Institute of Law Research and Reform

Judicial Discretion to Exclude Admissible Evidence

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It is clear that the law of evidence has long recognized that evidence relevant to a fact in issue may nontheless be inadmissible where the circumstances fall within an established rule of exclusion. What is far less clear is the extent to which there exists a judicial discretion to exclude evidence that is technically admissible.

In England, the authorities have supported at least a limited general discretion in the trial judge to exclude technically admissible evidence in exceptional cases. In the recent case of Jeffrey v. Black, [1978] 1 All E.R. 555, police officers found illegal drugs while searching the premises of an accused arrested for stealing a sandwich in a public house. The trial judge, finding that the search had been conducted without a search warrant and without the consent of the accused, excluded the evidence and dismissed the charges. The Court of Appeal, relying on the authority of Kuruma v. The Queen, [1955] A.C. 197, found that the manner in which the evidence had been obtained did not render it inadmissible. However, Lord Widgery, C.J. observed:

> But that is not in fact the end of the matter because the magistrates sitting in this case. like any other criminal tribunal in England sitting under English law, have a general discretion to decline to allow any evidence to be called by the prosecution if they think it would be unfair or oppressive to allow that to be done... It is not a discretion which arises only in cases where police can enter premises. It is a discretion which every criminal judge has all the time in respect of all the evidence which is tendered by the prosecution...But if the case is exceptional, if the case is such that not only have the police officers entered without authority, but they have been guilty of trickery or they have misled someone, or they have been oppressive or they have been unfair, or in other respects they have behaved in a manner which is morally reprehensible, then it is open to the justices to apply their discretion and decline to allow the particular evidence to be let in as part of the trial.

The decision of the Supreme Court of Canada in R. v. Wray, [1971] S.C.R. 272, would appear to severely restrict the exercise of judicial

discretion in Canadian courts. After reviewing the English authorities, Martland J. in the majority opinion stated:

> The development of a general discretion to exclude admissible evidence is not warranted by the authority on which it purports to be based...[T]he exercise of a discretion by the trial judge arises only if the admission of the evidence would operate unfairly. The allowance of admissible evidence relevant to the issue before the court may operate unfortunately for the accused, but not unfairly. It is only the allowance of evidence gravely prejudicial to the accused, the admissibilty of which is tenuous, and whose probative force in relation to the main issue before the court is trifling, which can be said to operate unfairly.

The Supreme Court specically rejected the notion that a trial judge has a discretion to exclude relevant evidence that is of substantial weight, regardless of the effect of such evidence. It would appear that the trial judge may only weigh the prejudicial effect of the evidence against its probative value only when the latter is "trifling". Wray has been followed in a number of cases involving confidential communications not covered by a recognized privilege in law. Thus in R. v. Harrinanan (1977), 40 C.R.N.S. 231, Laycraft J. admitted a voluntary statement made to a psychiatric social worker, noting that he had no discretion to reject it as urged by the defence "as being obtained under circumstances in which its admission would offend against public policy".

In Re Abko Medical Laboratories Ltd. and The Queen (1977), 35 C.C.C.(2d) 65 (Ont. H.C.), Steele J. granted mandamus on application by the accused to order a witness, a member of the Legislature of Ontario, to divulge the name of his informant. In reviewing the matter of discretion, Steele J. observed:

> The discretion referred to in compelling disclosure of information and the weighing of the public good against private confidentiality that may be available in England must be considered in Canada in conjunction with the dicision of the Supreme Court of Canada in R. v. Wray...it is my opinion that where an accused wishes to

> introduce evidence at his preliminary hearing he has an inherent right to so do and that such evidence will only be prohibited by the Judge exercising a discretion where in his opinion the Court has the gravest doubts about the admissibility of the tendered evidence and then only if the Judge is of the opinion that its probative force in relation to the main issue is trifling...there was no discretion in the Judge such as there may be in England in a similar case.

One of the few cases to express a contrary view is that of Cronkwright v. Cronkwright (1971), 14 D.L.R.(3d) 168 (Ont. H.C.), where the trial judge hearing a divorce petition refused to admit the evidence of an Anglican clergyman who had been active in pursuit of the reconciliation of the parties. Though the clergyman was not a person nominated by the Court as per s.21 of the Divorce Act, Wright J. held that he had a discretion to exclude admissible evidence because of "the particular circumstances in the case or for reasons of public policy". The case purports to follow Wray. However, the citation given is that of the Ontario Court of Appeal decision which was subsequently overruled at the Supreme Court of Canada. In exercising its discretion, the court probably erred per incuriam. However, the result in Cronkwright can most likely be supported on the grounds that the communications were made within the scope of "without prejudice" negotiations.

Does the limitation of judicial discretion in Wray apply only to criminal cases or does it apply to civil proceedings as well? In Draper v. Jacklyn, [1970] S.C.R. 92, a case decided shortly before Wray, the Supreme Court of Canada restored the ruling of the trial judge who, on an issue of quantum of damages, allowed certain photographs in evidence. After agreeing with the trial judge that the photographs, which showed pins protruding from the plaintiff's face as part of the treatment for his injuries, were not inflammatory

Spence J. noted that:

> The occasions are frequent upon which a judge trying a case with the assistance of a jury is called upon to determine whether or not a piece of evidence technically admissible may be so prejudicial to the opposite side that any probative value is overcome by the possible prejudice and that therefore he should exclude the production of the particular piece of evidence. In the case of photographs, this occurs more frequently in the trials of criminal offences and more usually in murder trials. The matter is always one which is difficult for the trial judge and in itself essentially a decision in which the trial judge must exercise his own carefully considered personal discretion.

The foregoing would appear to confer a much wider discretion, as it seems to balance the possible prejudice against the probative value in determining whether the evidence ought to be excluded. In view of Spence J.'s comments about criminal offences above, it is difficult to see how this case can be reconciled with Wray on a civil/criminal classification. What conclusion may be drawn from the fact that no mention of Draper v. Jacklyn was made in Wray is open to speculation. Perhaps the fact that liability had already been established and the only issue was quantum of damages provides a clue to the apparent inconsistency between the decision in Draper v. Jacklyn and that in Wray insofar as discretion is concerned.

In Slavutych v. Baker, [1976] 1 S.C.R. 254, a civil action for wrongful dismissal, the Supreme Court of Canada approved of Wigmore's four rules for establishing privilege for confidential communications. Wigmore's fourth rule involves weighing the injury that would inure to the relation by disclosure against the benefit gained for the correct disposal of litigation. Thus evidence of even substantial probative value could be excluded by this test. As Spence J. viewed the case as involving breach of confidence

and this was sufficient to justify the decision, the approval of Wigmore's rules may be regarded as obiter. Nevertheless, a strong indication of the Court's position on this issue is provided.

It would seem at least unusual for there to exist a greater discretion to exclude evidence in a civil case than in a criminal case. Traditionally, the courts have viewed the protection of the interests of the accused from possible prejudice or unfairness at trial on the highest level. Particularly in view of the possible consequences to the defendant in a criminal case, it might be expected that public policy demand a greater discretion in the trial judge in such cases.

The desirability of judicial discretion to exclude technically admissible evidence has not been explored here. That is an issue unto itself. Rather, the intention has been to point out some of the difficulties that exist in the current state of the law with regard to scope and exercise of such a discretion. If it is desirable to vest in the trial judge a residual discretion to exclude evidence in general, or evidence of confidential communications not covered by a recognized privilege in particular, then it would seem that legislation should be enacted to clarify the law and to accomplish this end.

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POSITIONS OF OTHER JURISDICTIONS

United States

Federal Rules of Evidence
Uniform Rules of Evidence
Vermont Draft Rules of Evidence

Rule 403:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

New Zealand

Professional Privilege in the Law of Evidence,
Report of the Torts and General Law Reform Committee

Re judicial discretion:

> This discretion, if given force of statute and exercised in accordance with guidelines laid down by statute, could provide a satisfactory and certainly more desirable alternative to the granting of privilege to a wider number of named groups.

See: Draft of recommended section, pp. 76-77.

We therefore recommend:

1. That the general discretionary power be conferred by statute on courts, tribunals, authorities and persons acting judicially to disallow a question or permit a witness to refuse to answer a question which would involve the disclosure of a confidential communication.

2. The statute should make provision for the determination of any question as to the obligation of a witness to divulge information or produce documents obtained in confidence. It should be open to any party to the proceedings and to any person called to give evidence as a witness to apply for such a ruling, either before the hearing commences or at any stage during the hearing. The court, tribunal, authority or person acting judicially should be entitled if it thinks fit to adjourn the application or reserve its decision until the appropriate stage of the hearing has been reached.

3. Without limiting the discretion of the court, tribunal, authority or person acting judicially regard should be had to the following factors:-

   (a) The likely significance of the evidence to the resolution of the issues to be decided in the proceedings.

   (b) The nature of the confidence and of the special relationship between the confidant and the witness.

(c) The likely effect of the disclosure on the confidant or any other person.

(d) Whether or not the disclosure would be in the public interest.

(e) The desirability of respecting confidences between persons in the relative positions towards each other of the confidant and the witness, including the importance of encouraging free communication between such persons.

We recommend that a section along the following lines be included in the Evidence Act 1908 to give effect to these recommendations:

"8B. Discretion of court, etc. to exclude evidence - (1) In any proceedings before any court, or before any tribunal or authority constituted by or pursuant to any Act and having power to compel the attendance of witnesses, or before any other person acting judicially, the court or tribunal or authority or other person may, in its or his discretion, excuse any witness from answering any question or producing any document that he would otherwise be compellable to answer or produce, on the ground that to supply the information or produce the document would be a breach by the witness of a confidence that, having regard to the special relationship existing between him and the person from whom he obtained the information or document and to the matters specified in subsection (2) of this section, the witness should not be compelled to breach.

(2) Without limiting the matters that the court or tribunal or authority or person acting judicially may take into account, the

court or tribunal or authority or person, in deciding any application for the exercise of its or his discretion under subsection (1) of this section, shall have regard to -

(a) The likely significance of the evidence to the resolution of the issues to be decided in the proceedings:

(b) The nature of the confidence and of the special relationship between the confidant and the witness:

(c) The likely effect of the disclosure on the confidant or any other person:

(d) Whether or not the disclosure would be in the public interest:

(e) The desirability of respecting confidences between persons in the relative positions towards each other of the confidant and the witness, including the importance of encouraging free communication between such persons.

(3) Nothing in subsection (1) of this section shall derogate from any other privilege or from any discretion vested in any court or in any tribunal or in any authority constituted by or pursaunt to any Act and having power to compel the attendance of witnesses or in any other person acting judicially or by other provision of this Act or of any other Act or by any rule of the common law.

(4) Any application to the court or tribunal or authority or person acting judicially for the exercise of its or his discretion under subsection (1) of this section may be made by any party to the proceedings or by the witness concerned at any time before the commencement of the hearing of the proceedings or at the hearing."

(I.L. McKay)
Chairman
for the Committee

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