottish courts an early opportunity to exercise a power to exclude improperly obtained real evidence where the infringement of the accused's rights outweighed the public interest in the evidence being placed before the courts. Unfortunately, the courts have failed to develop a clear and principled framework for operating this power, instead creating what sometimes seems to be a morass of incoherent and conflicting decisions in individual cases. As described above, there are a number of reasons for this. First and foremost, there is the lack of a clear rationale for excluding irregularly obtained evidence—whether it be a 'reliability', 'disciplinary', 'vindictory', or 'moral legitimacy' principle. As in other jurisdictions where similar discretions have been introduced more recently, this has fatally hindered the development of a coherent and consistent approach to the issue by the Scottish courts. As we have seen, this was first noted by Gray and by JTC¹⁰⁰ in the 1960s but it remains equally true today. Another important reason for the lack of clarity in the law has been the reluctance of the Appeal Court to concede a 'discretion' to the trial judge, and a resulting series of Appeal Court judgments which concentrate on the minutiae of the circumstances of particular cases rather than on setting out simple, clear and consistent principles. The development of a coherent legal framework has been further hindered by the tendency of the courts to avoid if at all possible having to engage in the balancing act envisaged by Lord Cooper in *Lawrie*.

Thus, despite over 50 years having elapsed since *Lawrie*, in Scotland we are in a position where the leading text on evidence simply lists, without further explanation, a series of factors which the courts may take into account in determining whether to excuse an irregularity and admit improperly obtained evidence.¹⁰¹ These include: the gravity of the crime; the seriousness of the irregularity; the urgency of the investigation; the likelihood of the evidence disappearing if not seized immediately (which is connected to the previous factor); the authority of those obtaining the evidence; the good faith of the investigators; and the question of fairness to the accused (whatever 'fairness' means in this context). It is not at all clear from the jurisprudence why each factor is relevant, nor in what circumstances it should be taken into account, nor what weight should be given to it. On examining the relevant cases, it is difficult to avoid the conclusion that the decision whether to admit improperly obtained real evidence is made by courts on the basis mainly of a 'gut reaction' which is then rationalised

¹⁰⁰ See text following n. 35.

¹⁰¹ Ross, above n. 2 at 7.

with whatever factor or factors from the list above best justifies the decision. As yet, no principled, logical and coherent regime has emerged in Scotland to guide the courts in the use of their power to admit or exclude irregularly obtained real evidence and it is important that other jurisdictions should learn from this experience which has now lasted for over 50 years.