Irish Council for
Civil Liberties

Maynooth University
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A Revolution in Principle:
Assessing the impact of the new evidentiary exclusionary rule

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IRISH RESEARCH COUNCIL
An Chomhairle um Thaighde in Éirinn

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Executive Summary

The exclusionary rule provides that evidence that has been obtained in breach of constitutional rights should not be put before a judge or jury in a criminal trial. The seminal case of *DPP v. JC*[1] significantly changed the exclusionary rule in Ireland by introducing an exception based on 'inadvertence'. The upshot is that evidence obtained unconstitutionally can now be admitted under a much more subjective standard where officers of the state claim to have no knowledge of the breach.

This report presents the findings of research conducted by Professor Claire Hamilton of Maynooth University that aimed to examine the impact of the new rule five years on from the *JC* decision. These findings are based on 20 interviews and 60 surveys conducted with criminal law practitioners, both barristers and solicitors, on their experience of the exclusionary rule in practice since *JC*.

The results throw up some troubling findings regarding its operation in practice, such as: the tendency to admit evidence, the complexity of the new test, the ineffectiveness of the safeguards contained within it, and the difficulty in challenging an assertion of inadvertence. One of the most significant findings from the survey and interviews is the overwhelmingly inclusionary manner in which it is being applied, in line with the predictions of many academics and the dissenting judges in *JC*.

The questionnaires and interviews also raise significant concerns about the knock-on effect of *JC* on other due process rights such as the right to privacy, as well as on policing and prosecutorial standards more broadly. The public should insist on the full enjoyment of these rights, as well as to insist that those charged with their protection do not operate significantly below the standards expected of all ordinary citizens.

By way of response to the research findings, ICCL has made a number of recommendations that for ease of reference are listed below. To fully understand the findings and recommendations the report should be read in full.

Recommendations

→	Given that the test set out in *JC* appears to do little to constrain a trial judge from exercising his/her discretion in favour of the admissibility of evidence, ICCL notes the *dicta* in *JC* whereby the appellate courts will correct any imbalance that has arisen, and provide a 'robust' response where necessary. In line with case law in other jurisdictions, relevant factors in any reformulation of the test might include: the importance of the right breached, the bad faith of the police, and the nature and quality of the evidence.
→	ICCL recommends that clarification should be provided by the appellate courts on the scope of the new exclusionary rule and whether it applies beyond the search warrant context. If it is extended to all constitutional rights, then guidance should be provided on the weight to be accorded to, and the importance of, the particular constitutional right affected. Practitioners should not be afraid to challenge application of the *JC* principles in arrest, detention and other scenarios as they may not be fit for purpose to deal with the issues that arise for the constitutional rights engaged in such scenarios.
→	Given that the safeguards set out in *JC* appear to do little to protect against wilful abuse of constitutional rights, ICCL recommends that the courts provide further guidance as to how both systematic violations of rights and recklessness/gross negligence should be assessed by trial judges. This should include guidance on the presumption against the admission of evidence obtained unconstitutionally, so as to give it substance in practice.
→	Given the concerns expressed about the workability of the test in practice, ICCL recommends further clarification on the key concept of 'inadvertence' and how it may be assessed by the trial judge, together with further guidance on the operation of the two-stage test in practice.
→	ICCL recommends that the Minister for Justice makes regulations to bring Irish surveillance laws in line with European standards. In this regard, ICCL notes developments in other jurisdictions where evidential rules have been diluted or evaded in such a manner as to facilitate the violation of an accused's privacy rights, and expresses its hope that such a situation would not arise here.
→	ICCL believes that it is imperative that Irish law continues to operate a robust exclusionary rule as a form of accountability that is crucial to a functioning democracy. If the price of liberty is constant vigilance, then the courts should be vigilant to ensure that the pendulum does not swing too far in favour of the inclusion of evidence *at all costs*.

1 [2017] 1 IR 417.

Introduction

The exclusionary rule provides that evidence that has been obtained in breach of constitutional rights should not be put before a judge or jury in a criminal trial. In April 2015, in the decision of *People (DPP) v. JC*,[2] the Supreme Court introduced dramatic changes to the exclusionary rule in Ireland. By a slim majority (4-3), it overhauled the exclusionary rule in relation to improperly obtained evidence that had been in operation in this jurisdiction for 25 years by introducing an exception based on 'inadvertence'. The upshot is that evidence obtained unconstitutionally can now be admitted where officers of the State claim to have no knowledge of the breach (the so-called 'green garda' or 'good faith' exception). The decision has been variously described as a 'revolution in principle',[3] the 'wrong move on evidence'[4] and as 'the most astounding judgment ever handed down by an Irish court'.[5] These comments are telling in terms of the profound implications the decision will have for criminal justice in this jurisdiction, particularly its role in suppressing evidence in order to discourage future illegal acts by gardaí and thus ensuring that proper standards are adhered to in criminal investigations. Its relaxation comes at a time that is pivotal for policing in Ireland and should be considered against research published by ICCL suggesting a serious gap in human rights compliance in the treatment of people in Garda detention, among other areas.[6]

Despite the critical importance of the *JC* decision, academics and NGOs working in this area find themselves largely in the dark as to its impact: what is the scope of the new rule? How is it being applied by the courts? How is it interacting with other procedural rights? There is a lack of clarity in relation to many aspects of the *JC* judgment and a dearth of appellate decisions, owing perhaps to disincentives contained within the *JC* decision itself. In the US, a similar 'good faith' exception created in 1984 has now effectively become the rule, stripping the exclusionary rule of much of its effect and utility.[7] It is thus crucial to discover, in a rigorous and empirical manner, the legal position as it has unfolded in the five years since the *JC* decision.

Against this background, in 2019 ICCL, kindly supported by the Irish Research Council New Foundations scheme, commissioned this report with a view to building a knowledge base on (post-2015) evidentiary admissibility in Ireland and highlighting areas where the highest standards of respect for suspect and accused persons' rights are not being met. The report gathers this information through interviews and surveys conducted with criminal law practitioners, both barristers and solicitors, on their experience of the exclusionary rule in practice since *JC*. The survey was administered between July 2019 and March 2020 and was completed by 60 criminal law practitioners. Of the 60 survey respondents, 53 were barristers and seven were solicitors. All of the solicitors were defence practitioners, and this was the case also for the majority of survey respondents; only 14 out of 60 (23 per cent) had experience of prosecution work. In terms of experience, 21 of the survey respondents (35 per cent) had been practising criminal law for over 16 years; 10 (17 per cent) had been practising for between 11 and 15 years; 14 (23 per cent) had been practising for between 6 and 10 years; and 14 for five years or less (23 per cent).[8] Three quarters of the respondents (75 per cent), therefore, had five years' or more experience in criminal practice. Practitioners at all jurisdictional levels were represented, with 48 per cent of respondents stating that they practised most frequently in the Circuit Court; 32 per cent in the District Court; 17 per cent in the Central Criminal Court; and 3 per cent in the Special Criminal Court. The survey comprised 15 questions on matters relating to the admissibility of evidence under the new test and its impact. The link to the online survey was distributed to practitioners via personal networks, the Irish Criminal Bar Association and the Criminal Law Committee of the Law Society. An advertisement drawing attention to the survey link was also placed in the Law Society Gazette and in the ICCL members' newsletter.

Interviewees were approached using purposive sampling[9] in order to ensure a certain number of years' experience of the exclusionary rule in practice, as well as to ensure representativeness in terms of the different court levels (District, Circuit, Central, Special Criminal Courts). Thus, the sample group of interviewees ranged from eight years in practice to 44 years, with the mean (average) number of years' experience being 20.1. The 20 interviewees comprised six solicitors and 14 barristers. Of the 14 barristers, seven were Junior Counsel and seven were Senior Counsel. All of the solicitors were defence practitioners, whereas the majority of the barristers (11 out of 14) had mixed practices, working on behalf of the defence and the prosecution. Interviews were conducted over a three-month period from December 2019 to February 2020.

Prior to presenting the results of the research, the first chapter explores the rationale for the exclusionary rule and briefly considers its development in Ireland and other common law jurisdictions. The following chapter discusses the key findings from the survey and interviews relating to the operation of the new exclusionary rule after *JC*. These findings are drawn on in the final chapter which makes a number of recommendations to better ensure the full vindication and protection of constitutional rights in Ireland.

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2 *People (DPP) v. JC* [2015] IESC 31; [2017] 1 IR 417.
3 ibid. (Hardiman J.) [134].
4 *Irish Times*, 'Wrong Move on Evidence' (Editorial), 17th April 2015.
5 Nial Fennelly, 'The Judicial Legacy of Mr. Justice Adrian Hardiman', (2017) 58 *Irish Jurist* 81-105, 91.
6 See Alyson Kilpatrick, *A Human Rights-Based Approach to Policing in Ireland* (Dublin: ICCL, 2018). Available at: https://www.iccl.ie/wp-content/uploads/2018/09/Human-Rights-Based-Policing-in-Ireland.pdf [Accessed various dates].
7 *United States v. Leon* (1983) 468 US 897. See discussion in next chapter.
8 One respondent did not answer this question.
9 Purposive sampling consists of inviting the participation of identified individuals who fulfil criteria which establish the relevance of their expertise to the research objectives.

Infringements of Constitutional Rights: The Exclusionary Rule

Introduction

For many decades, the exclusionary rule – the requirement that evidence obtained in breach of constitutional rights should, in most ordinary circumstances, be excluded – gave the constitutional rights of Irish citizens real, tangible effect, moving them beyond 'mere words on a page' (to use the words of Hardiman J in *JC*).[10] Its foundations were laid by the Supreme Court in 1965 in *People (Attorney General) v. O'Brien*[11] when it diverged from the traditional common law approach of discretionary inclusion of illegally obtained evidence.[12] This chapter first considers the various justifications for an exclusionary rule. It then discusses the origins and development of the exclusionary rule in Ireland before examining exclusionary evidentiary rules in other common law jurisdictions and under the European Convention on Human Rights (ECHR).

Why do we have an exclusionary rule?

The rationales that are commonly said to underpin the exclusion of evidence can be categorised into three main principles: the dissociation principle; the disciplinary or deterrence principle; and the protective or vindication principle.[13] The dissociation principle is predicated on a concern for the integrity of the criminal justice system and the reputation of the courts.[14] Evidence obtained unlawfully or unconstitutionally should be excluded so that the courts and judges are not implicated in, or seen as condoning, the illegal behaviour of investigating authorities of the state. The dissociation principle, therefore, is 'court-centric' as it focuses on the impact of exclusion on the integrity of the court.[15] While the principle 'promotes consistent and proper use of the exclusionary rule',[16] it has been interpreted as ensuring the court's ability to include probative evidence in the interests of justice and is thus 'vulnerable to distortion'.[17] The dissociation principle has failed to attract significant judicial support in the US but it underpins the exclusionary rule in Canada.[18] While it has not traditionally formed the basis for the Irish exclusionary rule, it has received some judicial endorsement in the past,[19] and crucially, appears to underpin O'Donnell J.'s concern in *JC* as to *when* the admission of (unconstitutionally obtained) evidence brings the administration of justice into disrepute.[20]

The deterrence principle holds that evidence obtained in breach of an accused's fundamental rights should be excluded from trial in order to deter similar breaches by state officials in the future. Exclusion, therefore, only occurs where it can be shown to have a deterrent effect. This rationale underpins the exclusionary rule in the US and perhaps also in Ireland since the *JC* decision.[21] *Dicta* by Clarke J. certainly appear to acknowledge what he terms the 'high constitutional value' to be placed on ensuring that investigative and enforcement agencies operate within the limits of their powers.[22] However, it is the least protective remedy for constitutional breaches because exclusion occurs less frequently and is applied in a manner which is 'limited and truncated'.[23] It is subject to a wide judicial discretion and a balancing test which tends to fall in favour of inclusion.[24]

The third principle, the protective principle, presumptively excludes evidence that is obtained in breach of the accused's rights in order to vindicate the breach. Thus, if the accused's rights have been breached by investigating officers, the courts are required to exclude any evidence pertaining to the breach to provide an effective remedy to the accused and to ensure that the courts exercise their function as custodians of constitutional rights. Exclusion is not just for the benefit

10 [2015] IESC 31 (Hardiman J.) [7].
11 [1965] IR 142.
12 *People (AG) and O'Brien v. McGrath* (1960) 98 ILTR 59; *Kuruma v. R* [1955] AC 197.
13 See generally, Mike Madden, 'A Model Rule for Excluding Improperly or Unconstitutionally Obtained Evidence' (2015) 33(2) *Berkeley Journal of International Law* 442-488.
14 ibid., 450-452; Declan McGrath, *Evidence* (2nd edn, Round Hall 2015) [7-03].
15 Madden, op. cit., 450.
16 Robert M Bloom and Erin Dewey, 'When Rights Become Empty Promises: Promoting an Exclusionary Rule that Vindicates Personal Rights' (2011) 46(1) *The Irish Jurist* 38-73, 70.
17 ibid., 70.
18 See, for example, the Canadian Supreme Court case of *R v. Collins* [1987] 1 SCR 265 [31].
19 *People (DPP) v. Lynch* [1982] IR 64, 76.
20 [2015] IESC 31 (O'Donnell J.) [97].
21 See Yvonne Daly 'Overruling the Protectionist Exclusionary Rule: DPP v JC' (2015) 19(4) *International Journal of Evidence and Proof* 270-280, 277-278: 'Basically, while the *Kenny* rule operated on a rationale of protectionism, the *JC* rule operates on a rationale of deterrence: evidence will not be excluded if it was obtained in inadvertent breach of constitutional rights.' In her later writing, Daly is more circumspect on this aspect, noting, 'the new test has undoubtedly moved away from the protectionist rationale that was overtly adopted by the Supreme Court in Kenny, it is not fully clear which rationale has replaced it'; see Yvonne Daly, '"A Revolution in Principle"? The Impact of the New Exclusionary Rule' (2018) 2 *Criminal Law and Practice Review* 1-17, 4-5.
22 [2015] IESC 31 [para 4.11].
23 Bloom and Dewey, op. cit., 69.
24 Madden, op. cit., 448; *Thompson v. United States* 523 F Supp 2d 1291, 1294-1295.

of the accused, but additionally 'for the larger public who has an interest in protecting rights more generally'.[25] In theory, the protective principle provides the most comprehensive, complete and, therefore, protective remedy due to its clarity as evidence obtained unconstitutionally should always be excluded. Scholars such as Andrew Ashworth have argued strongly for the vindication principle as it provides 'a stronger justification for the exclusion of improperly obtained evidence'.[26] Until *JC*, *dicta* of the Irish courts emphasising the 'imperative of protecting the constitutional rights of the accused'[27] suggested that the exclusionary rule was based on a vindication rationale which respects and upholds the rights of the individual and society more broadly. This is clearly the approach favoured by the minority in *JC* who criticised the majority decision 'as a gratuitous writing down of the respect due to the Constitution'.[28]

The origins of the Irish exclusionary rule

The Irish courts followed the common law approach to illegally obtained evidence until 1965 when the exclusionary rule was adopted in the leading case of *The People v. O'Brien*.[29] In *O'Brien*, the probative evidence was found in a search by An Garda Síochána of a home at 118 Captain's Road. However, due to an administrative error, the warrant that the search was predicated upon was issued with the wrong address: 118 Cashel Road. Despite the accused's argument that the evidence should be excluded because it had been obtained in breach of his constitutional right to inviolability of the home,[30] the High Court admitted it. The decision of the High Court was upheld in the Court of Criminal Appeal (CCA). However, that Court considered the matter to be a point of general public importance and advised that an appeal be taken to the Supreme Court in the public interest. The question of law articulated by the Supreme Court was: 'Is evidence procured by the guards in the course of and as a result of a domiciliary search, unauthorised by a search warrant, admissible in subsequent criminal proceedings?'[31] The Court dismissed the appeal because the error did not warrant exclusion of the evidence. The majority (Kingsmill Moore J., Lavery and Budd JJ. concurring) held that inclusion or exclusion of evidence was for the trial judge to decide in his or her discretion on a case-by-case basis. In their view, it would not be appropriate for the Supreme Court to set out a rule of either absolute inclusion or absolute exclusion.[32]

However, the minority (Walsh J., Ó Dálaigh C.J. concurring) distinguished between illegally obtained evidence and evidence obtained in breach of the accused's constitutional rights. According to Walsh J., evidence obtained in breach of a constitutional right 'assumes a far greater importance'[33] than if the breach was merely an illegality stopping short of a constitutional breach. He went on to say that 'protection of constitutional rights is a fundamental matter for all courts' and that the protection of the 'constitutional rights of the citizen is a duty superior to that of trying such citizen for a criminal offence'.[34] Thus, the evidence should be excluded where it is 'obtained or procured by the State or its servants or agents as a result of a deliberate and conscious violation of the constitutional rights of the accused person where no extraordinary excusing circumstances exist, such as the imminent destruction of vital evidence or the need to rescue a victim in peril'.[35] This was the test operated by the courts until the decision in *People (DPP) v. JC* in April 2015. Thus, if the violation was not conscious and deliberate or if there were extraordinary excusing circumstances, the trial judge would have a discretion to permit the evidence to be introduced. Similarly, if the accused's rights that were violated were not constitutional rights (if, for example, the property searched was a business premises and not a dwelling house) then the trial judge would have discretion to allow the evidence to be admitted.

The judgment led to contestation as to the exact meaning of deliberate and conscious in subsequent cases. Courts grappled with whether 'deliberate and conscious' referred to actual knowledge of the constitutional breach or simply a deliberate and conscious act that resulted in a constitutional breach. In the latter, any evidence obtained in a deliberate and conscious act that resulted in a breach would be excluded, whereas in the former, knowledge on the part of the agent of the state of the constitutional breach itself would be required for the court to exclude evidence arising from it. This debate led to a divergence of views in the courts in the years following the decision. In *People (DPP) v. Madden*[36], for example, the courts held that it was immaterial whether the person carrying out the act was conscious of the constitutional breach. In *People (DPP) v. Shaw*[37], however, the majority held that the officer(s) was required to have actual knowledge of the constitutional breach for the Court to exclude evidence arising therefrom, despite the protestations of Walsh J. that this would be to 'put a premium on ignorance of the law'.[38]

25 Madden, op. cit., 454.
26 Andrew Ashworth, 'Excluding Evidence as Protecting Rights' (1977) *Criminal Law Review* 723.
27 Dermot Walsh, *Walsh on Criminal Procedure* (Round Hall 2018) [12–82].
28 [2015] IESC 31 per Hardiman J. at [160].
29 [1965] IR 142.
30 Constitution Art 40.5.
31 [1965] IR 142, 150.
32 Liz Heffernan and Úna Ní Raifeartaigh, *Evidence in Criminal Trials* (Bloomsbury, 2014) [8.11].
33 [1965] IR 142, 170.
34 ibid.
35 ibid.
36 [1977] IR 336.
37 [1982] IR 1.
38 ibid., 33.

Until recently,[39] the conflict over the interpretation of 'deliberate and conscious' appeared to have been settled by the decision in *People (DPP) v. Kenny*[40] in which Finlay C.J. made it clear that it is the conduct of the Gardaí that is decisive, not their state of mind. In *Kenny*, the case against the accused rested upon evidence found on foot of a warrant that was subsequently found to be invalid. On seeking the warrant, the Gardaí followed a long-standing practice which, in an unconnected case, was declared unlawful by the High Court.[41] There was no question that the Gardaí were unaware of the illegality of the practice at the time of the search. Nonetheless, the Court held that the evidence should be excluded because it was obtained on foot of an invalid search warrant which it held to be in conscious and deliberate violation of the accused's right to inviolability of the dwelling. The Court noted that to exclude only evidence obtained by someone who knows, or reasonably should have known, that their conduct is in breach of a constitutional right amounts to a 'negative deterrent'.[42] It preferred to impose an 'absolute protection rule of exclusion' which encompasses a negative deterrent as well as a 'positive encouragement' to officers to ensure that they consider the constitutional rights of the accused which is likely to provide more stringent protection of constitutional rights.[43] In adopting this position, the Court was acutely aware of the implications that exclusion of probative evidence may have on the criminal justice system. However, it held that no matter how important the detection of crime and conviction of perpetrators is, it 'cannot outweigh the unambiguously expressed constitutional obligations' on the Courts to 'defend and vindicate the personal rights of the citizen'.[44] *Kenny* was thus a strong endorsement that the rationale underpinning the exclusionary rule in Ireland was that of the vindication and protective principle. The Court explicitly stated that where there are alternative principles underpinning exclusionary rules, there was 'an obligation to choose the principle which is a ... stronger and more effective defence and vindication of the right concerned'.[45]

Was *Kenny* an absolute exclusionary rule?

The rule formulated in *Kenny* remained the law for the next 25 years until the decision in *People (DPP) v. JC*. Before turning to that decision, it is important to examine the proposition, repeatedly advanced by the majority in *JC*, that *Kenny* established an 'absolute or near absolute'[46] rule. Close scrutiny of the case law, however, demonstrates that this was not in fact the case, with the courts frequently admitting evidence obtained on foot of search warrants containing minor errors on their face. The most recent case to clarify this point was *People (DPP) v. Mallon*,[47] where evidence obtained on foot of a misdescription of the address on a warrant did not trigger the exclusionary rule. The CCA noted that 'a mere error will not invalidate a warrant'[48] particularly where the error is not, and does not, mislead the authorities. The CCA went on to hold that, in general, courts 'should be slow to invalidate warrants on the grounds of typographical, grammatical or transcription errors'.[49]

Another important qualification to the operation of the exclusionary rule in practice was the '(not insignificant) requirement of a causative link between the breach and the evidence'[50] that arose therefrom. This requirement, although implicit in *O'Brien*, was made clear in *People (DPP) v. Healy*[51] where it was described as a 'vital issue'[52] in determining whether evidence should be admitted or excluded where a breach has occurred. The causative link was strengthened in later cases[53] and proved particularly significant in cases where evidence, usually statement evidence, was obtained while an accused was in unlawful custody. In *People (DPP) v. Buck*,[54] for example, the Supreme Court held that where *bona fide* (good faith) attempts are made by the Gardaí to contact an accused's solicitor following a request from the accused, the inclusion of any statement made prior to the arrival of the solicitor will be a matter within the trial judge's discretion. The significance for the exclusionary rule came in its later (*obiter*) statement that *even if* there had been a breach of the accused's rights in the period prior to the arrival of a solicitor in the station, the exclusionary rule does not apply to statements made *after* the solicitor's arrival, on account of the fact that once the accused gains access to a solicitor the causative link is deemed to have been severed or the breach 'cured'.[55] As observed by Doyle and Feldman,[56] the very strict causative requirement in *Buck* and other cases sits most uncomfortably with the underlying rationale of the *Kenny* decision to provide the fullest protection possible of constitutional rights. As they argue, the law had undergone some considerable evolution in the 25 years following *Kenny*, a point which perhaps was overlooked by the majority in *JC* in their rush to brand the Irish constitutional position as absolutist and extreme.

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39 *People (DPP) v. JC* [2015] IESC 31.
40 [1990] 2 IR 110.
41 *Byrne v. Grey* [1988] IR 31.
42 [1990] 2 IR 110, 134.
43 ibid.
44 ibid.
45 [1990] 2 IR 110, 133.
46 *People (DPP) v. JC* [2015] IESC 31 (O'Donnell J.) [49].
47 [2011] IECCA 31.
48 ibid. [44].
49 ibid. [58].
50 Claire Hamilton, 'Green Guards, Good Faith and the Exclusionary Rule' (2015) 109(7) Law Society Gazette 20-21, 20.
51 [1990] 2 IR 73.
52 ibid., 81.
53 *People (DPP) v. O'Donnell* [1995] 3 IR 551; *People (DPP) v. Buck* [2002] 2 IR 268; *People (DPP) v. O'Brien* [2005] 2 IR 206; *People (DPP) v. AD* [2008] IECCA 101.
54 [2002] 2 IR 268.
55 *People (DPP) v. O'Brien* [2005] 2 IR 206, 212.
56 Oran Doyle and Estelle Feldman, 'Constitutional Law' in *Annual Review of Irish Law 2015* (Round Hall 2016) 156-224 at 216.

From exclusion to inclusion: the *JC* decision

While the *JC* decision is rightly understood as overturning the exclusionary rule as laid down in *Kenny*, much of the judgments is also taken up with the jurisdictional issue of whether the appeal was validly before the Court. It is worth dwelling on this point briefly given that it serves to underline the truly exceptional nature of the decision, even with regard to the process used to bring the issue before the courts. The respondent, *JC*, had been on trial for robbery before Judge Mary Ellen Ring and a jury at the Circuit Criminal Court. His arrest and questioning had taken place following the search of his premises on foot of a warrant issued under s.29 of the Offences against the State Act 1939 and while in custody he had made several inculpatory statements. Before *JC* came to trial, the Supreme Court issued a decision in an unrelated case in which it declared s.29 (which allowed warrants to be issued by gardaí rather than an independent authority) unconstitutional.[57] The effect of this finding was that at the time that *JC* made the inculpatory statements, he was in unlawful custody. Judge Mary Ellen Ring, correctly following the precedent in *Kenny*, excluded the statement evidence and directed the accused's acquittal. The DPP appealed the decision to the Supreme Court under s.23 of the Criminal Procedure Act 2010, a novel provision allowing the DPP to appeal an acquittal to the Supreme Court in the case of a ruling 'which erroneously excluded compelling evidence'. Notwithstanding the Supreme Court unanimously accepting that the law was correctly applied, it allowed the appeal on the basis that *Kenny* itself was erroneously decided. As Daly asserts, this 'required significant linguistic acrobatics' from the Supreme Court to justify the appeal, and even more 'questionable' behaviour from the DPP in pursuing it under this particular section.[58] It is worth noting that this was the first time this provision had been used and its deployment in *JC*, 'essentially with a view to having *Kenny* overruled,'[59] has been heavily criticised.[60]

Returning to the substantive issue in the case, the majority in *JC* held that *Kenny* had been incorrectly decided and the Supreme Court in that case had misinterpreted the meaning of 'conscious and deliberate' in *O'Brien*. Contrary to the finding in *Kenny*, the *JC* Supreme Court held that 'deliberate and conscious' referred to the actual breach of constitutional rights and not to the physical action of the investigating officer in question. In other words, 'evidence obtained in inadvertent breach of constitutional rights' may be admitted but only to the extent that it is not a 'knowing, reckless or grossly negligent breach'.[61] The majority found that in *Kenny* the balance weighed disproportionately in favour of the rights of the accused to the detriment of the administration of justice and the 'constitutional importance that a trial should be conducted on the basis of all material evidence probative of guilt'.[62] The view of the majority was that *Kenny* introduced an absolute or near absolute exclusionary rule leading to problematic exclusions of probative evidence even in cases of inadvertence on the part of the investigating officers. The application of the rule, in their view, was overly strict and, placing emphasis on its deterrent effects, it was no longer necessary as there were now more adequate remedies for garda misconduct.[63]

The new exclusionary rule is set out clearly in the judgment of Clarke J.[64] (as he then was)[65] and is summarised at paragraph 7.2 of his judgment as set out below. As can be seen, at point (ii) the learned judge appears to provide for a two-stage test, dealing respectively with (a) the issue of breach, and (b) the issue of whether it can be excused through *inter alia* inadvertence.

(i) The onus rests on the prosecution to establish the admissibility of all evidence. The test which follows is concerned with objections to the admissibility of evidence where the objection relates solely to the circumstances in which the evidence was gathered and does not concern the integrity or probative value of the evidence concerned.

(ii) Where objection is taken to the admissibility of evidence on the grounds that it was taken in circumstances of unconstitutionality, the onus remains on the prosecution to establish either:-

(a) that the evidence was not gathered in circumstances of unconstitutionality; or
(b) that, if it was, it remains appropriate for the Court to nonetheless admit the evidence.

The onus in seeking to justify the admission of evidence taken in unconstitutional circumstances places on the prosecution an obligation to explain the basis on which it is said that the evidence should, nonetheless, be admitted and also to establish any facts necessary to justify such a basis.

(iii) Any facts relied on by the prosecution to establish any of the matters referred to at (ii) must be established beyond reasonable doubt.

(iv) Where evidence is taken in deliberate and conscious violation of constitutional rights then the evidence should be excluded save in those exceptional circumstances considered in the existing jurisprudence. In this context deliberate and conscious refers to knowledge of the unconstitutionality of the taking of the relevant evidence rather than applying to the acts concerned. The assessment as to whether evidence was taken in deliberate and conscious

57 *Damache v. DPP* [2012] IESC 11.
58 Daly, 'Overruling the Protectionist Exclusionary Rule: DPP v *JC*' op. cit., 275-276.
59 Walsh, op. cit. [12–115].
60 See, for example, Walsh, op. cit. [26–256] to [26–284]; Daly, 'Overruling the Protectionist Exclusionary Rule: DPP v *JC*' op. cit., 275-276; Fennelly, op. cit.
61 Daly, 'Overruling the Protectionist Exclusionary Rule: DPP v *JC*' op. cit., 276.
62 Walsh, op. cit. [12–118]; *People (DPP) v. JC* [2015] IESC 31 (Clarke J.) [4.8] and (O'Donnell J.) [97].
63 Walsh, op. cit. [12–119]. This point is dealt with in more detail below.
64 *People (DPP) v. JC* [2015] IESC 31 (Clarke J.) [7.2].
65 Mr Justice Clarke is now the Chief Justice.

violation of constitutional rights requires an analysis of the conduct or state of mind not only of the individual who actually gathered the evidence concerned but also any other senior official or officials within the investigating or enforcement authority concerned who is involved either in that decision or in decisions of that type generally or in putting in place policies concerning evidence gathering of the type concerned.

(v) Where evidence is taken in circumstances of unconstitutionality but where the prosecution establishes that same was not conscious and deliberate in the sense previously appearing, then a presumption against the admission of the relevant evidence arises. Such evidence should be admitted where the prosecution establishes that the evidence was obtained in circumstances where any breach of rights was due to inadvertence or derives from subsequent legal developments.

(vi) Evidence which is obtained or gathered in circumstances where same could not have been constitutionally obtained or gathered should not be admitted even if those involved in the relevant evidence gathering were unaware due to inadvertence of the absence of authority.

Deliberate and conscious violation is now 'confined to knowledge of the unconstitutionality'[66] under *JC*, a position expressly rejected by the *Kenny* court and one which is suggestive of a shift towards a deterrence rationale.[67] While there is a presumption against the admission of unconstitutionally obtained evidence even where it was not deliberate and conscious, it should be emphasised that inadvertence as to the unconstitutionality will permit the admission of the evidence where the breach was effectively the result of negligence. Clarke J. made clear that gross negligence or recklessness is not included in the concept of inadvertence and evidence obtained in 'knowing, reckless or grossly negligent breach of constitutional rights will be excluded'.[68] The court failed, however, to clarify what is meant by either inadvertence or the threshold beyond which negligence becomes gross or reckless. As Walsh points out, inadvertence lies on a continuum which can encompass, on one end, the closing of one's mind to the possibility of a particular outcome that would otherwise be obvious, to, at the other, 'blameless inadvertence' where the individual could not have been expected to consider a particular outcome.[69] Clearly this continuum can incorporate *O'Brien*-type inadvertence whereby the evidence was admitted notwithstanding the invalidity of the search warrant due to the inclusion of an incorrect address. It is unlikely that the intention of the *JC* court was to exclude evidence in these circumstances. However, given that the error was visible on the face of the warrant to the executing officer, surely non-inspection of the warrant prior to its execution can, and arguably should, constitute recklessness or gross negligence?[70] There is also the question of the scope of the *JC* rule which, as Walsh has also noted, remains quite uncertain.[71] In *JC*, O'Donnell J., while noting the applicability of the principles set out therein to evidence obtained consequent on arrest and detention, preferred to deal only with the issue of search warrants.[72] Clarke J. was not quite as restrictive and in subsequent cases appears to be of the view that the rule should apply in cases of this nature more generally.[73]

Criticism of *JC*

The majority judgments were heavily criticised from the outset by academics,[74] practitioners[75] and journalists.[76] Indeed, given the strong dissents handed down by the three minority judges, the decision revealed deep ideological divisions within the Supreme Court itself.[77] While not examining the substantive issue, Murray J. described as an 'appalling prospect' the suggestion that the law could be retrospectively changed by the Supreme Court after a citizen's trial for a criminal offence. He describes the manner in which the proceedings were brought before the court as one which is akin to changing the goalposts, 'not during the game, but after the game is over'.[78] The other two minority judges were vocal on both points. For his part, Hardiman J., described the judgment as a 'revolution in principle', and the process by which it had come before the court as 'gamesmanship of the worst and most cynical kind by public officials'.[79] He viewed *Kenny* as

66 Walsh, op. cit. [12–140].
67 Daly, 'Overruling the Protectionist Exclusionary Rule: DPP v JC' op. cit., 278.
68 ibid., 278; *People (DPP) v. JC* [2015] IESC 31 (Clarke J.) [5.14].
69 Walsh, op. cit. [12–147] to [12–150].
70 Daly, 'Overruling the Protectionist Exclusionary Rule: DPP v JC' op. cit., 278.
71 Walsh, op. cit. p.796.
72 [2015] IESC 31 *per* O'Donnell J. para 5
73 *People (DPP) v. Colm Roche* [2015] IESC 67. See further Daly '"A Revolution in Principle"?' op. cit., 13.
74 See, for example, Hamilton, 'Green Guards, Good Faith and the Exclusionary Rule' op. cit.; Daly, 'Overruling the Protectionist Exclusionary Rule: DPP v JC' op. cit.; Walsh, op. cit. [12–120] to [12–132].
75 See, for example, Jenny McGeever, 'Love/Hate: The Effects of the Majority Supreme Court Decision in *DPP v. JC* on the Exclusion of Unconsitutionally Obtained Evidence are Set to Reverberate for Many Years to Come' (2015) *Law Society Gazette*, June 2015, 26-29; Ruadhán Mac Cormaic 'Supreme Court ruling a get-out for gardaí; Barrister says decision relaxing rules on criminal evidence has huge implications' *Irish Times*, 18th April 2015; Tony McGillicuddy, 'Criminal Law in the Age of Donald Trump', paper presented by Sean Gillane SC at the Criminal Law and Evidence Update Conference, Irish Rule of Law International, Distillery Building, Dublin, 26th November 2016.
76 *Irish Times*, 'Wrong Move on Evidence' (Editorial), 17th April 2015; Fintan O'Toole, 'Why Supreme Court Ruling on Evidence is Bad for Democracy' *Irish Times*, 21st April 2015; Mary Carolan, 'Supreme Court Alters Rule for Trial Evidence' *Irish Times*, 16th April 2015.
77 *People (DPP) v. JC* [2015] IESC 31 (Hardiman, Murray and McKechnie JJ).
78 ibid. (Murray J.).
79 ibid. (Hardiman J.) [134, 22]. The objection to the manner in which it was brought before the court refers to the use of s 23 of the Criminal Procedure Act 2010.

'one of the monuments of the constitutional jurisprudence in independent Ireland',[80] the overturning of which 'affects in an important way the rights and liberties of every citizen,'[81] and represents 'a major step in the disengagement of this Court from the rights-oriented jurisprudence of our predecessors'.[82] McKechnie J. was similarly concerned with the dilution of fundamental constitutional rights. The rights that are engaged by the exclusionary rule were, as he put it, 'intended to have meaning ... at the highest level available [and] cannot be let yield as the public has a major constitutional interest in seeing their full and effective enjoyment'.[83] Like Hardiman J., McKechnie J. questioned the process by which the appeal had been brought to the court, as a 'contrivance' that is 'inherently offensive to deep rooted values of the criminal justice system'.[84]

Unsuitable remedy

The view of the majority was that garda misconduct could be dealt with by alternative accountability mechanisms other than the exclusion of probative evidence which 'extracts a significant price in terms of the capacity of the court to perform its primary function' to ensure the administration of justice in criminal matters.[85] Gardaí or other state officials, they argue, might be separately proceeded against and punished for doing so, without excluding the evidence they have gathered against the original defendant. However, as Hardiman J. stresses, there is little reality to this contention as there has never been a single prosecution against a state official for breach of constitutional rights, and this is also borne out by the experience in other jurisdictions (see below).[86] Walsh, an academic and long-time observer of policing in Ireland, asserts that the reforms that have been introduced following the conclusions of several tribunals of inquiry into garda misconduct 'are simply not sufficient in themselves to provide suitable remedies for, or prevent' violations of the constitution by gardaí.[87]

This leads on to the wisdom of diluting the effectiveness of the exclusionary rule given recent scandals in policing. From the 'blue wall of silence' first referenced in the Morris Tribunal, to more recent allegations regarding misconduct in Cavan-Monaghan, combined with the recent enhancement of garda powers under the Covid legislation, there remain real concerns about the impact of the inadvertence test on standards of policing.[88] The Garda Síochána Inspectorate, as recently as 2014,[89] identified serious deficiencies in garda investigation procedures including insufficient training for crime scene investigators and inadequate interview training for members of An Garda Síochána. Moreover, crime scene examination results were often not recorded on the PULSE system, there was an absence of effective supervision at all stages of some crime investigations and, along with several issues with warrants and summonses, there was limited recording of actions taken in the execution of a warrant. The Commission on the Future of Policing in Ireland outlined similar issues and recommended an 'urgent, thorough overhaul of the entire crime investigation function of An Garda Síochána' in its 2018 Report.[90] In addition, ICCL published a ground-breaking report in 2018 advocating for a human rights-based approach to policing in Ireland. The Report highlighted the need for a culture change at all levels of An Garda Síochána and for the organisation to fully embrace human rights as not just a 'core value or objective but as a practical guide to decision-making and behaviour'.[91] The Report noted the historical lack of willingness on the part of the Gardaí to reform despite several reports over many decades recommending important structural changes in the organisation.[92] The long line of reports testifying to a form of 'cultural malaise'[93] within the Gardaí runs counter to the narrative of the majority in *JC* that there are sufficient civil and disciplinary procedures in place to deter gardaí from breaching the constitutional rights of the accused. On the contrary, it would appear that unless and until these structural and procedural issues are addressed in An Garda Síochána, it is undesirable to hold those exercising power to a *lower* legal standard than previously required.

It is also worth noting that the constitutional breach in *JC* and many other post-*Kenny* cases were avoidable because the Gardaí were on notice that the procedures used (so-called 'self-service warrants') were constitutionally vulnerable. Warnings had been issued by both the Morris Tribunal, and the courts in decisions such as *Ryan v. O'Callaghan* about s.29 of the Offences against the State Act 1939 and potential constitutional infirmities associated with it.[94] The ruling in *Damache* and the implications it had for *JC* could therefore have been avoided had these warnings been heeded.

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80 ibid., p 26.
81 ibid. [1].
82 ibid., p 26.
83 ibid. (McKechnie J.) [253]
84 ibid. [82]
85 ibid. (O'Donnell J.) [4].
86 ibid. (Hardiman J.) [14].
87 Walsh, op. cit. [12–127].
88 Cecilia Ní Choileáin and Anna Bazarchina, 'Admissibility of unconstitutionally obtained evidence after DPP v. JC' (2015) 20(4) *Bar Review* 83-86, 84; *People (DPP) v. JC* [2015] IESC 31 (Hardiman J.) Pt IV.
89 Garda Inspectorate, *Crime Investigation Report 2014* (Garda Síochána Inspectorate, 2014) available at https://www.gsinsp.ie/wp-content/uploads/2019/07/Crime-Investigation-Full-Report.pdf [last accessed 23rd June 2020].
90 Commission on the Future of Policing in Ireland, *The Future of Policing in Ireland* (2018) pp 25-26 available at http://www.policereform.ie/en/POLREF/The per cent20Future per cent20of per cent20Policing per cent20in per cent20Ireland(web).pdf/Files/The per cent20Future per cent20of per cent20Policing per cent20in per cent20Ireland(web).pdf [last accessed 24th June 2020].
91 Kilpatrick, op. cit., p.112.
92 See also, Liam Herrick, 'Policing Authority Report: Why Should Things Be Different This Time' (ICCL 2019) available at https://www.iccl.ie/opinion/policing-why-should-things-be-different-this-time/ [last accessed 24th June 2020].
93 Kilpatrick op. cit., p.112.
94 Walsh, op. cit. [12–1278].

Premium on Ignorance

As with the judgments, academic and practitioner commentary has tended to focus on the reframing of the meaning of 'deliberate and conscious' and the introduction of inadvertence. The introduction of the amended test essentially equates to an American-style 'good faith' exception, one which is based on the deterrence rationale. Yet, as discussed at the start of this chapter, deterrence did not form the basis for either the *Kenny* or *O'Brien* decision and the pre-*JC* exclusionary rule was intended neither to punish the investigating officers, nor to benefit the accused, but to vindicate the Constitution.[95] In criticising *Kenny* for resulting in exclusion of evidence where there was no garda misconduct, therefore, the *JC* court were criticising it 'out of context'.[96]

The *JC* test also replaces the standard in *Kenny* – which had the not inconsiderable benefit of clarity – with a more opaque and subjective standard based on 'inadvertence'. As O'Toole[97] has argued 'Who knows whether an action was inadvertent or not? Only the person who has taken that action'. Moreover, the introduction of such a test affords the state a defence of 'I didn't mean it' or 'I didn't know it was against the law' that is unavailable to ordinary citizens. To quote McCarthy J. in *Healy*, it results in the state being held to a lower constitutional standard than the ordinary citizen, thereby placing 'a premium on ignorance'.[98]

Evidence gap

As observed by McKechnie J. in *JC* there is an 'evidential gap' for the proposition advanced by the majority relating to the exclusionary rule. Indeed, the high-water mark of the majority's argument in this regard would appear to be a highly selective survey of a number of unnamed cases listed in the judgment of O'Donnell J., in which evidence was (apparently unjustly) excluded. While O'Donnell J. provides a list of examples of cases in which evidence was excluded[99] to demonstrate, in his view, the 'considerable' impact *Kenny* has had on criminal trials, he acknowledges that this 'random sample' cannot 'purport to be a comprehensive catalogue' of *Kenny*-related cases.[100] Curiously, he found no value in the DPP adducing evidence[101] to support its claim that *Kenny* had produced a rule that, in Charleton J.'s words 'remorselessly excludes evidence'.[102] McKechnie J. took a different view. He found it concerning that the DPP had not offered any empirical evidence to support its claim that the exclusionary rule regularly 'frustrate[s] prosecutions'.[103] Given the resources available to the DPP, and its role at the forefront of prosecutions, McKechnie J. found it 'all the more surprising that ... the DPP [had] not sought to fill the obvious evidential gap', a discrepancy which 'fatally impairs the ability of [the] Court to measure the cost or benefit of modifying *Kenny*'.[104] Indeed, according to the Director of Public Prosecutions' Annual Reports, the average rates of acquittal for the years 2010 to 2017 were under 4.5 per cent, hardly a criminal justice crisis.[105]

Giving rights meaning

McKechnie J. and, in particular, Hardiman J. placed great emphasis on the need to ensure that constitutional rights have meaning and are not reduced to 'mere words on a page'.[106] Criminal procedural and due process rights in Ireland have been criticised for many decades for being overly qualified and 'having a "look but do not touch, touch but do not taste" feel to them'.[107] The *Kenny* exclusionary rule was 'one of the strongest protections for suspects' rights'[108] in the criminal justice system and 'one of the most significant exceptions'[109] to the many critiques of weak protection of due process rights. Hardiman J.'s dissent had at its heart the need to ensure that there were firm protections for suspects against the exercise of arbitrary power by the 'force publique', by which he meant the full range of state officials. In his view, the change brought about by the decision of the majority in *JC* will '*in every single case* favour the prosecution and handicap the defence'[110] thereby further weakening the already heavily qualified constitutional rights of the accused. The majority's view that it is more appropriate for the trial judge to exercise discretion on breaches of constitutional rights, in line with the case law on illegally obtained evidence, does not augur well for the exclusionary rule given that, as Hogan points out

95 McGeever, op. cit., 28.
96 Walsh, op. cit. [12–126].
97 O'Toole, op. cit..
98 *DPP v. Healy* [1990] 2 IR 73, 89 cited by Hardiman J. in *People (DPP) v. JC* [2015] IESC 31 (Hardiman J.) [228].
99 *People (DPP) v. JC* [2015] IESC 31 (O'Donnell J.) [6].
100 ibid. [7].
101 ibid. [8].
102 *People (DPP) v. Cash* [2007] IEHC 108 [65].
103 *People (DPP) v. JC* [2015] IESC 31 (McKechnie J.) [234].
104 ibid. [239].
105 DPP Annual Reports 2013, 2015, 2017, 2018.
106 *People (DPP) v. JC* [2015] IESC 31 (Hardiman J.) [7].
107 Hamilton, 'Green Guards, Good Faith and the Exclusionary Rule' op. cit., 20, citing Shane Kilcommins, Ian O'Donnell, Eoin O'Sullivan, and Barry Vaughan, *Crime, Punishment and the Search for Order in Ireland*, (IPA, 2004), 174.
108 Yvonne Daly and John Jackson, 'The Criminal Justice Process: From Questioning to Trial' in Deirdre Healy, Claire Hamilton, Yvonne Daly and Michelle Butler (eds.), *The Routledge Handbook of Irish Criminology* (Taylor and Francis 2015) 283.
109 Hamilton, 'Green Guards, Good Faith and the Exclusionary Rule' op. cit., 20.
110 *People (DPP) v. JC* [2015] IESC 31 (Hardiman J.) [6].

in his dissent to the *Balance in Criminal Law Report*, in practice illegally obtained evidence is almost never excluded.[111] Hardiman J. also raises more fundamental concerns about the status of constitutional rights arising from the judgment. If mistake or inadvertence is permitted as a defence in this case, 'there would be many more mistakes occurring' giving rise to the prospect that the 'content will be sucked out' of other constitutional rights.[112] The majority's response to this important point is significant, and one that will be returned to later in the report. In their view, 'the solution to any general tendency to be overgenerous in the admission of evidence ... is to rely on appellate courts to redress any imbalance which may thus arise', including, it should be said, 'a robust response' in cases where an inappropriate balance has been struck[113]

The majority, particularly O'Donnell J, wrote at length about the exclusionary rule in other common law jurisdictions. The next section examines the rule as it operates in some of these jurisdictions as well as the jurisprudence of the European Court of Human Rights (ECtHR) on the issue.

The exclusionary rule in comparative perspective

The United States – in good faith

The exclusionary rule was first introduced in the United States in *Weeks v. United States*[114] in which the US Supreme Court emphasised the need to ensure judicial integrity as well as the importance of vindicating a constitutional violation. Following a period of uncertainty during which the Supreme Court introduced the deterrence rationale,[115] the court reaffirmed *Weeks* in *Mapp v. Ohio*.[116] *Mapp* represented the 'high-water mark for the exclusionary rule' in the US in which the Supreme Court firmly rooted the rule in a concern for judicial integrity and vindication of constitutional rights.[117] The *Mapp* exclusionary rule was similar to the pre-*JC* Irish rule in that it automatically excluded evidence that was obtained in violation of the Fourth Amendment to the US Constitution. A series of cases following *Mapp* succeeded in shifting the rationale for the exclusionary rule from one based on judicial integrity and the vindication principle to one solely based on deterrence of police misconduct.[118] The culmination of this shift was the deterrence-based good faith exception introduced in *United States v. Leon*.[119] *Leon* concerned a search warrant that was executed in good faith by a police officer but was subsequently found to be lacking in probable cause. The court allowed the evidence to be admitted, holding that when an illegal search involves an honest mistake, 'deterrence has no rational application'.[120] Judicial integrity, in the court's view, is unaffected by the reasonable actions of the police. Justice Brennan in his dissent claimed that the majority 'ignore[d] the fundamental Constitutional importance of what [was] at stake' and emphasised the important role of the courts in defending the constitutional rights of the accused.[121]

More recently, the balancing test of deterrent effect versus cost of excluding probative evidence has tended to favour admission. In *Hudson v. Michigan*[122] the Supreme Court held that unless there were deterrence benefits from exclusion, the evidence should be admitted. *Hudson* also introduced a balancing test so that now even where it is determined that there is deterrent value in exclusion, deterrence must be 'so great as to outweigh the social costs of exclusion'.[123] It went further to argue that civil remedies were sufficient to address violations where there was no *mala fides* on the part of the authorities. In dissent, Justice Bayer argued that the majority had failed to cite a single case in which a plaintiff was awarded damages, other than nominal damages, for a violation of their rights. Thus, the penalties imposed on police by civil law are insufficient to justify the deterrence rationale. As noted above, a similar argument was made by Hardiman J. in *JC* in relation to cases brought against investigating officers for constitutional violations in this jurisdiction.

The long-term doctrinal trend of the case law has significantly reduced the scope and application of the exclusionary rule in the US to the point that it now constitutes a rule of inclusion of most evidence regardless of the constitutional violation that has occurred. Furthermore, the more recent decision in *Herring v. United States*[124] has resulted in a proliferation of so-called 'evidence laundering' where one police officer obtains evidence unconstitutionally and then passes it to another officer who is untainted by the unconstitutional act. The second officer can then develop the evidence further and pass it on to prosecutors and the 'constitutional taint disappears in the wash'.[125] The conversion of the exclusionary rule in the US

111 Gerard Hogan, 'Note of Dissent on Exclusionary Rule' in *Balance in Criminal Law Review Group: Final Report* (2007), 287-295, 289; *People (DPP) v. JC* [2015] IESC 31 (Hardiman J.) [15].
112 *People (DPP) v. JC* [2015] IESC 31 (Hardiman J.) [16].
113 *People (DPP) v. JC* [2015] IESC 31 (Clarke J.) [4.25].
114 (1914) 232 US 383.
115 *Wolf v. Colorado* (1949) 338 US 25.
116 (1961) 367 US 643.
117 Bloom and Dewey, op. cit., 44.
118 See Bloom and Dewey, op. cit., 44-45.
119 (1983) 468 US 897.
120 Bloom and Dewey, op. cit., 45.
121 *United States v. Leon* (1983) 468 US 897, 929-930.
122 (2006) 547 US 586.
123 Yvonne Marie Daly, 'Judicial Oversight of Policing: Investigations, Evidence and the Exclusionary Rule' (2011) 55 *Crime, Law and Social Change* 199-215, 201.
124 (2009) 555 US 135.
125 Kay Levine, Jenia Turner and Ronald Wright, 'Evidence Laundering in a Post-*Herring* World' (2017) 104(4) *The Journal of Criminal Law and Criminology* 627-679.

to an inclusionary rule together with subsequent developments in this regard present a salutary lesson to courts in Ireland, particularly given the strong influence of the US law over its development.[126]

Unlike in the US, the exclusionary rule in New Zealand and Canada is codified in statute and based largely on the rationale of judicial integrity. However, given that both were previously based on the vindication rationale, it is instructive to examine the evolution of the rule in these jurisdictions.

New Zealand – achieving a balance

The exclusionary rule in New Zealand, now codified in statute, originates from the case of *R v. Shaheed*.[127] Prior to *Shaheed* there existed a *prima facie* rule of exclusion of evidence obtained in violation of the New Zealand Bill of Rights Act 1990.[128] *Shaheed* was strikingly similar to the *JC* case in Ireland, both in its majority ruling and its dissent. The majority criticised the vindication rationale that previously underpinned the exclusionary rule for failing to protect 'the interest of the community' to punish those guilty of crimes.[129] The majority also focussed on respect from the community for the system of justice and the deleterious effects exclusion of evidence may have on it.[130] The dissent from the Chief Justice was 'particularly strong' and similar to that of the dissents in *JC*.[131] Elias C.J. noted the clear guidance provided by the rule 'in an important area', as well as the risk of balancing away rights and of 'double-counting ... public interests already balanced in the determination of the breach'.[132] Similar to Hardiman J., she noted that the vindication principle did not seek to punish the violating officer or compensate the accused but rather to vindicate the 'rights fundamental to all citizens'.[133] Nonetheless, the majority concluded that the new test for exclusion should be a balancing test between the rights of the accused and other factors such as the administration of justice.[134]

The balancing test laid down in *Shaheed* has now been codified by s.30 of the New Zealand Evidence Act 2006 and requires courts to consider several factors when determining the admissibility of evidence obtained in breach of rights. These factors include 'the importance of the right breached, the bad faith of the police, the nature and quality of the evidence, the seriousness of the offence and the availability of alternative investigatory techniques and alternative judicial remedies'.[135] Daly is critical of the balancing test for providing 'no guidance' as to how the test should be applied. Subsequent cases have done little, she argues, to provide clarity on the test and many have applied it without any reference to the factors mentioned in *Shaheed*.[136] For example, in *R v. Allison*,[137] the police had stopped a suspect in what appeared to be lawful circumstances. However, it later transpired that the police were delaying the suspect so that covert listening devices could be installed in his home. Notwithstanding the flagrant deliberate and conscious nature of the breach, the New Zealand High Court allowed the evidence holding that 'the principal factor of relevance to the admissibility [under *Shaheed*]' was the appearance of legality to the accused and to any 'disinterested observer'.[138]

Judges seem to be selective in the factors that they consider when applying the test which, Optican has warned, risks an inadequate response to the violation of rights and 'the judicial institutionalisation of a slipshod approach to balancing'.[139] Some of the criticism of the subjective approach taken by the courts in this area was addressed in *R v. Williams*[140] which set out the manner in which courts should apply and assess all the factors. Optican observed that this case 'brought much needed jurisprudential exactness' to the proportionality/balancing test.[141] However, he subsequently concluded that the Supreme Court has largely abandoned the *Williams* test and has left the exclusion of evidence to the 'unguided discretion of individual judges'.[142] Despite these criticisms, the new exclusionary rule does not seem to have dramatically changed the judicial approach to illegally obtained evidence. Choo and Nash, in their study of the operation of the exclusionary rule post-*Shaheed* found that it did 'not appear to have decreased the extent of exclusion' in practice.[143]

126 Ruadhán Mac Cormaic, *The Supreme Court*. (Penguin, 2016).
127 [2002] 2 NZLR 377.
128 *R v. Butcher* [1991] 2 NZLR 257.
129 *R v. Shaheed* [2002] 2 NZLR 377 [140].
130 *R v. Shaheed* [2002] 2 NZLR 377 [143].
131 Dimitrios Giannoulopoulos, *Improperly Obtained Evidence in Anglo-American and Continental Law* (Hart Publishing 2019), 239.
132 *R v. Shaheed* [2002] 2 NZLR 377 [19].
133 ibid.
134 ibid. [144].
135 Giannoulopoulos, op. cit., 239.
136 Daly, '"A Revolution in Principle"?' op. cit.
137 Unreported, High Court, Auckland, 9th April 2003, T002481.
138 Daly, '"A Revolution in Principle"?' op. cit., 7-8.
139 Scott Optican, 'The New Exclusionary Rule: Interpretation and Application of *R v. Shaheed*' (2004) *New Zealand Law Review* 451, 463.
140 [2007] 3 NZLR 207.
141 Scott Optican, '*R v. Williams* and the Exclusionary Rule: Continuing Issues in the Application and Interpretation of Section 30 of the Evidence Act 2006' (2011) 3 *New Zealand Law Review* 507, 543.
142 Scott Optican, '"Lessons from Down Under": The Exclusion of Improperly Obtained Evidence in New Zealand as a Model for a Changing United States Exclusionary Rule' (2011-2012) *Journal of Commonwealth Criminal Law* 226, 235.
143 Andrew Choo and Susan Nash, 'Improperly Obtained Evidence in the Commonwealth: Lessons for England and Wales' (2007) 11 *International Journal of Evidence and Proof* 75, 104.

Canada – bringing justice into disrepute

Similar to New Zealand, the Canadian exclusionary rule also employs a balancing of interests. Canada's balancing test focusses on whether a violation of the Canadian Charter of Rights and Freedoms brings 'the administration of justice into disrepute'. It was first articulated in *R v. Collins*[144] and the 'but for' test which excluded evidence when it 'could not have been obtained 'but for' the Charter violation' was subsequently introduced in *R v. Burlingham*.[145] Exclusion under *Collins* and *Burlingham* occurred where there factually existed a Charter violation and the Court determined that the violation risked bringing the administration of justice into disrepute. *Collins* made a distinction between conscriptive (self-incriminating) and non-conscriptive evidence, with a rule of near-automatic exclusion operating in relation to evidence obtained in violation of the rule against self-incrimination. The test was criticised as being too 'broad and imprecise'.[146] In *R v. Grant* the court dispensed with the distinction between conscriptive and non-conscriptive evidence[147] and set out a new three-step test which held that '[i]n all cases, it is the long-term repute of the administration of justice that must be assessed'.[148] In assessing a violation, the Court should consider the seriousness of the violation, the effect of it on the accused and the effect of it on the administration of justice. The balancing test, therefore, is concerned not with the accused's rights, but rather with the reputation of the justice system.[149] In addition, the Court 'emphasised that appellate judges ought to pay "considerable deference" to trial judges' once the factors in the test were considered.[150] Bloom and Dewey argue that the formulation of the balancing test is inconsistent in its application and 'results in a diminished remedy'.[151] Jochelson and Kramar argue further that the *Grant* test allows for 'the potential of a socio-legal trend towards inclusion'.[152] Despite this, again echoing the New Zealand experience, empirical surveys of post-*Grant* case law have shown that Canadian courts 'continue to routinely exclude improperly obtained evidence'.[153] On the other hand, Milne has found that appellate courts tend to show deference to trial courts more often when evidence has been included, but are more interventionist in cases of exclusion which implies an 'inherent bias on the part of ... higher courts to have all evidence included'.[154] Overall, while the Canadian courts have shown a willingness to give 'serious consideration to the protection of constitutional rights' and use their exclusionary powers, *Grant* seems likely to affect the admission of unconstitutionally obtained physical evidence in particular, given that evidence obtained in breach of the right against self-incrimination still enjoys a general presumption in favour of exclusion.[155]

EU Law and the European Convention on Human Rights (ECHR)

The exclusionary rule holds some significance for the effective enjoyment of rights under EU Directives on the procedural rights of suspected and accused persons,[156] as the Directives fall back on domestic law regarding the question of remedies for violations of their provisions, while (for the most part) requiring Member States to take account of the case law of the ECtHR. However, the ECHR does not contain rules on admissibility of evidence and the ECtHR has yet to pronounce a comprehensive exclusionary remedy for breaches of Convention rights. To date, it has established a limited number of exclusionary rules: first, in respect of evidence obtained by means of torture and second, evidence obtained as a result of police incitement.[157] Outside of these limited circumstances, evidence obtained in violation of other fundamental rights may also give rise to a violation of the right to a fair trial enshrined in Article 6 of the ECHR, but not necessarily. And, because the procedural rights of suspected and accused persons are guaranteed under the ECHR solely by virtue of the overall right to a fair trial, subject to a balancing exercise based on the 'overall fairness of the proceedings', the ECHR is silent as to the remedies for violations of the specific provisions of the Directives.

However, the Convention is a living document and the Court has made reference to exclusion of evidence in circumstances other than those arising from torture.[158] In *Salduz v. Turkey*,[159] the accused was not provided with access to a lawyer before

144 [1987] 1 SCR 265.
145 *R v. Burlingham* [1995] 2 SCR 206.
146 *R v. Grant* [2009] 2 SCR 353 [60].
147 Giannoulopoulos, op. cit., 243.
148 *R v. Grant* [2009] 2 SCR 353 [36].
149 Bloom and Dewey, op. cit., 54-55.
150 Justin Milne, 'Exclusion of Evidence Trends Post *Grant*: Are Appeal Courts Deferring to Trial Judges' (2015) 19 *Canadian Criminal Law Review* 373-394, 374.
151 Bloom and Dewey, op. cit., 55.
152 Richard Jochelson and Kirsten Kramar, 'Situating Exclusion of Evidence Analysis in its Socio-Legal Place: A Tale of Judicial Populism' (2014) 61 *Crime, Law and Social Change* 541, 554.
153 Giannoulopoulos, op. cit., 244, fn.294.
154 Milne, op. cit., 394.
155 Giannoulopoulos, op. cit., 245.
156 For example, Directive (EU) 2016/343 *on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings;* Directive (EU) 2016/800 *on procedural safeguards for children who are suspects or accused persons in criminal proceedings;* Directive (EU) 2016/1919 *on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings.*
157 *Jalloh v. Germany* (2007) 44 EHRR 32; *Harutyunyan v. Armenia* (2009) 49 EHRR 9 [66]. See Paul Roberts, 'Excluding Evidence as Protecting Constitutional or Human Rights' in Lucia Zedner and Julian Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (Oxford University Press 2012), 171-190, 187
158 *Allan v. United Kingdom* (2003) 36 EHRR 12 [52] and *Zaichenko v. Russia* App. No. 39660/02 (ECHR, 18 February 2010) [57] to [60] (evidence obtained contrary to the privilege against self-incrimination should be excluded).
159 (2009) 49 EHRR 19.

making inculpatory statements to the police. The Court held that this was a violation of art 6(3)(c) and ordered a retrial of the case 'in accordance with the requirements of Article 6 § 1'. It 'reiterate[d] that the most appropriate form of redress for a violation of Article 6 § 1 would be to ensure that the applicant, as far as possible, is put in the position in which he would have been' had the violation not occurred.[160] The Court has also ruled on evidence obtained in breach of the right to privacy under art 8 and has held that a breach of art 8 does not automatically result in a breach of the right to a fair trial. However, some of the Court's dissenting opinions are telling. In *Khan v. United Kingdom*[161] Judge Loucaides, dissenting, argued that a trial cannot be fair if it is based on evidence gathered contrary to Convention rights. Similarly, Judge Tulkens, dissenting in *PG and JH v. United Kingdom*,[162] argued that the Convention must be 'interpreted as a coherent whole'. In circumstances where evidence has been obtained in breach of art 8 and the majority finds no breach of the right to a fair trial, 'the Court renders Article 8 completely ineffective'. Therefore, the ECtHR is open to exclusion, however it is cautious not to infringe too heavily on the autonomy of contracting states.[163]

Conclusion

Exclusionary rules of evidence are important because they improve policing and prosecutorial standards, and ensure that courts are not implicated in, or seen as condoning, the illegal behaviour of investigating authorities of the state. Perhaps most importantly, exclusionary rules give *practical* or tangible effect to the fundamental rights guaranteed to Irish citizens under the Constitution. The reinterpretation of the key phrase 'deliberate and conscious' in the decision of *People (DPP) v. JC* has opened the door to a more flexible application of the exclusionary rule so that evidence may now be admitted where the actions of the officer in question were 'inadvertent'. This is a much more ambiguous and subjective test than that operated under *People (DPP) v. Kenny*, which was not absolute, but which did offer clarity and the robust protection of constitutional rights. The 2015 decision appears to have attracted more criticism than praise from journalists, academics and practitioners. Among the criticisms are: a lack of supporting evidence that the old rule was frustrating prosecutions; the introduction of a much lower, more subjective standard for public officials, thereby placing those exercising power in a much more privileged position than ordinary citizens; a fear of an inclusionary bias, as seen in the field of unlawfully obtained evidence, and the initiation of a trend towards the gradual erosion of constitutional rights. The development of the case law in other jurisdictions holds important lessons for Ireland in this regard, particularly the US, where evidence is now 'laundered' between police officers and the exclusionary rule now operates as an effective rule of inclusion.

160 ibid. [72].
161 (2000) 31 EHRR 1016.
162 (2002) *Criminal Law Review* 308.
163 For a detailed discussion of the exclusion of evidence under the ECHR, see Andrew Ashworth, 'The Exclusion of Evidence Obtained by Violating a Fundamental Right: Pragmatism Before Principle in the Strasbourg Jurisprudence' in Paul Roberts and Jill Hunter, *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (Bloomsbury Publishing 2012).

The Exclusionary Rule in practice after *JC*: Key Trends

Introduction

This chapter presents the findings from the interviews and practitioner surveys on the operation of the new exclusionary rule outlined in *People (DPP) v. JC.* As will be elaborated further below, the results throw up some troubling findings regarding its operation in practice, such as: the tendency to admit evidence, the complexity of the test, its inconsistent application, the ineffectiveness of the safeguards, and the difficulty in challenging an assertion of inadvertence. These findings would appear to amount to a significant deterioration in the exclusionary rule as an effective remedy for breaches of constitutional rights, thereby substantiating concerns discussed above with regard to the manner in which the test would be applied.

Inclusion or exclusion?

The majority of the respondents to the survey (38 respondents, or 63 per cent) were of the view that the new test had been applied in a predominantly inclusionary manner by the courts. 16 per cent (10 respondents) stated that it had been applied in a predominantly exclusionary manner, whereas 20 per cent (12) indicated that it had been applied in a varied manner dependant on the circumstances of the case (see Figure 2.1). This view was confirmed by the interviewees with all respondents with experience of *JC* in practice stating that the tendency was to admit evidence under the new *JC* rule. One interviewee noted that counsel would routinely advise clients facing trial on indictment that they would have only a 10 per cent chance of unconstitutionally obtained evidence being excluded at trial (Interviewee 12).

Figure 2.1: In your experience, how has the People (DPP) v. JC test been applied in practice?

In relation to the circumstances in which evidence is admitted, some of the respondents were of the view that this depended on the centrality of the evidence to the case, so that if the evidence is merely ancillary to the case being advanced by the prosecution, the defence stand a better chance of the court exercising its discretion to exclude. Others pointed to evidence being more likely to be admitted in situations where the breach derived from subsequent legal developments, citing recent case law on the admissibility of audio surveillance evidence.[164]

One important point in this regard is the differing approaches taken by trial judges to the exclusion of evidence, and particularly geographical variation in the application of the test. This is reflected in some of the comments made by survey participants and interviewees as outlined in Box 2.1 below:

164 See discussion and Box 2.12 below.

BOX 2.1

The courts should try to balance the practical effect of JC by taking a harder line and not merely finger wagging. In fairness some judges are far more exacting that (sic) others. (survey participant)

It's difficult to say one way or the other. A lot depends on personalities. ... (Interviewee 6)

And I think that a lot of it is going to be, especially on Circuit, if you've got a Judge like [redacted], you'll be doing better than if you have a Judge and I won't name the bad ones. But absolutely I think that it is going to become exactly that which shouldn't happen, highly subjective. (Interviewee 7)

Certainly, what I would have heard anecdotally from people who have been involved in cases where JC is applied is that, that is all very, very inconsistent, how much emphasis is placed on that really comes down to whatever particular judge you are up before. (Interviewee 3)

A: *But to answer your question directly, I think myself that that particular judge, the judge that I have experience of, would not entertain JC.*

Q: Yeah. And you have observed that in other cases?

A: Well, I have observed judges taking a very, Circuit judges taking a very sort of direct approach, we'll say in relation to Garda evidence. And they would be very, very quick to exclude it if they felt that it was obtained in improper circumstances.' (Interviewee 2)

Yeah, I suppose the first thing to say is it really comes down to the judge. There are judges who are applying JC to non-warrant cases, ... After JC, and I think everyone had their own similar experiences in front of some judges on that and started to get very kind of skittish about advising clients. Other judges I have to say ignore JC entirely and almost apply the, as best they can I suppose, the O'Brien/Kenny principles. (Interviewee 9)

Indeed, the extent to which the experiences of practitioners differ in this regard is highlighted by the excerpts below from an interview/survey with two practitioners reflecting on the application of the *JC* test in the District Court:

BOX 2.2

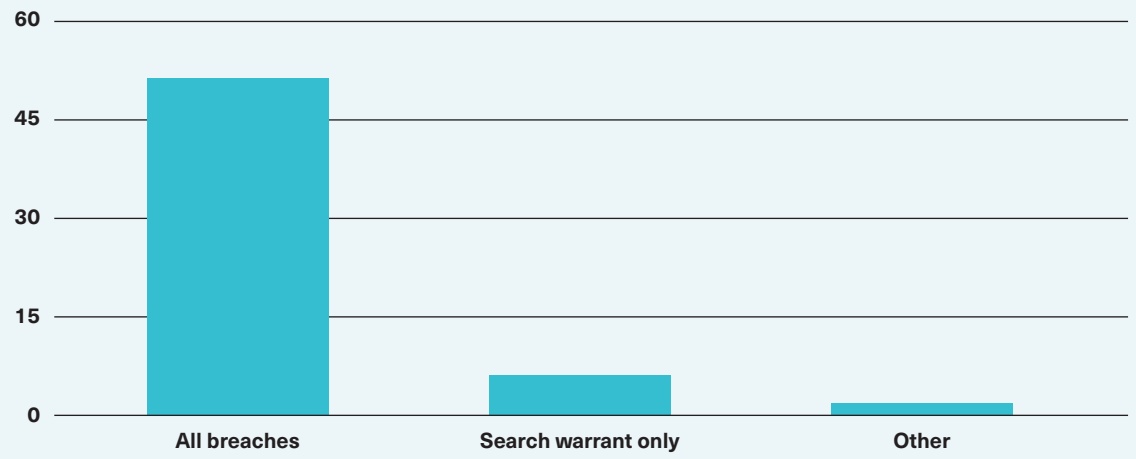
I mean, dealing with District Court cases where, on any given day you might be arguing that the results of a search were unlawful, that entering into a house on foot of a search warrant was unlawful. You know, even dealing with the bread and butter sort of drink driving cases, where you are arguing that the arrest was unlawful because there wasn't an explanation in ordinary language, or the correct power wasn't invoked. All those sorts of things. You never see JC being applied to any of those issues, in my experience, in the District Court. So, it is just not applied in the District Court. (Interviewee 3)

It is certainly cited on a regular basis in the district court for all manners of error by the prosecution. Judges at District court level look at the 6 stage test, without having considered how the court came to the 6 stage step, and will nearly always find for the prosecution. (survey participant)

Scope of the new rule

Respondents were asked whether the new rule was being applied only to search warrants or to all breaches of constitutional rights. This was considered important in light of the uncertainty over the scope of the rule in the majority judgments in *JC*. As can be seen in Figure 2.2, out of the 59 responses received, a strong majority (51 respondents or 86 per cent) indicated that it is being applied *beyond* the search warrant context. Two respondents selected the 'other' category; with one indicating that, while it is *currently* mostly applied to search warrants, there is a clear judicial appetite to move it into other areas, and the other suggesting the misconception that it goes beyond warrants stems from a type of anticipatory logic in terms of the Supreme Court moving towards a more inclusionary approach (namely, that if the test does not currently encompass breaches of rights outside of the search warrant context, it soon will).

Figure 2.2: Is the new rule being applied only to search warrants or to all breaches of constitutional rights?



Despite this clear finding, there was undoubtedly a lack of clarity on the issue, and a suggestion again of geographical variation on this aspect, as indicated in the survey and interview responses:

BOX 2.3

It is being successfully argued, in front of some Circuit Court judges, that JC only applies to search warrants, but this is not generally accepted by the DPP. There is a need for some guidance from the Superior Courts on how JC is to be applied (survey participant)

Although strictly speaking JC only applies to search warrants, many view it as effecting (sic) all constitutional rights. Many do not even try to argue against this which shows the extent to which it has undermined rights (survey participant)

Well, I'm finding on Circuit, ... they are generally saying, well look, it's only in respect of warrants, because I have had prosecutors try and wheel it out for other aspects of a case (Interviewee 1)

There's a judge, [name redacted] in the Circuit Court in Dublin, who seems to take the view that the case JC is limited to search warrant cases, and [s/he] has kind of interpreted it that way, and then other judges haven't interpreted it that way, but that's [his/her] interpretation. (Interviewee 18)

I suppose the perception is; if strictly speaking it does apply to search warrants, it will very readily be expanded to other areas of evidence very quickly if you try and litigate the point and if you go into the Court of Appeal having lost a point and say 'oh, JC doesn't apply there's an absolute exclusionary rule' or not quite absolute but, the Court of Appeal are immediately going to say 'well if there is we're following JC, we're going to change it'. So, if it does apply to search warrants, it won't for much longer, I suppose (Interviewee 8)

Workability of the new test

Aside from uncertainty as to the scope of the rule, interviewees also expressed concerns about the complexity of the test and its workability in practice, with some practitioners even suggesting judges try to sidestep *JC*-type arguments by reaching a determination on other grounds:

BOX 2.4

And some judges don't understand it. They won't say that publicly but they'll tell you. I've spoken to judges – not that they've said they don't understand it, because they'd never say that. But they'll kind of say, oh Jesus, JC, you know? (Interviewee 4)

I mean the decision is so long as well and we have all kind of struggled through it at various degrees but to try and refresh, you know, to try and just refresh your memory, I mean it must be difficult, you know, for judges in particular. At least we know we're making the point but they're just greeted with this on the spot... The nuance is lost, I suppose (Interviewee 11)

I've also, and I don't know if this is going to come up later on but I mean I've also found sometimes they try and avoid it and sidestep it and use other things if it's possible, it's not always possible but sometimes that happens, yes. ... Rather than relying on JC, they might find an illegality, they might find it's an illegality rather than something unconstitutional. (Interviewee 15)

I think in fact, what I find is that people or Judges are perhaps more inclined, and even prosecution Solicitors are more inclined to try and use other methods before using JC and only kind of use JC as a last resort. I'm not sure. I suppose the concern would be, I mean even if a Judge isn't that familiar with it and asks to read it because it's so long, so it may even be that and they may be worried that they'll have to do submissions on it and that they might feel that if they have a more basic point that they might try and use that. (Interviewee 16)

Another feature of JC not coming up in practice a lot of times is just the bloody length of it, the complexity of it and people trying to compromise issues and get on with it (Interviewee 19)

I think JC is completely indigestible. I think the test, I mean my own view, I mean I think the test is you know, you've the paragraphs in 7.2 of the judgement, you then have to go, there's a six- step test. You then have to go back and read sections four and five of the judgement of Clarke. Section four has 25 sub-paragraphs and section five has 23 sub-paragraphs. And you know a test that needs that much elaboration isn't really a test at all. I mean, JC reads like an essay. ... The manner in which it is expressed is indigestible, difficult to apply and when you're talking about like Circuit Court cases, you know. Circuit Judges they're doing a trial, long lists, they want you to be able to express a test in three or four sentences (Interviewee 20)

The complexity of the test, and the length of the decision, in *JC* were not the only issues raised by respondents in this regard. The two-stage test put forward by Clarke J. (as he then was) —whereby the judge first makes a determination on whether there has been a breach of constitutional rights and then decides whether the breach can be excused —was seen as problematic by some practitioners, as it appeared to allow the prosecution to serve additional evidence, having already ventilated the issue:

BOX 2.5

It's because it's a two stage test. But my view would be you have to call the evidence. You can't just give the court rules that something was unlawfully obtained. Or sorry, was unconstitutionally obtained. You can't at that point say oh, sure we'll now call evidence from the guards to say that they weren't aware of the subsequent legal development or whatever the reason is that they're offering. I think you have to do that first but that hasn't been the way it's been in practice either in that courts have allowed them then to call evidence given the ruling that we do find there was a breach of the constitution here and we'll now move onto the next test and allow them to call more evidence again from the guards who were involved or from a senior guard to say that it wasn't conscious and deliberate under the new terms of what conscious and deliberate is. Whereas in my view, that should all be done in the voir dire and the evidence in the voir dire as opposed to you're finished the voir dire, you get your ruling, and then they get another chance at it again (Interviewee 4)

This is a point that I think I made to you ... that some people go into an admissibility hearing with a two-stage process that is; first of all they look for the ruling on the legality and the constitutionality and then they entertain some kind of a separate hearing on whether or not it's inadvertent or anything like that. But I think it's totally wrong and I would never do it in that way and I say you put up the evidence, you make it very clear you're going to be invoking JC in advance, tell them they want full proof of everything, let the evidence be heard and then when the evidence is heard the submission is made (Interviewee 6)

So, yeah, it's all done during the context of a voir dire. But the voir dire starts and if a breach is found then the question is right, I'm taking that as is, we're now going to attempt to excuse it. So, obviously that can then be met with an objection going no, your option was to pick whichever horse you're on but it has been allowed, additional evidence has been allowed post-breach to cure the breach (Interviewee 7).

Related to this, another practitioner appeared to suggest the two-step test in a sense was otiose as the issue of admissibility usually hinged on the second limb of the test relating to inadvertence:

BOX 2.6

Q: And then the other safeguards that are being held up by the majority, or the fact that there would be a presumption against admissibility... how do you find that operating?

A: It's kind of... that rule is kind of overtaken by the other rules. ...Because, one goes one way, for the accused, another one... if it's inadvertence, it's the end of it too. So, there's very few cases where I've seen it analysed in the middle. ... That first phase, phase of the first rule of the test, it's kind of like setting out a stall as it does in all cases when they're breaking new ground, it's a presumption against. But here's the reasons where it can be admitted.

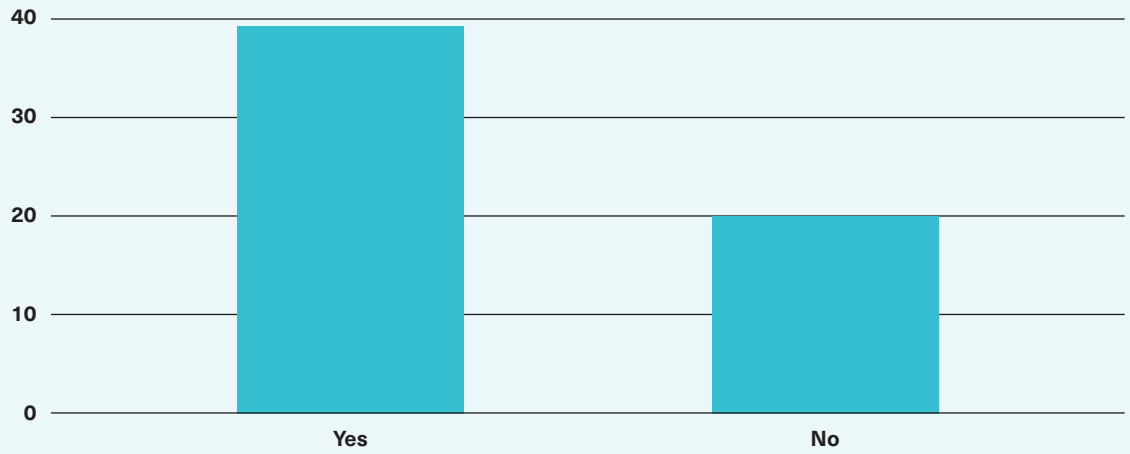
Q; So de facto is the presumption then an effective safeguard, do you know what I mean?

A: Yeah, well I haven't seen it been exercised, but they [the defence] never get beyond that (Interviewee 18)

Inadvertence

Most respondents (64 per cent or 38 respondents) responded positively when asked whether there was scope to challenge an assertion of inadvertence by the prosecution. Worryingly, however, 31 per cent (18 respondents) felt this was not the case. Three respondents selected the 'other' category in response to this question, with one indicating there was usually scope to mount a challenge and two indicating that this was usually very difficult. When these responses are factored in, the breakdown changes to 34 per cent (no scope to challenge) and 66 per cent (scope to challenge) as outlined in Figure 2.3.

Figure 2.3: In your view, is there scope to challenge an assertion of 'inadvertence' once asserted?



Interviewees, while generally in agreement that an assertion of inadvertence by the prosecution could be challenged, provided important insights into the difficulties facing defence practitioners in this regard. These ranged from the speed at which these matters are determined, to courtroom dynamics, to the near-impossibility of establishing what amounts to *mala fides* (bad faith) in practice. As can be seen in Box 2.7 there is also a concern about the subjective nature of the 'inadvertence' test and the level of discretion judges possess in this regard.

BOX 2.7

I mean, it's not even in the District Courts. It's going to happen. Because of any system, any justice system, the guards are a vital part of it and judges are always very reluctant to criticise guards. If there's another way of doing it to get a just result, they'll do it the other way. Which is understandable because otherwise the whole integrity of the system comes into question (Interviewee 4)

Yeah, but I mean look, what the majority says is this is dispiriting and depressing to suggest that certain court judges or trial judges won't do their duty, call it as it is. Well that's what they say. But the reality is generally speaking, no judges want to turn around and point the finger at the guards and say you've done very wrong, very bad things, they don't want to do it. (Interviewee 6)

Yeah, but in reality, how do you show a negative and that's effectively what it is isn't it?... see the problem is I suppose it's kind of a catch 22 because if it's inadvertent, it is inadvertent. So, there's nothing to point to a reason why it was done. And if you're doing it because you're being very sneaky and deliberately doing it and trying to cover that up, there's not going to be any reason to point that that either. So, it's very difficult I suppose to prove that something has been done for the wrong reasons. (Interviewee 5)

CONTINUED OVER

BOX 2.7 ***CONTINUED***

No, again I think the difficulty with any of the arguments and it has always been the case, even though the onus is obviously firmly established on the prosecution you still even implicitly as a defence team are trying to levy some prejudice or introduce some evidence in one sense of the word into it and it's very difficult for you to be able, I find, to be able to actually adduce evidence that the guard was reckless and to actually get that piece of evidence out rather than it just having been done wrong or was just a mistake. Other than the guard coming out himself and saying in cross examination, 'I was reckless, I'm sorry' it just doesn't work like that... other than being able to point to a previous history that they have or any other decisions that they might have made I don't really see how that works in practice, how you point to that. (Interviewee 9)

So, I mean how you're going to shake some kind of evidence of the contrary, it's, you'd be getting very lucky to get any sort of facts, unless you actually know something. I have never come across a situation where you'd have those kind of facts, you're just hoping for an ambiguity. And I mean a judge is always going to say well the presumption is that people are trained and they know the law and they are doing their job properly. ... So no, in practice it seemed very much as opening the door to unconstitutional evidence going in and that once it's invoked, it's very hard to, to argue against it, to stop the evidence going in. Because it's not, I can see how on paper you could see, you know, if it's applied properly with loads of time and it's all gentle but, unfortunately, these things happen very quickly (Interviewee 11)

[T]here's a lot of scope for them to talk their way away around it and put it down to inadvertence. Or maybe a bit of ignorance as well, you know. And they are given a bit of latitude [by the judge] on that and that would be my experience. I think obviously in a situation like this, I think it's pretty subjective, depending on the lawyer you're speaking to and the judges that they have been in front of but that's my experience with it anyway (Interviewee 15)

Respondents were also asked how the prosecution usually establish inadvertence. As can be seen from Figure 2.4 below, the majority of respondents who provided an answer to this question (76 per cent or 25 respondents) indicated that this was usually done by the prosecution calling the relevant guard to give oral evidence, although a few practitioners stated that this was done through written submissions (9 per cent or 3 respondents) or mere assertion (15 per cent or 5 respondents). While prosecution evidence must usually be disclosed in advance, there was a sense among respondents that this was not always the case, with several suggesting that the prosecution tend to react to defence challenges in this regard rather than including statements in the Book of Evidence:

BOX 2.8

Sometimes you will have a statement but very often it is just, if you raise any issues on it, they will just call the guard (Interviewee 17)

As a prosecutor you might even be reluctant to go there because if you start serving evidence you might be serving evidence at a point that the defence haven't even thought of. You react more to it; you wait to see whether it is going to be raised and then see what the response might be (Interviewee 19)

It would be an objection to the evidence and then the evidence is led by the prosecution of say how the search was carried out. And I have never seen it that they'll ask specific questions about that, it would be they would establish the lawfulness of the search and then when submissions are made at the end to say, well this was obviously unlawful, the judge then will, based on the facts that were led in the currency of that, will draw a conclusion maybe of inadvertence. But I have never seen it specifically led as evidence, it's like a default (Interviewee 11)

Figure 2.4: How the prosecution usually establish inadvertence

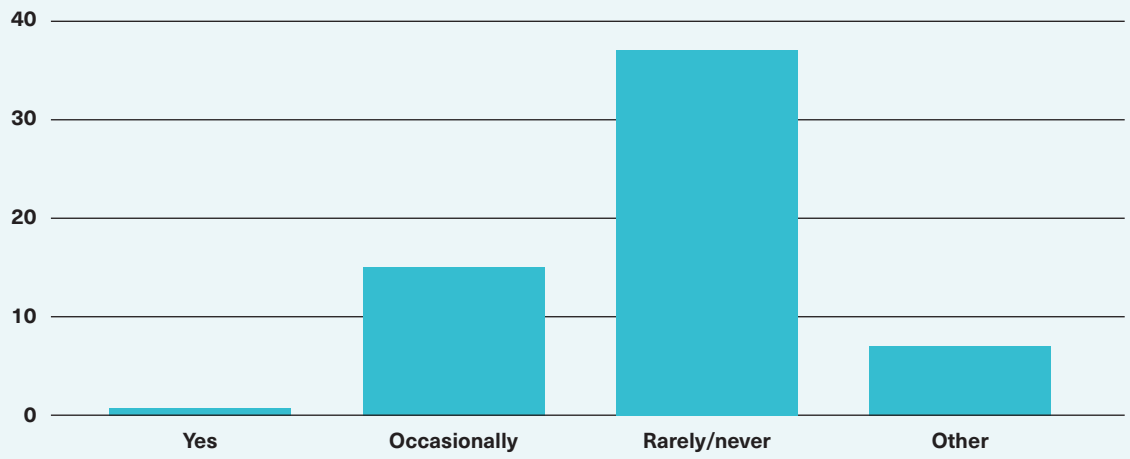
Source: Survey Monkey

Safeguards

As discussed in the previous chapter, the *JC* decision introduced several safeguards against wilful ignorance on the part of An Garda Síochána. These include: (i) the fact that the assessment as to whether evidence was taken in deliberate and conscious violation of constitutional rights extends beyond the individual who actually gathered the evidence to other senior officials involved either in that decision or in decisions of that type generally or in putting in place policies concerning evidence gathering of the type concerned; (ii) where evidence is taken in circumstances of unconstitutionality but where the prosecution establishes that same was not conscious and deliberate, then a presumption against the admission of the relevant evidence arises; and (iii) the term 'inadvertent' does not encompass reckless or grossly negligent behaviour on the part of investigatory or law enforcement officials.

Responses to questions on this topic in the survey showed that nearly two thirds felt that these safeguards were rarely or never effective in mitigating the effects of *JC*. Figure 2.5 shows responses to the question concerning the rebuttable presumption against the admission of evidence obtained in reckless or grossly negligent breach of constitutional rights. Practitioners were asked whether they felt that this safeguard mitigates the effects of *JC* in practice. The majority (62 per cent or 37 respondents) felt that it did not do so or did so rarely. This was confirmed by the interviews where not one practitioner had experience of this line of argument winning favour with the courts. As one interviewee said, 'It is not a real-world presumption. *JC* is the opposite in practice, the presumption is that it is in, I think, and you have got to do the work to show why it should go out' (Interviewee 19). Similar sentiments were expressed by another senior practitioner who argued that *JC* effectively created 'a presumption in favour of admitting which will only be ousted where badness is established' (Interviewee 20). This creates risks for the defendant as it is effectively requiring them to assert *mala fides* on the part of the Gardaí. One practitioner described this as 'just too difficult a threshold' to meet, and one which carried huge risks in terms of the sentence that might be imposed on conviction: 'if you are going down the road of accusing the guards of *mala fides* then you have just upped the ante to a whole new level' (Interviewee 17).

Figure 2.5: Does the presumption against the admission of evidence obtained in reckless or grossly negligent breach of constitutional rights mitigate JC in practice?



A similar scepticism about the effectiveness of the safeguards in *JC* is evident in responses to the question about the court's inquiry into inadvertence extending beyond the minds of the individual agent involved. As can be seen in Figure 2.6 the majority (60 per cent or 35 respondents) stated that this broader assessment (an examination of state agents involved in decision-making at senior levels) was rarely or never carried out in practice. As can be seen in Box 2.9, several of the interviewees did not place much stock in the effectiveness of this part of the test as a safeguard:

BOX 2.9

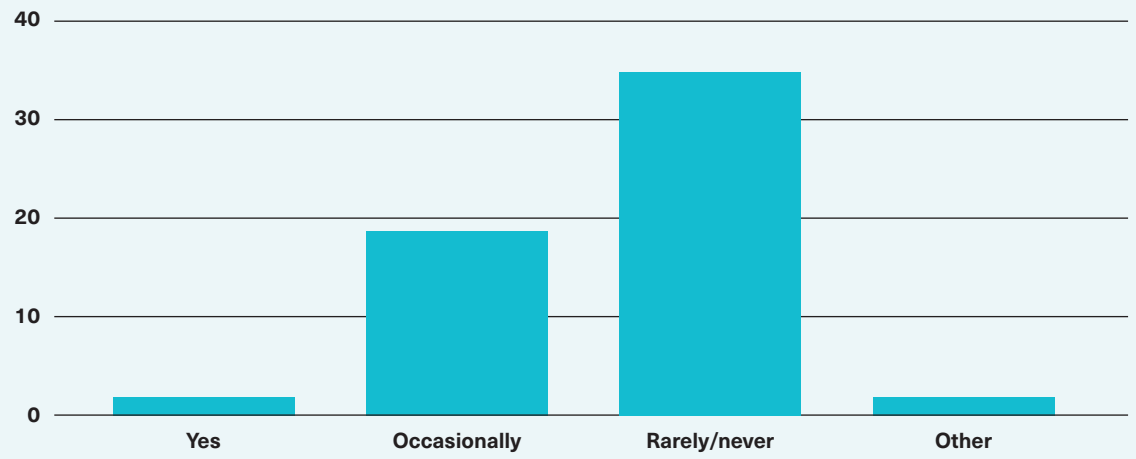
But sure, in practice how would that work because I mean, an example being a guard applying for a warrant for to search a house with drugs. I mean I'm not sure how much involvement his senior officers would have in making that application. Very little I imagine. (Interviewee 12)

The bit about superiors, I don't think will really arise, it'll be some guard that didn't do this or didn't do that. I don't think you're going to have an instance of something being... someone doing something wrong and then insulating themselves from it – I don't think that's likely to arise very much in practice. (Interviewee 13)

I don't think they really are from the defence perspective, safeguards. They are fine words, but I have yet to see a superior get in and take responsibility for what is obviously a garda policy. For example, if you look at the audio cases of which there have now been five. ... it has been plain as a pikestaff that the Minister hasn't made regulations for years. But you just bumble on and then JC is used by the court to say it's actually okay when you might have thought that this is clearly a case for saying, "Hang on a second. This couldn't be in advertence anymore". (Interviewee 19)

Indeed, several respondents appeared to suggest that the opposite was the case and that the fact that the Gardaí are simply working within established practice seemed to have the opposite effect of militating in favour of *admission* of the evidence. One respondent explained the dilemmas faced by the defence in this regard: 'I suppose, in fact if it's a system kind of thing, in a way that could work against showing a deliberate and conscious violation because you're just part of a system and this has always been the way it's been done... But you know because that is inadvertent, the system was always there, I just followed the system. I didn't know it breached; you know. So, how can that be deliberate and conscious?' (Interviewee 5). Another interviewee agreed: 'courts are reluctant to rule stuff out if the individual guard himself is simply working within the architecture that he has been given' (Interviewee 19).

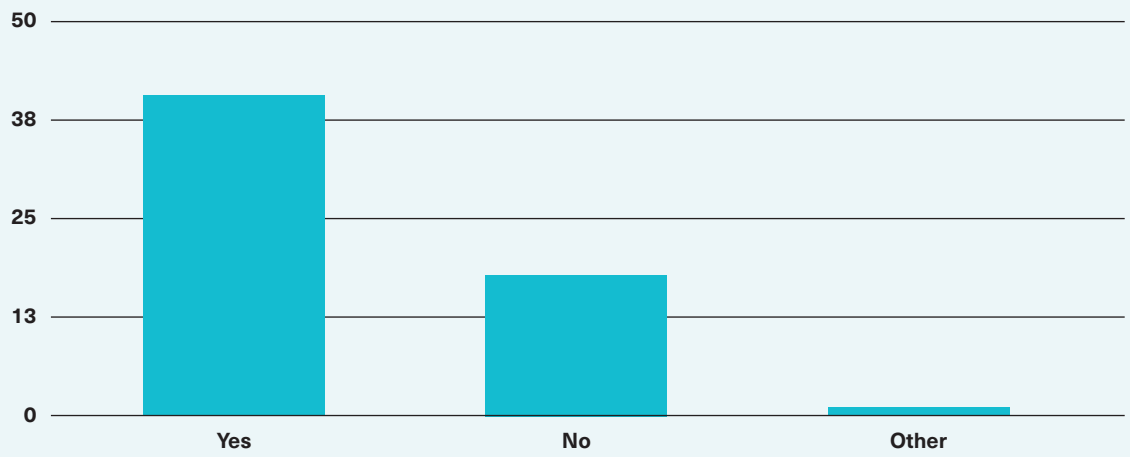
Figure 2.6: In your experience do the courts consider not only the state of mind of the person collecting the evidence but that of his/her superiors in determining 'inadvertence'?



Impact on guilty pleas

Aside from the question of the admission of evidence, the survey posed two questions to practitioners on the impact of the decision, one relating to advice to clients in terms of their decision to plead guilty or not guilty, and one relating to the impact of the decision on other procedural rights. Figure 2.7 shows that just over two thirds of the practitioners surveyed (68 per cent or 41 respondents) felt that the *JC* decision had changed their advice to clients in this regard.

Figure 2.7: Has the change in the exclusionary rule affected your advice to clients in terms of their decision to plead?



Textual responses to the follow up question on this issue indicated that advices have changed given that it is now a lot less likely that evidence obtained unconstitutionally will be excluded. Thus, clients are advised that evidence obtained on foot of a defective search warrant, or during detention following a technically unlawful arrest, will no longer be excluded. Of concern was the fact that a number of practitioners related this directly to the decision to plead guilty. One interviewee described this as having 'a real chilling effect' on bringing arguments about breaches of constitutional rights 'because you know they are not going to win' (Interviewee 17). Box 2.10 contains the wide range of responses elicited from practitioners on this issue from both the questionnaire and the interviews.

BOX 2.10

Harder to get an acquittal - more incentive to plead (survey participant)

More likely to advise a guilty plea (survey participant)

There is little point in advising a client to fight a case where the success of the defence is contingent upon the Court exercising JC in favour of the defence, hence pleading is often the more practical option (survey participant)

More guilty pleas. Less matters contested at trial where futile to do so (survey participant)

Much more likely [t]o advise not to fight the case even when there are potential issues surrounding the admissibility of evidence (survey participant)

If previously exlcuded [sic] evidence is so readily being admitted, and it is, clients are far more likely to plead (survey participant)

Increase in cases not contested (survey participant)

CONTINUED OVER

BOX 2.10 ***CONTINUED***

The greatest impact is before the case ever gets to trial. There is now a two-fold disincentive to fight charges: 1) there is an apprehension that more and more avenues of legal argument are being closed or diluted; 2) there is a sense that appeals and judicial reviews on criminal matters will not find sympathetic ears in the Superior Courts (survey participant)

Yeah, there's a huge change. Yeah, it is. And certainly, like I say sure it's had a huge effect on how people will run a trial or whether people will run a trial. So, yeah, I think it is a big thing. (Interviewee 5)

Yeah, that's where it's really become, really manifest. The amount of times I sit down with a guy, 'this is going to go in, they're going to get their stuff together and this is going to go in'. Whereas before you might have said, 'Do you want to give it a go?' (Interviewee 8)

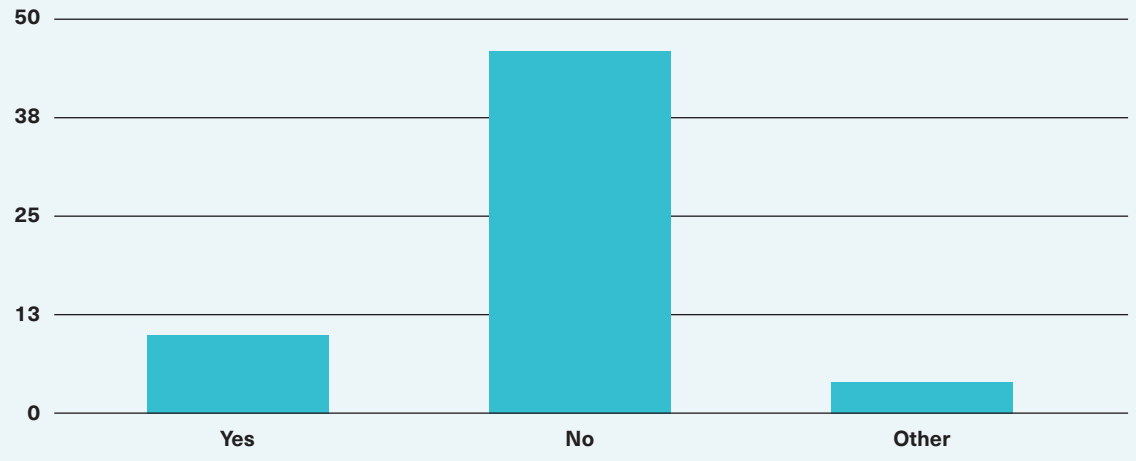
So, if somebody is going to get the ten years for drugs or they're going to get the life sentence for murder, then a challenge in JC would be something that somebody might say I've no choice but to fight this. In anything else where there's discretion there's the temptation of the trade-off. You're saying you know we could have challenged this warrant but we want credit because we haven't (Interviewee 10).

I would say the main effect of JC is not visible, because the effect is to induce a great sense of inertia. Before, you got a book of evidence, you looked at a warrant, you looked at the information, you looked at the signature, you looked at the formalities, because any one of them could sweep the whole case away. Now, people hardly even bother ... the attitude is, oh well, sure look, if it's only a technical mistake, it's JC. And people don't know what JC actually says, most criminal defence lawyers - very few people have actually read it. And even some of them haven't even read Clarke's executive summary. So, it has induced a sense of inertia, a sense of defeatism, and a sense that things have changed - there hasn't even been a battle. ... So, the biggest thing is the not visible, it's inertia (Interviewee 13)

Impact on other procedural rights

Practitioners were also asked about the impact of the *JC* decision on other procedural rights. As can be seen in Figure 2.8, over three quarters of those surveyed (77 per cent or 46 respondents) were of the view that it has not affected other procedural protections. Further exploration in the interviews, however, revealed some interesting knock-on effects in terms of the protection provided by other rights, including interaction with the new inference provisions curtailing the right to silence:

Figure 2.8: Has the new exclusionary rule impacted other procedural protections such as the right to legal advice?



BOX 2.11

And clearly what is reasonable to expect of you to say in custody might very well turn on the admissibility of the evidence that was put to you in the interviews. So, if the search was JC vulnerable, does the interview fall out? I mean, does even the whole arrest fall out because, you know, if they're in your house and they found the child pornography and the warrant is bad, can they then rely on what you said or didn't say in an arrest that would never have happened were it not for the search? (Interviewee 10)

I think there is probably more scope for JC being applied to any issue arising out of adverse inferences ... And I have had this example where I have had a statement taken from a client where Section 2 inferences were invoked, but they didn't invoke them properly and then we applied to have the statements ruled out... basically, they left out one part of the caution every time they gave it to him. They forgot to or didn't say that if he answered the question but it was false or misleading that that could also invoke the inference. So, they really only concentrated on the part that if he said nothing. The client did answer questions but then their case was that the answers were either false or misleading. ...So, we challenged the admissibility of that on the fact that the inference was improperly given so and we were successful. But the State - their argument on that case was there was a solicitor present. They also used JC because they were unsuccessful and on the solicitor being present part, the judge said that it isn't the solicitor's function to correct, the High Court Judge on the Special Criminal Court said that it wasn't the solicitor's function to correct. Then they did try and apply JC. (Interviewee 17)

I have a case coming up... it's based on ID and the senior counsel is actually intending on running something similar effectively on how the ID parade was run, that it should have been a double-blind administration and all the rest of it. And the anticipation is that they're going to try and somehow JC it if the court bites at all to say that the ID parade was in any way flawed (Interviewee 9)

Practitioners also spoke about the extent to which the new *JC* test had been applied in criminal prosecutions to admit audio surveillance evidence in breach of the fundamental right to privacy under EU and ECHR law. Several respondents had experience of these cases in the Central Criminal Court and Special Criminal Court. Thus, it appears that the test (or more specifically the part of the test that allows evidence to be admitted where the breach derives from subsequent legal developments) is being invoked to remedy deficiencies in the data retention regime relating to audio surveillance:

BOX 2.12

In a case called Jason O'Driscoll and then in a subsequent case called Tynan and Fitzgerald, the Judges have held that the breach of a Convention Right under Article 8, so your breach to a private life, can be the equivalent of a breach to a constitutional right and have then held that there was a breach of privacy in respect of telephone records but have admitted them on a JC analogue (Interviewee 7)

The audio surveillance stuff is only now coming into court after they invested the money in the units and the rest of it and they have finally now started basing cases on the surveillance. Whereas before it tended to be just kept hidden and it was confidential and used as a way to start a case, they never relied on it but they are now relying on it. But the legislation is very complicated. The Minister hasn't made any regulations so there is a pile of arguments made about why it should be excluded. So that is why I think JC is coming up much more in the last eighteen months ... There was an Elizabeth Kennedy ruling saying what the guards did was all illegal, but they are letting it in [under] JC. And then there was a Paul Coffey decision in another case where he said it was again illegal or against the law, but JC allowed it in. (Interviewee 19)

Concerningly, this also appeared to be the case in relation to other privacy rights relating to, for example, the retention of forensic samples, and the right to privacy of the dwelling:

BOX 2.13

I'm going to refer you to one case in the Court of Appeal called Murphy … a similar situation to what happened in Freeman, there was forensic evidence. The Gardaí had taken forensic samples from one of the defendants. They were a match for items at the scene of an aggravated burglary but the Gardaí didn't charge him within 12 months of taking the sample. So, they needed to go to a District Judge to get an authorisation to retain the samples, they didn't do that, they kept them on the system. They presented the samples at trial that had been taken. Defence stood up and said these samples have been retained unlawfully and the trial Judge said so what and the Court of Appeal stood over it and said so what. They've been obtained properly. This was an inadvertent mistake. (Interviewee 20)

But on that note, at the moment I've a case in which there's, a peace commissioner signed a warrant. The peace commissioner now has dementia and isn't in a position to give evidence and I've an instruction from the Director to seek, to adduce the evidence of the search made on foot of that warrant notwithstanding that I can't prove the state of mind of the peace commissioner and to attempt to rely on JC. … To admit in essence that I can't prove the lawfulness of the search, but so what (Interviewee 7)

Impact on policing and prosecutorial culture

More broadly, several practitioners expressed concern about the impact that a 'good faith' exception may have on standards of policing, particularly in ensuring that proper standards are adhered to in criminal investigations:

BOX 2.14

JC has had a major effect on limiting the ability of a defendant to successfully challenge the admissibility of unconstitutionally obtained evidence. While this may seem like a good thing from a prosecution point of view, it leads to sloppy police work and a questionable, revisionist view of their state of mind at the time of the breach. Neither of these positions are desirable in a functioning professional police force (survey participant)

I think JC gives a carte blanche to gardai to ignore constitutional rights and then to retrospectively argue inadvertence. I think this is a slippery slope which leads to bad practice and encourages a disregard of fundamental rights which were hard fought for and were important safeguards. It also inadvertently encourages gardai to at least stretch the truth in their statements which cannot be a desired effect (survey participant)

The previous rule was there to encourage the Gardaí to comply with the provisions of the Constitution, it succeeded, which was why the level of performance was as it had been since it's (sic) establishment. Now the standards are slipping, and being tolerated by a judiciary which show no inclination or understanding 'at the coalface' of the effect of inevitably admitting evidence, once in my experience where an irritated judge inquired why the objection to admissibility was being raised when it was clear he had a discretion to admit the evidence (survey participant)

JC damaged the Rule of Law and the reputation of our justice system as being robust. It gave consent to the members of the police system to override some protections, who needed little encouragement in this regard (survey participant)

But at the end of the day if something looks like it's going to be ruled out, they're [the Gardaí] still going to be in the box and say 'oh Jesus, I didn't know that'. And that's the problem. The underlying problem is that it's very difficult to deal with… It's that guards get in the witness box every day and lie. … If all the guards get into the witness box and told the absolute truth every time they get into a witness box, then JC would probably be fine. (Interviewee 4)

[W]hen the deterrence is working, what you have is a non-product. And you can't – it's very hard to quantify a non-product. Whether or not it'll make the force more aggressive and all the rest of it, time will tell. But it's the way things are going … I don't know where it's going to end, but not somewhere pretty (Interviewee 13)

CONTINUED OVER

BOX 2.14 *CONTINUED*

And just, I can only speak for myself and it may be on a small scale but I think within the police generally, procedure is a nuisance and I think this is now a free pass for ignoring it. So that's what I think from my own point of view. (Interviewee 15)

I understand to some extent that from a public perception point of view that it might seem crazy that a serious case could go out over what might be perceived as a minor anomaly. But for me, I just think the principle of, if you are prosecuting someone, if you are going into someone's house, if you are overriding their constitutional rights then that has to be done, every I dotted, every T crossed and it leads to good practice, is the main thing for me. And if you allow for sloppy police work, I just don't think that is a good road to go down. I think it just allows for a certain attitude to creep in. Even for the guards, their defence to it has to be that they come in and say, 'Oh, it is inadvertence.' That is not a good culture to encourage. (Interviewee 17)

Interestingly, some respondents also spoke of the potential impact of *JC* on prosecutorial culture and the dangers associated with a 'convict at all costs' mentality:

BOX 2.15

So, I think it would heighten, if the Kenny Rule was still there, would heighten a consciousness of things needing to be done properly because if they're not there is a danger that everything else is set in nothing ... I do think as a culture it is important that people, not people but systems are held accountable and things like Kenny did hold people accountable ... and the problem is it leads, and look we're all human, but it leads to lazy prosecutors, it leads to lazy detective work, it leads to 'ah, it's enough sure I don't need to push it, I can just rely on JC' and I don't say that, like I refer to myself as much as anyone else, like I don't think anyone isn't doing their work. It's just such an easy out and it makes it so much easier not to push hard issues and because it is a get out of jail free card effectively for prosecutors (Interviewee 5)

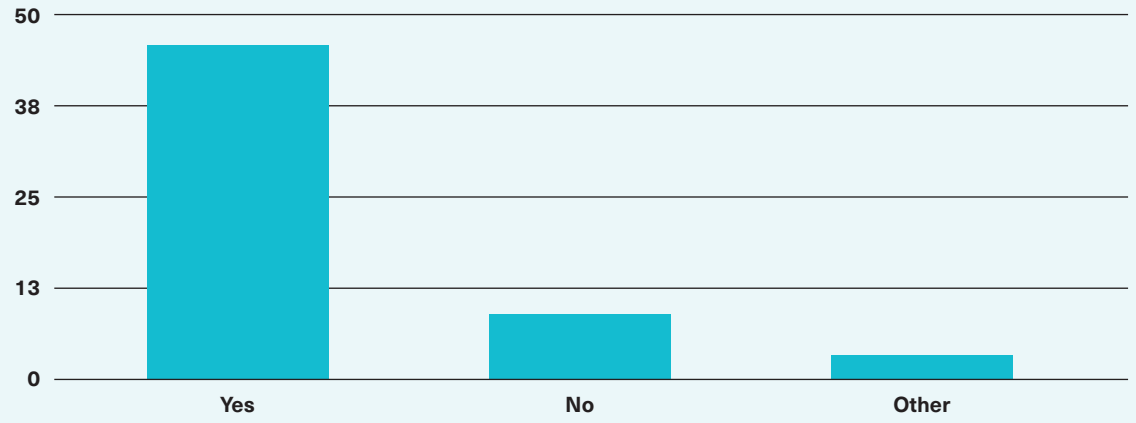
But I know that the state's view anyway and the state solicitors' view is that JC can plug an awful lot of gaps ... I know that that is the position of the DPP, that is to run JC as best they can (Interviewee 9)

I do think the most interesting area would be to see has JC kind of seeped over into other issues, you know... Like I think that would be very interesting, you know. ...Yeah and even like I do think, I know we had a case recently .... It was a murder case and you know, like we were horrified at the kind of attitude the guards took in the case, you know, and what they were allowed get away with, you know. That, you know, ultimately... Like to some extent by the prosecution as well, you know, and that this kind of, you know, 'convict at all costs' kind of you know. I think there is an element of that seeping in, you know, which is very unhealthy, you know (Interviewee 16)

A 'Revolution in Principle'?

In the final survey question practitioners were asked whether they agreed with Hardiman J.'s description of the majority decision in *JC* as a 'revolution in principle' and 'a major step in the disengagement of [the] Court from the rights-oriented jurisprudence of [its] predecessors'. Again, as can be seen in Figure 2.9, over three quarters of those surveyed (77 per cent or 46 respondents) indicated their agreement with this.

Figure 2.9: Do you agree that the majority decision in JC can be described as a 'revolution in principle' and 'a major step in the disengagement of this Court from the rights-oriented jurisprudence of our predecessors'.



The textual follow up question elicited responses that provide some further sense of the strength of feeling on this issue:

BOX 2.16

The recent approach's (sic) taken by the Supreme Court in its effort to safeguard the public interest against defendants Constitutional protections have all but eroded any such safeguards for the criminal process (survey participant)

JC has gone too far. Even the DPP's office think so (survey participant)

In this writer's view, JC places a premium on the ignorance of those involved in the collection of evidence in breach of an accused['s] rights. It is simply unacceptable to say, "ah well we didn't avert to the fact that we were breaching the accused's rights, so the evidence should be admitted" (survey participant)

JC is an unmitigated disaster which has been applied in exactly the way everyone was assured it would not be, and which is used in situations where it was promised up and down it wouldn't. Its only utility is that when the powers that be try this next time we can point to JC and say, 'Well, you said the same thing there, and look how that worked out' (survey participant)

I think universally on both sides of the court, with a few exceptions, sorry not universally, but a few exceptions, people didn't like it, I think. I thought it was just really bad. I suppose the criminal bar in Dublin is split up into those who prosecute and defend, those who defend only and those who prosecute only and with the exception of a few people in the final category I think most people were just very against it (Interviewee 8)

I just think JC has had, it has given a liberty to the High Court and the Court of Appeal and particularly the Criminal Court of Appeal and also the Supreme Court now to apply general rights and general procedural rights and due process rights, massively conservatively and has given them that leeway where they had been held to a more broad and a higher standard... I know very few who welcomed JC and even the most conservative prosecutors I don't think that they welcomed it per se. (Interviewee 9)

I do think JC, they really went, they were too quick to change without, I feel, giving enough weight or consideration to all the principles that we had evolved over hundreds of years (Interviewee 11)

Hardiman I think is right though, in terms of the crux of what he was saying. This is how we used to think, and this is very, very different. It is a different relationship between citizen and state from that point of view. I think he is right still. (Interviewee 19)

Of particular interest are the views of some respondents to the effect that the problem did not lie with the *JC* test itself, but with the (inclusionary) manner in which the decision has been subsequently applied by the courts:

BOX 2.17

[In response to the question about disengagement from rights] No, but only if the new test is correctly applied. (survey participant)

Properly-applied, the test formulated by the majority in JC provides a good balance between the various rights and interests. The problem is that in practice most Judges seem to view JC as the case which overturned Kenny without properly considering what JC itself actually stands for. I've never seen a Court assess the state of mind of anybody other than the individual member. And I've seen the Court frequently overlook the requirement that the prosecution establish admissibility beyond all reasonable doubt and by admissible evidence. I would not share Hardiman's expression based on JC itself - but when one considers how JC is applied in practice, it is difficult not to have serious concern (survey participant)

The JC judgments themselves are not the problem. The problem is that Hardiman and the minority were right that the trial judges would not reliably apply the Clarke test and the appellate courts would not correct the trial judges (survey participant)

[A]nd JC, I agree on paper that all makes sense and it's all great but I just think in practice it doesn't necessarily follow that in every case it's going to be well applied and there is the danger... And the problem is because JC isn't aired in the cases where somebody may well be guilty but something was done wrong, because it's never aired in those types of circumstances, it makes the danger all the more great that in circumstances where somebody actually [is innocent] that they could be caught by it (Interviewee 5)

I think that perhaps that the exclusionary rule as it was, was too rigid, the bright-line rule was too rigid. But I'm going to temper that quite heavily and I'm going to say that in my experience unless you have managed to pin a Judge into an absolute categorical exclusionary constitutional right-type scenario, you so rarely get the bounce of the ball on the discretion. When a Judge has a discretion, invariably it is exercised in favour of the prosecution. (Interviewee 7)

Conclusion

This chapter has sought to present the main findings from interviews and surveys with criminal law practitioners on their experience of the exclusionary rule in practice since the decision in *People (DPP) v. JC*. It is clear from the excerpts discussed above that there are significant issues relating to the workability and intelligibility of the *JC* test as well as uncertainty over its scope, substantiating concerns that the new test would diminish the certainty which was the hallmark of the *Kenny* decision. One of the most significant findings from the survey and interviews is the overwhelmingly inclusionary manner in which it is being applied, again in line with the predictions of academics and the minority judges in *JC*. The questionnaires and interviews also raised important concerns about the knock-on effect of *JC* on other due process rights such as the presumption of innocence and the right to privacy, as well as policing and prosecutorial standards more broadly. All of these issues will be discussed in the next, concluding chapter.

Protecting Constitutional Rights into the Future: Conclusions and Recommendations

Introduction

This final chapter of the report draws on the empirical data discussed in the previous chapter with a view to arriving at a number of conclusions and recommendations on the vindication and protection of constitutional rights in Ireland. In line with the concerns raised by criminal law practitioners in the survey and interviews, the chapter focuses on three broad areas, relating to: (i) the application of the *JC* test itself; (ii) the impact of the decision on other rights; and (iii) the impact on policing and prosecutorial culture.

Application of the test in *People (DPP) v. JC*

Inclusionary trend

The tendency of the courts in the five years since the *JC* decision to admit evidence under the newly formulated test is a matter of huge import to the protection of the fundamental rights enshrined in the Constitution. It would appear, as predicted by the minority judges in *JC*,[165] and by the Chairman of the Balance in Criminal Law Review Group, Gerard Hogan,[166] that when provided with discretion in this matter, trial judges in Ireland tend to exercise this in favour of the prosecution. Dr. Hogan premised his remarks on the closely related area of evidence obtained by illegal – as opposed to unconstitutional – means, where judges have a discretion and where very few cases of discretion were ever exercised in favour of exclusion. Hardiman J., for the minority in *JC*, was of the similar view that 'experience of the courts over the past 40 years strongly suggests that "inadvertence" will be accepted very generally as a reason to allow to be proved in evidence the fruits of deliberate and conscious violation of citizens' rights'.[167] Unfortunately, these comments have proved prescient in the post-*JC* period, with the advice currently being given to defendants running to the effect that there is only a 10 per cent chance of evidence obtained in breach of constitutional rights being excluded at trial (Interviewee 12). It is perhaps not without significance that the dissenting judges in *JC* were among those with the most experience of criminal law in practice, and that practitioner views in the wake of the judgment were largely in line with those of the minority on this point.[168] While academic commentary may criticise Hardiman J. for his 'distrust' of trial judges,[169] and argue that the exclusionary rule in Ireland remains 'unusually rigid',[170] empirical investigation of the application of the test does not bear this out.

This *de facto* presumption in favour of admitting unconstitutionally obtained evidence raises important questions about the extent to which violations of the Constitution are being taken seriously in Ireland. The routine admission of such evidence gives little in the way of tangible effect to fundamental rights in Ireland, and denies them substance as 'real living rights'[171]. ICCL believes that the exclusionary rule serves an important function in ensuring that the provisions of the Constitution are protected. As ICCL has previously argued, any violation of the Constitution, no matter its degree, should be taken seriously and judges should not be required to consider evidence which they know has been obtained in breach of the Constitution.[172] As the former Chief Justice O'Higgins explained, in countries governed by a written Constitution, 'one may expect the judges, by their oath of office, to be bound to uphold the Constitution and its provisions and to do so on all occasions in the courts in which they preside'.[173]

The operation of the exclusionary rule in Ireland now appears to have come full circle, moving from a test that was largely (although by no means exclusively) exclusionary in its orientation, to one which is now predominantly inclusionary. Paradoxically, therefore, given that reforms in other jurisdictions were used by the majority to paint Irish law as an 'outlier',[174] in the period following *JC* Ireland now presents as the outlier among common law jurisdictions that have relaxed their exclusionary rules. As noted in the first chapter of this report, academic research into the operation of the test in

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165 *People (DPP) v. JC* [2017] 1 IR 417-807, 468.
166 Balance in the Criminal Law Review Group, *Final Report* (Dublin: Stationery Office, 2007), p.287.
167 *People (DPP) v. JC* [2017] 1 IR 417-807, 468.
168 See, for example, McGeever , op. cit.; Mac Cormaic, 'Supreme Court ruling a get-out for gardaí' op. cit.; McGillicuddy, op. cit.
169 See David Gwynn-Morgan, 'Supreme Court ruling on evidence leaves questions on 'inadvertence' unanswered', Irish Times, 18th April 2015; Clare Leon and Tony Ward, 'The Irish Exclusionary Rule after DPP v. JC' *Legal Studies*, Vol. 35 No. 4, 2015, 590–593. See also O'Donnell J.'s judgment in *JC* where he describes it as 'offensive and self-defeating to devise a judicial rule of absolute or near absolute exclusion on the basis that courts will not enforce rules of exclusion'.
170 Leon and Ward, op.cit, 593.
171 *People (DPP) v. JC* [2017] 1 IR 417-807, Hardiman J, 473. On this point more generally see Claire Hamilton, 'Green Guards, Good Faith and the Exclusionary Rule', *Gazette of the Incorporated Law Society of Ireland*, Aug/Sept 2015, 20-21; Claire Hamilton, *The Presumption of Innocence in Irish Criminal Law* (Dublin: Irish Academic Press, 2007).
172 Irish Council for Civil Liberties, *Taking Liberties: The Human Rights Implications of the Balance in the Criminal Law Review Group Report* (Dublin: ICCL, 2008), p.26.
173 *People (DPP) v. Lynch* [1982] IR 64 at 76.
174 See judgment of O'Donnell J., where he describe the Irish law on the exclusion of evidence as 'the most extreme position adopted in the common law world'. *People (DPP) v. JC* [2017] 1 IR 417-807, O'Donnell J., 624.

other common law jurisdictions that have altered their exclusionary rules of evidence, such as New Zealand and Canada, suggests that courts continue to routinely exclude improperly obtained evidence.[175] It is the citizens of these jurisdictions that now appear to be better protected in the enjoyment of their fundamental rights.

Given that the test set out in *JC* appears to do little to constrain a trial judge from exercising his/her discretion in favour of the admissibility of evidence, ICCL notes the *dicta* in *JC* whereby the appellate courts will correct any imbalance that has arisen, and provide a 'robust' response where necessary. In line with case law in other jurisdictions, relevant factors in any reformulation of the test might include: the importance of the right breached, the bad faith of the police, and the nature and quality of the evidence.[176]

The Reach of the New Exclusionary Rule

It will be recalled from Chapter 1 that in *JC* O'Donnell J. specified that the decision applies only in the context of search warrants, while Clarke J. was not quite as restrictive. He suggested that the new rule applies only where there is a question about the manner in which a relevant piece of evidence was gathered, as opposed to any question relating to the probative value of the evidence. The tension between the two leading judgments in this respect would appear to have created a significant degree of uncertainty regarding the scope of the new rule as reflected in the interviews and surveys. While certain Circuit and District Court judges are (quite reasonably) interpreting the judgment as extending only to search warrants, rulings handed down in the Special and Central Criminal Courts have applied the test to all breaches of rights.[177]

Given the need for consistency of approach in relation to the admission of evidence at criminal trials, it seems clear that this is an aspect of the test that would benefit from guidance from the appellate courts. Should the test be extended to all breaches of constitutional rights, then, as noted above, guidance should address the importance of the particular constitutional right which is affected. As McGillicuddy has argued, for example, the *JC* principles may well not be fit for purpose in an arrest and detention context where the right to liberty may be engaged.[178] The jurisprudence of the New Zealand courts may also be instructive in this regard such as the decision in *R. v. Williams*[179] holding that a 'serious breach of rights' would normally lead to exclusion, even where the crime is serious. In *Williams*, Glazebrook J held that '[t]he more fundamental the right and the more serious the breach, the less likely it is that the balancing test will result in the evidence being admitted.'[180]

ICCL recommends that clarification should be provided by the appellate courts on the scope of the new exclusionary rule and whether it applies beyond the search warrant context. If it is extended to all constitutional rights, then guidance should be provided on the weight to be accorded to, and the importance of, the particular constitutional right affected. Practitioners should not be afraid to challenge application of the *JC* principles in arrest, detention and other scenarios as they may not be fit for purpose to deal with the issues that arise for the constitutional rights engaged in such scenarios.

Effectiveness of Safeguards

Given the more subjective standard introduced by the *JC* test, the robust application of the safeguards provided for in the judgment assumes a particular importance for the effective protection of constitutional rights. It will be recalled from the previous chapters that these relate to: (i) the fact that the assessment as to whether evidence was taken in deliberate and conscious violation of constitutional rights extends beyond the individual who actually gathered the evidence to other senior officials involved either in that decision or in decisions of that type generally or in putting in place policies concerning evidence gathering of the type concerned; (ii) Where evidence is taken in circumstances of unconstitutionality but where the prosecution establishes that same was not conscious and deliberate, then a presumption against the admission of the

175 Choo and Nash, op. cit.; Giannoulopoulos, op. cit., 237.
176 These are all factors listed in s.30 of the Evidence Act 2006 in New Zealand. See further Chapter 1 of this report and Daly, '"A Revolution in Principle"?' op. cit..
177 In a recent Special Criminal Court ruling in *People (DPP) v. Murphy and Kennedy* (18th November 2019) Burns J: held: 'This Court is well aware - and indeed, counsel for the accused do not take exception to the fact - that the test in JC is utilised on a general basis when illegal evidence has been gathered which interferes with constitutional rights'. In the course of her ruling Burns J. referred to a decision of the Central Criminal Court in *DPP v. O'Driscoll* (15.11.17) where a challenge was made to telephone records being admitted into evidence and *JC* was applied to admit the evidence.
178 McGillicuddy, op. cit..
179 [2007] 3 *New Zealand Law Review* 207.
180 ibid., 239 (para. 106). Indeed, one of the most influential texts on exclusionary rules written in Germany at the turn of the 20th Century argued that while balancing is a necessary element of the criminal trial in many respects, some violations were so serious that they should trigger a presumption of exclusion and that balancing should only occur where the violation cannot be categorised as a fundamental rights violation. Ernst Beling, *Die Beweisverbote als Grenzen der Wahrheitserforschung im Strafprozess* (Schletter'sche Buchhandlung 1903) cited in Stephen Thaman, 'Constitutional Rights in the Balance: Modern Exclusionary Rules and the Toleration of Police Lawlessness in the Search for Truth' (2011) 61(4) *University of Toronto Law Journal* 691-735, 696.

relevant evidence arises; and (iii) the term 'inadvertent' does not encompass reckless or grossly negligent behaviour on the part of investigatory or law enforcement officials. These will be considered in turn.

Despite academic commentary underlining the significance of this as a safeguard against wilful abuse by gardaí,[181] the interviews and surveys suggest that in practice there appears to be little scrutiny of those in senior positions, save where authorisation by officers of a higher rank is required by statute. This may perhaps be due to a certain reticence on behalf of practitioners to press for a full inquiry; as one experienced practitioner mentioned during an interview, an 'inertia' appears to have grown up around the *JC* decision, which may have stymied efforts in this regard. Of course, it may also be a tactical decision by practitioners. As noted in the previous chapter, there are risks for the defendant in pursuing this approach as the sentence will be higher if convicted. This conservatism may well be justified given that in cases where issues of systemic rights violations have arisen evidence has continued to be admitted. This is well illustrated by the line of litigation relating to the admissibility of audio-surveillance (phone-tap) evidence (discussed below), where the Minister has failed to make regulations relating to the retention of this data, but where such evidence is regularly admitted. It is also demonstrated in the case of *People (DPP) v. Murphy*[182] where the Gardaí retained a person's genetic materials beyond the statutory time period, in contravention of legislation in force since 1990, and where the evidence at the trial had been to the effect that there was a lack of any system at the relevant time for the destruction of such records after the statutory retention period had elapsed. Despite this, the Court of Appeal upheld the trial judge's decision to admit the evidence, holding that this involved a breach of a *legal* rather than *constitutional* right.

At the second stage of the *JC* test where the issue of inadvertence is considered, a presumption is said to operate in favour of the exclusion of the evidence. As suggested by the responses to the survey and interviews this did not appear to provide effective protection for rights in practice; rather, practitioners averred to a presumption in favour of the *inclusion* of evidence. In addition to the judicial tendency towards admitting evidence noted above, a structural problem previously highlighted by McGillicuddy[183] is that the presumption only arises when a determination *has already been made* that the breach was not conscious or deliberate. The fact that a judge has determined that the breach was not deliberate has obvious implications for a finding of inadvertence or mistake, for as one practitioner noted, 'evidence to explain a breach [is] always going to be intermixed in the issue as to whether there was a breach' (Interviewee 14). Indeed, another interviewee suggested that in some cases the prosecution declined to lead further evidence on the issue of advertence and chose to deal with the two issues combined (conscious and deliberate breach, and inadvertence) (Interviewee 4). All of these factors militate in favour of the admission of the evidence and dilute the effectiveness of the presumption as an effective safeguard against abuse.

The final, related protection is the fact that an act will not be 'inadvertent' where 'any relevant person' acts in a manner deemed reckless or grossly negligent. The reference to 'relevant person' again suggests that assessment by the court will extend beyond the individual who carried out the act in question. As with the presumption against admissibility, however, there is a serious question mark over its effectiveness in practice, particularly in the absence of further judicial guidance as to how this should be assessed by the court. As Daly[184] has argued there is a worrying lack of clarity in relation to circumstances involving recklessness and gross negligence: 'Is this entirely a matter of judicial discretion? Are there guidelines for trial judges to follow in exercising said discretion, or factors which must explicitly be balanced against one another? It seems not; or at least not pronounced within *JC* itself'. The need for effective oversight is particularly acute given the well-established difficulties of establishing something that is peculiarly within the knowledge of the officer in question, or, as one interviewee put it, 'showing a negative' (Interviewee 5).[185] In reality, the only person who knows whether an action was inadvertent or not is the person who has taken that action. Combined with courtroom dynamics,[186] the presumption that operates in practice is one in favour of admission rather than exclusion. As one interviewee put it, '... a judge is always going to say well, the presumption is that people are trained and they know the law and they are doing their job properly' (Interviewee 11).

Given that the safeguards set out in *JC* appear to do little to protect against wilful abuse of constitutional rights, ICCL recommends that the courts provide further guidance as to how both systematic violations of rights and recklessness/gross negligence should be assessed by trial judges. This should include guidance on the presumption against the admission of evidence obtained unconstitutionally, so as to give it substance in practice.

181 See, for example, Doyle and Feldman, op. cit., at 220: 'This makes it more difficult for prosecuting authorities to secure the inclusion of evidence, since they will not be able to rely on a particular officer's lack of knowledge. It appears that a breach would be "conscious and deliberate" if An Garda Síochána, as an institution, failed to adapt its policies and practices to take account of legal developments'.
182 [2016] IECA 287 (October 12th 2016).
183 McGillicuddy, op. cit.
184 Daly, '"A Revolution in Principle"?' op. cit., 5.
185 Interestingly Irish law has proved amenable to the 'peculiar knowledge principle' when applied to the defendant. For a discussion of the case law, see Caroline Fennell, *The Law of Evidence in Ireland*. (Dublin: Bloomsbury, 2009) 132 *et seq*.
186 See further Richard Young, 'Exploring the Boundaries of the Criminal Courtroom Workgroup', (2013) 42 *Common Law World Review* 203-229.

Workability of the Test

The final issue with the application of the *JC* test in practice concerns its workability. Its length and complexity were highlighted by interviewees as problematic for practitioners and judges, leading both groups to 'compromise issues' (Interviewee 19) and avoid its application on occasion. These findings echo concerns expressed by the minority in *JC* and by practitioners in the wake of the *JC* decision. McKechnie J. opined: 'the modification of the rule suggested by the majority is unworkable and will add to the length, complexity and uncertainty of a trial'.[187] Similarly, McGillicuddy queried how practitioners could summarise the salient principles in *JC* in a few sentences, when 'those practitioners advising about the *JC* test must digest and explain a six step test while also having regard to sections 4 and 5 of the judgment by Clarke J. [25 and 23 sub-paragraphs respectively].'[188] Despite the test's complexity, it would appear that it has done little to promote consistency of approach in this area, with survey and interview responses suggesting a not inconsiderable degree of variation between judges in the application of the test. This is likely down to the differing interpretations of 'advertence' and the lack of guidance relating to this key concept in the Supreme Court judgments.[189]

As averred above, the test has also proved to be problematic in terms of its structure. The two-stage test that *JC* introduced, requiring an initial determination on whether there has been a breach, and then a subsequent finding on whether it can be excused, appears at first blush to allow for a logical working through of the relevant issues. In practice, however, it fails to take account of the interconnectedness of the evidence relating to the two issues, namely, the purported breach and the explanation offered by the prosecution for it. It also appears to afford the prosecution an opportunity to serve additional evidence relating to the breach, despite the matter having already been put in issue (Interviewees 4, 6, 7).

Given the concerns expressed about the workability of the test in practice, ICCL recommends further clarification on the key concept of 'inadvertence' and how it may be assessed by the trial judge, together with further guidance on the operation of the two-stage test in practice.

187 MacCormaic, op.cit.
188 McGillicuddy, op.cit.
189 For a critique on this aspect of the judgment see, see Gwynn-Morgan, op.cit.

Impact on procedural rights

Right to be Presumed Innocent

The overwhelming response of practitioners to the question on advice to clients in light of the *JC* reforms is strongly suggestive of a 'chilling effect' on the willingness of defendants to fight trials, to borrow the words of one practitioner. Indeed, some suggested that the main effect of *JC* is largely invisible in that it has induced a sense of 'inertia' and 'defeatism' among practitioners (Interviewee 13). This state of affairs is highly concerning from the perspective of the right to be presumed innocent, the fundamental bedrock of the criminal justice system, which incorporates the right to put the prosecution case to full proof. While it may be premature to draw conclusions about the impact of the decision in the absence of more up to date data, it is noteworthy that the annual reports of the Director of Public Prosecutions appear to show a steady uptick in the proportion of defendants pleading guilty in trials on indictment in the years following the decision from 86 per cent in 2015 to 92 per cent in 2017 (see Table 3.1):

TABLE 3.1: Breakdown of Convictions and Acquittals (excluding cases still to be heard)

	2017	%	2016	%	2015	%
Conviction by Jury	87	4%	123	5%	182	6%
Conviction Following Plea of Guilty	2159	92%	2314	88%	2432	86%
TOTAL CONVICTIONS	**2246**	**96%**	**2437**	**93%**	**2614**	**92%**
Acquittal by Jury	74	3%	136	5%	142	5%
Acquittal on Direction of Judge	32	1%	65	2%	74	3%
TOTAL ACQUITTALS	**106**	**4%**	**201**	**7%**	**216**	**8%**
TOTAL	**2352**		**2638**		**2830**	

Source: Office of the Director of Public Prosecutions: Annual Report 2018

Right to Privacy

As noted in the previous chapter it would seem that the decision in *JC* is being used to admit audio surveillance (phone-tap) evidence that has been retained unlawfully in violation of the right to privacy under European Union[190] and ECHR[191] law. This evidence has been accessed in breach of the Criminal Justice (Surveillance) Act 2009, which is legislation governing the collection and retention of audio surveillance (phone-tap) evidence in Ireland. The Act, as Harrison points out, is 'insufficient in safeguarding against unjustified interference with the right to privacy'[192] owing in part to the failure of successive Ministers for Justice to make regulations authorising gardaí to use the recordings. Under s.10(1) of the Act, the Minister for Justice must legislate to 'ensure that information and documents relating to ... surveillance applications and operations are stored securely, and that only persons who he authorises for that purpose have access to them'.[193] The section also provides that ministerial authorisation is required before material obtained as a result of a surveillance operation can be stored, accessed or copied by the Gardaí or the DPP. In several cases before the Central Criminal Court and the Special Criminal Court (SCC),[194] trial judges have relied on *JC* to admit this type of evidence notwithstanding the absence of prior Ministerial authorisation to store, access or copy the data as required by the Act. *JC* is significant in this regard as it provides that evidence obtained in breach of constitutional rights can still be used where the breach results from 'developments in the law which occurred after the time when the relevant evidence was gathered'.[195] For example, in *People (DPP) v. O'Driscoll*,[196] McCarthy J. in the Central Criminal Court admitted the telephony data despite his view that there was a breach of 'the rights of the accused in community [European Union] law'. McCarthy J. explained that the

190 Article 8, EU Charter of Fundamental Rights. In April 2014 and again in December 2016 the European Court of Justice held that general and indiscriminate data retention laws were contrary to EU law. See *Digital Rights Ireland Limited v. Minister for Communications, Marine and Natural Resources & Ors* and *Kärntner Landesregierung and Others (Joined Cases C-293/12 and C-594/12)* [ECLI:EU:C:2014:238] and *Tele2 Sverige AB v. Post- och telestyrelsen* and *Secretary of State for the Home Department v. Tom Watson and Others (Joined Cases C-203/15 and C-698/15)* [ECLI:EU:C:2016:970].

191 Article 8, European Convention of Human Rights. The European Court of Human Rights has held that the law regulating surveillance data should clarify 'the nature of the offences which give rise to an interception order; a definition of the categories of people liable to have their telephones tapped; a limit on the duration of telephone tapping; the procedure to be followed for examining, using, and storing the data obtained; the precautions to be taken when communicating the data to other parties; and the circumstances in which recordings may or must be erased or the tapes destroyed'. *Weber and Saravia v. Germany* (2008) 46 EHRR SE5. [95].

192 Alice Harrison, *The Special Criminal Court: Practice and Procedure* (Bloomsbury Professional 2019) [5.04].

193 Walsh, op. cit. [9–135].

194 The ICCL has called for the abolition of the Special Criminal Court due to the threats it poses to the right to a fair trial. See Colm Byrne, 'ICCL Review of the Special Criminal Court' (ICCL, 23rd June 2020) available at www.iccl.ie/wp-content/uploads/2020/06/ICCL-Review-of-the-Special-Criminal-Court-2020.pdf.

195 [2015] IESC 31 (Clarke J.) [5.11]

196 McCarthy J., Central Criminal Court, 15th November 2017.

Detective Chief Superintendent 'acting with upmost good faith had also acted on the basis of the law of the land as it then stood ... and that this is a case where I should receive this evidence by virtue of the discretion extended by *JC*'.[197] A similar conclusion was reached by White J. in two other Central Criminal Court cases: *People (DPP) v. Jason O'Driscoll*[198] and *People (DPP) v. Tynan and Fitzgerald*.[199]

Clarke J.'s judgment in *JC* has also been used to admit evidence on grounds unrelated to the exclusionary rule. For example, a Special Criminal Court ruling by Kennedy J. in *People (DPP) v. Hannaway*[200] accepted that s.10(1) of the 2009 Act had been breached but admitted the evidence through reliance on the distinction drawn in *JC* between questions of admissibility arising from the manner in which the evidence was gathered and questions of admissibility that affect the probative value of the evidence, to which the exclusionary rule as formulated in *JC* does not apply.[201] The Court considered that the words used by Clarke J. in the test he set down in *JC*, 'relates solely to the circumstances in which the evidence was gathered',[202] limited the application of the exclusionary rule strictly to the manner in which the evidence was *obtained* rather than *retained*. In applying it to the present case it found that as the audio recording was lawfully gathered, the exclusionary rule was not engaged. The decision was upheld by the Court of Appeal which held, 'We are satisfied that the respondent is correct in maintaining that the exclusionary rule only applies to the gathering of evidence, and not to its handling or processing once gathered'.[203] The appellants, however, argued that the Court had created an 'artificial division'[204] by distinguishing between the gathering of the audio and the storing and accessing of the device. They claimed, convincingly, that the nature of audio recordings means that once it is gathered, it is simultaneously stored and accessed. Harrison makes the point that it is 'unclear where the "gathering" of evidence ceases and "retention" of material begins', particularly in the context of audio recordings.[205]

Given the indiscriminate nature of the surveillance regime operating in Ireland, described by retired Chief Justice John Murray as an illegal system of 'mass surveillance' (in a report commissioned by the Department of Justice and Equality itself),[206] it is a matter of grave concern that the reformulated exclusionary rule is being used to admit evidence obtained unlawfully and thus to ground convictions. This includes the use of *dicta* in the *JC* judgment to sidestep the fundamental right to privacy through the drawing of artificial distinctions between the 'gathering' and 'retention' of data. On this point, Daly cautions against the evasion of the exclusionary rule in Ireland by avoiding direct consideration of claims that constitutional rights have been breached.[207] This is particularly so where the failure of the Minister to make regulations governing the storage of data provided for under the 2009 Act for many years now might well be argued to be grossly negligent or reckless under the *JC* test. The failure of An Garda Síochána, as an institution, to adapt its policies and practices to take account of legal developments in respect of data retention under European Union law, could also be construed as a 'deliberate and conscious' breach of privacy rights under EU and ECHR law, as well as Irish constitutional law. A salutary lesson in this regard is provided by Poland where the ruling PiS party has introduced changes to the laws relating to use of illegally obtained evidence in tandem with laws significantly expanding the surveillance powers of the security services and the police.[208] The combined effect has been to allow the introduction of surveillance evidence into criminal proceedings where it has been gathered by intelligence services without a court order, in violation of fair trial rights, equality of arms and the right to privacy.[209]

In light of this, ICCL recommends that the Minister for Justice makes regulations to bring Irish surveillance laws in line with European standards. In this regard, ICCL notes developments in other jurisdictions where evidential rules have been diluted or evaded in such a manner as to facilitate the violation of an accused's privacy rights, and expresses its hope that such a situation would not arise here.

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197 Cited in *Graham Dwyer v. Commissioner of An Garda Siochana, Minsister for Communications, Enegery and Natural Resources, Ireland and AG* [2018] IEHC 685.
198 Central Criminal Court, 16th July 2018/
199 Central Criminal Court, 8th November 2018.
200 26th February 2018.
201 *DPP v. Hannaway and others* [2020] IECA 38 [54]; *DPP v. JC* [2015] IESC 31 (Clarke J.) [7.2].
202 *DPP v. JC* [2015] IESC 31 (Clarke J.) [7.2].
203 *DPP v. Hannaway and others* [2020] IECA 38 [61]
204 ibid. [56].
205 Alice Harrison, *The Special Criminal Court: Practice and Procedure* (Bloomsbury Professional 2019) [5.22].
206 Mr Justice John Murray, *Review of the Law on the Retention of and Access to Communications Data* (Dublin: Stationery Office, 2017).
207 Daly, 'A Revolution in Principle? The Impact of the New Exclusionary Rule', *op.cit.* at 15. On the distortion of rights in this way in New Zealand, see further: Optican, Scott '"Front-End"/"Back-End" adjudication (rights versus remedies) under section 21 of the New Zealand Bill of Rights Act 1990' (2008) 2 *New Zealand Law Review* 409.
208 Ustawa o zmianie ustawy – Kodeks postępowania karnego oraz niektórych innych ustaw. Dziennik Ustaw, No. 0, Location 437, 2016.
209 M. Kusak, *Mutual admissibility of evidence in criminal matters in the EU: A study of telephone tapping and house search* (2016) *IRCP Research Series*. Volume 53. Available at: https://prawo.amu.edu.pl/__data/assets/pdf_file/0011/326909/IRCP-53-M-Kusak-Mutual-admissibility-E-version.pdf; Amnesty International, *Poland* (Submission to the United Nations Human Rights Committee, 118th Session, 17 Oct.-04 Nov. 2016 No. EUR 37/4849/2016) (London: Amnesty International 2016). On Poland, see further, Claire Hamilton, *Contagion, Counter-terrorism and Criminology* (London: Palgrave 2019) Chapter 3.

Impact on policing and prosecutorial culture

ICCL also considers that the exclusionary rule is important to the doctrine of the separation of powers on the basis that the judicial arm of the State should monitor any behaviour of agents of the executive arm (e.g. the Gardaí) in carrying out their role. The admission of unconstitutionally obtained evidence is not only a major injustice to the individual on trial, it also serves to undermine the entire criminal process. Any acceptance by the courts of evidence that has been obtained in breach of the Constitution creates the danger that such practices may become more prevalent.[210]

As set out in the previous chapter, many practitioners who completed the survey and interviews were pessimistic about the impact of the reformulated exclusionary rule on investigative standards. While several referenced a drive towards professionalisation of policing in recent years, there was also an acknowledgement that, as Michael O'Higgins SC has put it, 'not all elements within the force adhere to high standards'.[211] Experienced practitioners referred during interviews to gardaí lying when giving evidence, threatening to arrest close relatives, planting evidence and physically assaulting clients.[212] These findings are bolstered by those of various tribunals of inquiry into garda misconduct, from the Morris Tribunal to more recent revelations, repeatedly demonstrating that certain members have been prepared to bend or ignore the law to obtain convictions against people, some of whom were individuals innocent of any wrongdoing.[213] They are also supported by successive unsuccessful processes of garda reform since the Morris report, including a further negative assessment from the Policing Authority in its final report into the modernisation of An Garda Síochána.[214] It is also worth noting the concerns voiced by interviewees on the impact on prosecutorial standards and culture, the view of *JC* as an 'easy out', one that can 'plug an awful lot of gaps', even in areas such as identification evidence which would appear to be outside the ambit of the *JC* rule.[215]

In light of this, ICCL believes that it is imperative that Irish law continues to operate a robust exclusionary rule as a form of accountability that is crucial to a functioning democracy. If the price of liberty is constant vigilance, then the courts should be vigilant to ensure that the pendulum does not swing too far in favour of the inclusion of evidence *at all costs*.

Conclusion

The decision in *People (DPP) v. JC* represents an important watershed in the Irish law of evidence and, it could be argued, in the relationship between the state and the citizen more generally. Five years out from this decision, Ireland is now at a crucial juncture in the evolution of its criminal law. While several common law jurisdictions have witnessed reforms in this area, these have taken very different paths, so that in the US the exclusionary rule now constitutes a rule of inclusion of most evidence, regardless of the constitutional violation that has occurred. The 'good faith' exception, akin to the 'inadvertence' exception in this jurisdiction, has now also been extended so that evidence which may be considered constitutionally suspect is now 'laundered' between police officers. Research conducted in New Zealand and Canada, on the other hand, is suggestive of an exclusionary rule that does not appear to have shown dramatic changes in the occurrence of exclusion and thus continues to operate with some meaning and effect. Against the background of a police force that to date at least appears stubbornly resistant to cultural reform, it is to be sincerely hoped that Ireland chooses the latter route. It is inevitable that these issues will return to the appeal courts and, in putting flesh to the bones of the *JC* decision, appellate courts may do much to address what thus far appears to be a predominantly inclusionary approach to the issue of unconstitutionally obtained evidence. In this regard, the potential of a strongly attenuated exclusionary rule to 'suck the content' from other constitutional rights (to borrow the words of the late Mr. Justice Hardiman) should not be forgotten, and indeed has been demonstrated through the line of litigation on surveillance evidence and the right to privacy. At a time when human rights-led policing has never seemed more important, the public should insist on the full enjoyment of these rights, as well as to insist that those charged with their protection do not operate significantly below the standards expected of all ordinary citizens.

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210 See *Taking Liberties: The Human Rights Implications of the Balance in the Criminal Law Review Group Report*, op.cit.
211 Quoted in MacCormaic 'Supreme Court ruling a get-out for gardaí; Barrister says decision relaxing rules on criminal evidence has huge implications', op.cit.
212 Interviewees 4 and 20.
213 On this point, see *Irish Times*, 'Wrong Move on Evidence' (Editorial), 17th April 2015.
214 See Herrick, op. cit.
215 Interviewees 5 and 9.

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