# Evidence, Causation, and the New Zealand Bill of Rights

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## I: INTRODUCTION

> We think it enough to say that the statutory provision, like other similar provisions in the [New Zealand Bill of Rights] Act, cannot be treated as a dead letter and that, where a plain breach of the right declared by Parliament has been established, it is a proper course for the Court to rule out an admission or confession obtained in consequence.[1]

With these words, the President of the Court of Appeal marked the beginning of jurisprudence on the exclusion of evidence obtained in violation of the New Zealand Bill of Rights Act 1990 ("Bill of Rights"). One aspect of this jurisprudence which remains underdeveloped and in need of clarification is the nature of the connection, or causal link, between the breach and the evidence subsequently obtained which must be established in order for the remedy of exclusion to be granted.

The aim of this article is to identify the shortcomings of the current New Zealand approach to causation, and to formulate a rational, coherent theory of causation which addresses these problems and provides a clear framework for decisions in future cases. First, the nature of the causation problem and its importance within the area of excluding evidence will be discussed. Second,

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1 *R v Kirifi* [1992] 2 NZLR 8, 12 (CA), per Cooke P.

various alternative theories of causation are identified and related to the different remedial objectives which have been used to justify the exclusion of evidence under the Bill of Rights. Third, the approach to causation adopted by the New Zealand courts will be examined and critically evaluated. Finally, a general theory of causation will be formulated to provide a rational basis for determining whether an item of challenged evidence should be excluded.

## II: THE CAUSATION PROBLEM

### 1. Background To The Causation Problem

The lack of a remedies section within the Bill of Rights has not prevented the courts from assuming a wide remedial jurisdiction once a breach has been established. Because this power has been judicially formulated, the task of defining its scope and limitations must also fall upon the judiciary. A set of rational principles is required, governing the *choice* of remedy and its *availability* in a particular situation.

One important principle governing the *choice* of remedy is that it must fit the alleged breach. The remedy should relate to the wrong done and be directed to the mischief which actually exists. Exclusion of evidence will normally be the appropriate choice of remedy when it is established that the State has violated the rights of an accused person in the course of gathering evidence against him or her. [2] For this reason, the exclusionary rule will usually only arise in the context of a breach of ss 21, 22, or 23 of the Bill of Rights.

Having defined the appropriate choice of remedy, the next step is to determine the applicable principles governing the *availability* of that remedy. Not every breach of an accused's rights will warrant the exclusion of evidence. There must be a rational basis for deciding when the remedy will be granted, and which items of evidence will be excluded.

### 2. The Nature Of The Causation Problem

Causation is one principle that may be adopted by the courts to determine the availability of the exclusionary remedy. In essence, theories of causation require that evidence should only be excluded if it is obtained as a consequence of a breach of the Bill of Rights. However, the choice is not so simple as deciding whether to require a causal link within the structure of the exclusionary rule. If it is accepted that a causation requirement should be imposed, the critical question is determining the content and nature of this requirement.

There are several alternative theories of causation which may assist in this determination. The choice of theory depends on the courts' general objectives

2 However, Richardson J's obiter comments in *Martin v Tauranga District Court* [1995] 2 NZLR 419, 427 (CA) suggest the availability of alternative remedies, such as an award of damages, in the future.

when granting a remedy. In other words, it depends on what the Court is trying to achieve by excluding evidence. The crux of the causation problem is deciding on the choice of theory, and determining the practical effects of its implementation.

### 3. The Importance Of The Causation Question

In practice, the choice of approach to causation is of great importance. A high standard of causation will be more likely to result in the admission of a particular item of evidence, while a lower standard will be more likely to lead to exclusion.[3] Therefore, it is imperative that the courts approach the causation issue in a consistent manner. A clear and rational theory of causation is required in order to provide a degree of certainty, and to ensure that the exclusionary rule adequately serves the remedial objectives which justify its continued application.

## III: POSSIBLE APPROACHES TO CAUSATION

### 1. Remedial Objectives

The choice of approach depends on the courts' justification for granting remedies. Paciocco has identified three separate rationales for rectifying violations of the Bill of Rights; [4] the rights objective, the enforcement objective, and the public interest objective. Each of these rationales has different implications for the approach to causation.

#### *(a) The rights objective*

At the heart of the rights objective is the desire to vindicate the individual's fundamental claim to the enjoyment of the right which has been breached. Writing in the context of the Canadian Charter, Kent Roach has described the objective as one of:[5]

> [N]ullifying state improprieties, returning the applicant to the position he or she was in before the right's violation and making sure the applicant suffers no disadvantages from the state's transgression.

Therefore, availability of a particular remedy is dependent on the extent to which the applicant has suffered detriment, and an assessment of the best way to

3 This point is made by Donovan, commenting on the Supreme Court of Canada's approach to causation under s 24(2) of the Charter of Rights and Freedoms; "The Role of Causation Under s 24(2) of the Charter: Nine Years of Inconclusive Jurisprudence" (1991) 49 Toronto U Faculty L Rev 233, 234-235.

4 Paciocco, "Remedies for Violations of the New Zealand Bill of Rights Act 1990" in *Essays on the New Zealand Bill of Rights Act 1990* (Legal Research Foundation, 1992) 40, 41-44.

5 Roach, "Constitutionalizing Disrepute: Exclusion of Evidence After *Therens*" (1986) 44 Toronto U Faculty L Rev 209, 235 (Hereafter "Constitutionalizing Disrepute"). Also see Roach, "Section 24(1) of the Charter: Strategy and Structure" (1986-87) 29 Crim LQ 222.

compensate for that detriment. In this sense, the rights objective is personal to the alleged offender. It is concerned solely with the relationship between the State and the individual accused, without regard to wider public interests. According to this rationale, a deliberate breach of the Bill of Rights should attract the same remedy as an unintentional or good faith breach. The motivation of the person responsible for the breach does not change the simple fact that the right has been violated.

The adoption of the rights objective appears to dictate a relatively high standard of causation.[6] Roach states that:[7]

> The requirement of a causal connection between the evidence and the impropriety is taken seriously because the exclusion of evidence is seen as compensation for that particular infringement of Charter rights.

If the desire is to restore the accused to the same position he or she would have occupied but for the breach, only those items of evidence which were obtained *as a result of* the breach will be excluded. In this way, the accused is relieved of the detrimental effects of the breach.

*(b) The enforcement objective*

The enforcement objective (also known as the deterrence rationale) is designed to ensure that the rights affirmed under the Bill of Rights are respected and adhered to by the police in the future. It justifies the granting of a remedy on the basis that this will promote future compliance with the Act by agents of the State.

Under the enforcement objective, the position of the accused person is irrelevant. The exclusion of incriminating evidence is seen as an unpalatable result, representing a pure windfall to the accused and is only justifiable if it will be effective to deter similar violations in the future. The implications of the enforcement objective for the approach to causation are equivocal. Roach argues that:[8]

> The requirement for a causal connection between the obtaining of the evidence and the misconduct is interpreted loosely to allow judges to sanction police misconduct whenever it is discovered.

However, it is also possible to argue that the exclusion of evidence causally unconnected to the violation will not have a deterrent effect on the conduct of the police. Hence, such evidence should remain admissible.[9] Acceptance of this argument appears to require a stricter approach to causation than that envisaged by Roach.

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6 Contrary to this view, Mahoney is strongly in favour of the vindication of rights rationale, yet also supports a "same transaction" approach to causation: "Vindicating Rights: Excluding Evidence Obtained in Violation of the Bill of Rights" in Huscroft & Rishworth (eds) *Rights and Freedoms* (1995) Chapter 11.

7 Roach, "Constitutionalizing Disrepute", supra at note 5.

8 Ibid, 232.

9 This argument was relied upon by the US Supreme Court when it adopted the inevitable discovery exception to the exclusionary rule in *Nix v Williams* 467 US 431, 444 (1984).

*(c) The public interest objective*

This rationale emphasises the importance of general community standards and expectations when considering the availability of a particular remedy. The public may lose respect for the judicial system if the court fails to provide a remedy to a person who has suffered a violation of their rights. On the other hand, the public may disapprove if the court is willing to grant a remedy to an ostensibly guilty person.

The public interest objective offers considerable flexibility to a court considering the appropriate remedial response to a Bill of Rights violation. It allows the judge to weigh up a range of different public concerns such as the integrity of the justice system itself, the fairness of a future trial, and the degree of public disapproval at the State's original misconduct. Roach has described the judge who adheres to this remedial objective as:[10]

> [A] crisis manager who tries to prevent the court from getting bad press, which will erode public respect for the administration of justice.

Given the flexibility of the public interest objective, its impact upon the role of causation is dependent upon the choice of relevant factors, and their emphasis in a particular case. For example, if the focus is on the fairness of the accused's trial, a relatively strong causal link between the violation and the obtaining of the evidence may be required. This is because a fair trial only requires the exclusion of evidence which has been obtained as a result of the breach.[11] Conversely, if the Court focuses upon the seriousness of the rights violation, the causation issue may only be of peripheral significance. The Court is concerned to provide a remedy in response to a serious breach of rights, and will not refrain from doing so simply for the reason that the evidence would have been obtained even without the violation.[12] For these reasons, while the public interest objective allows flexibility in the application of the exclusionary rule, it also carries with it the risk of an inconsistent, ad hoc approach to causation.[13]

*(d) New Zealand's approach to remedial objectives*

Although the New Zealand courts have not yet finally settled the issue of which remedial objective is to prevail under the Bill of Rights, the rights objective seems to have been preferred. In *R v Goodwin*, Richardson J, stated:[14]

10 Roach, "Constitutionalizing Disrepute" supra at note 5, at 231.

11 See Roach, *Constitutional Remedies in Canada* (1994) para 10.370.

12 Ibid, para 10.400.

13 This criticism has been levelled at the Supreme Court of Canada's approach to causation: see Donovan, supra at note 3; Paciocco, "The Judicial Repeal of s 24(2) and the Development of the Canadian Exclusionary Rule" (1990) 32 Crim LQ 326.

14 [1993] 2 NZLR 153, 193 (CA).

> Consideration of the [Bill of Rights] leads inevitably to the conclusion that its primary focus is rights centred...Where there is a right there is a corresponding duty to respect that right, but the primary thrust of the statute is on the positive assurance of rights rather than on the deterrence of official misconduct....[Also,] a rights-centred approach best meets New Zealand's obligations under the International Covenant.

However, in practice this approach has occasionally taken a back seat to deterrence based considerations. In *MOT v Noort*[15] Hardie Boys J appeared to be reluctant to hold that an evidential breath test should be ruled inadmissible. His Honour eventually agreed with the result on the basis that condoning the breach in the case before him would probably afford a precedent for breach in future cases.[16] Similarly, in *R v H*,[17] Richardson J placed emphasis on the need to deter unlawful police conduct:[18]

> It does not follow that the evidence must be admitted. Otherwise the police may feel entitled to ignore the law and make warrantless searches and seizures secure in the knowledge that the evidence obtained will be admitted...

More recently, the president of the Court of Appeal has strongly criticised a rigid adherence to the vindication of rights rationale. In *R v Barlow*[19] Cooke P stated:[20]

> With full respect to those who may think otherwise, I cannot accept that the New Zealand Bill of Rights should be seen as 'rights-centred' in some way requiring an approach significantly different from a deterrence or overall public interest approach to the application of the United States Bill of Rights or the Canadian Charter. No such rather elusive distinction is obvious on a comparison of the scheme of these and other human rights instruments...I am not convinced that subtle distinctions of the foregoing kind are fruitful. Every right has its corresponding duty, as Hohfeld underlined and expanded upon. And the public interest in preserving and strengthening a free and democratic society permeates the New Zealand Bill of Rights. The rights pertaining to the legal system in ss 21 to 27 reflect ultimately the dictates of the public interest.

It therefore appears that both the rights and deterrence objectives are relevant under the Bill of Rights. Such an approach would recognise the importance of redressing the effects of past violations, and the broader issue of ensuring future compliance with the Bill of Rights by the State.

15 [1992] 3 NZLR 260 (CA).
16 Ibid, 288.
17 [1994] 2 NZLR 143 (CA).
18 Ibid, 150.
19 Unreported, CA 144/95, 26/5/95 (Cooke P, Richardson, Hardie Boys, Gault and McKay JJ).
20 Ibid, per Cooke P, at 14.

## 2. Theories Of Causation

### *(a) Temporal proximity test*

#### *(i) Nature of the test*

The temporal proximity test has two distinct formulations. First, there is the "same transaction" theory. This states that an item of evidence is causally linked to the Bill of Rights violation if the violation and the obtaining of the evidence occurred in the course of the same transaction. The essential feature of the theory is that the two events (the rights violation and obtaining the evidence) must occur sufficiently close together in time, having regard to the nature of the right which has been violated. The order of the two events is theoretically irrelevant.

The second formulation is the "temporal sequence" theory. This states that an item of evidence is causally linked to the Bill of Rights violation if the evidence was obtained after the violation, but not in a manner that renders the evidence too remote from the violation. The order of the two events is critical; evidence obtained prior to the rights violation cannot satisfy the causation requirement. The length of time after which the evidence will be considered too remote from the violation will depend on the nature of the right which has been infringed.

#### *(ii) Relationship to remedial objectives*

The temporal proximity theory of causation is most likely to be adopted if the courts favour the public interest objective as the primary justification for the application of the exclusionary rule. The public interest objective requires the court to weigh up a range of different factors when determining the availability of the exclusionary remedy.[21] Considered together, no single approach to causation is evident. A low standard of causation, such as that provided by either formulation of the temporal proximity theory, would allow the court to retain the flexibility required by the public interest objective.

#### *(iii) Practical application of the theory*

The jurisprudence under s 24(2) of the Canadian Charter [22] is helpful as a means of demonstrating the practical effect of the temporal proximity theory. In *R v Strachan*,[23] the Supreme Court of Canada held that evidence is "obtained in a

21 See section III above.

22 Section 24(2) of the Charter expressly provides for the exclusion of evidence obtained in a manner that infringed a Charter right, if the admission of the evidence in the proceedings would bring the administration of justice into disrepute.

23 (1988) 46 CCC (3d) 479 (SCC). The case involved a breach of the accused's s 10(b) right to counsel. Acting on a valid warrant, police officers visited the accused's home and arrested him for possession of marijuana. Although the officers informed him of his right to counsel, they prevented him from exercising it until after a search of the house had revealed a quantity of marijuana. The accused challenged the admissibility of a certificate of analysis relating to the seized marijuana.

manner" that infringes a Charter right, if the evidence and the violation occur "in the course of the same transaction" or "in the same chain of events".[24] The court rejected a strict causation test on the grounds that such a test would involve speculating on what might have happened had the Charter violation not occurred.[25]

Thus, the Court was able to avoid an analysis of the causal link, if any, between the violation of the right to counsel and the discovery of the marijuana. Having noted that the two events were temporally proximate, the Court proceeded directly to the second part of s 24(2), which poses the question whether the admission of the evidence would bring the administration of justice into disrepute. The certificate of analysis was held to be admissible because it would not render the trial unfair, and the violation was inadvertent and not serious.[26]

The reasoning in *Strachan* demonstrates that the temporal proximity theory of causation will not present a significant hurdle for the accused in most applications for the exclusion of evidence. Had a stricter causation requirement been applied to the facts of the case, the Court may have concluded that there was no causal link between the breach and the discovery of the drugs.[27] The causation standard not having been established, the Court would not have been required to consider the second part of the s 24(2) test.

### *(b) "But for" test*

#### *(i) Nature of the test*

Under the "but for" theory, a causative link will be held to exist if the evidence would not have been obtained but for the rights violation. Given that the evidence has in fact already been found, this test requires determination of the hypothetical question of whether the evidence would have been obtained in any event.

The "but for" theory sets a higher standard of causation than the temporal proximity theory. If adopted, it would require the admission of evidence in some situations where the temporal proximity theory points toward exclusion.[28]

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24 Ibid, 498. Prior to *Strachan*, it appeared that the Supreme Court had endorsed a higher causation threshold than a mere temporal connection: *R v Therens* (1985) 18 CCC (3d) 481 (SCC); *R v Upston* (1988) 42 CCC (3d) 564 note (SCC).

25 *Strachan*, supra at note 23, at 496.

26 Ibid, at 500-501.

27 On the "but for" theory of causation, it is clearly arguable that the marijuana would have been discovered even if the violation of the right to counsel had not occurred. The absence of a causal link would require admission of the evidence.

28 Two Canadian cases serve as a useful illustration of the potential for different results under the two tests. In *R v Cohen* (1983) 5 CCC (3d) 156 (BCCA), the accused was subjected to an unreasonable chokehold and search of her mouth for drugs. Nothing being found, the police lawfully searched her purse and found a quantity of cocaine. The British Columbia Court of Appeal held that the handbag would have been searched in any event, even if the prior unreasonable search had not occurred. Hence, the evidence of the cocaine was admissible. By way of contrast, the Supreme Court of Canada rejected such a strict approach to causation in *R v Collins* (1987) 33 CCC (3d) 1, which involved a scenario almost identical to *Cohen*. The Court treated the chokehold and the subsequent search of the accused as part of the same transaction, and were prepared to exclude the evidence if it could be demonstrated that there were no reasonable grounds for administering the chokehold.

*(ii) Relationship to remedial objectives*

Adoption of the rights objective as the justification for the exclusionary rule leads naturally to a "but for" theory of causation. The rationale dictates that the accused should not be disadvantaged at the trial by reason of the breach. Where an item of evidence would not have been obtained but for the violation, it is necessary to exclude that evidence in order to nullify the effects of the violation. Exclusion restores the status quo that existed prior to the breach.[29] Conversely, if the item of evidence would have been obtained in any event, exclusion cannot be justified because it would place the accused in a better position than if there had been no violation at all.

Paciocco appears to implicitly adopt this theory as the natural corollary of the vindication of rights rationale: [30]

> [T]he claim is that fundamental rights have been violated, and the complainant is looking to the court to vindicate those rights by *depriving the state of its gain* through the restitutionary remedy of exclusion.

Under the "but for" theory of causation, exclusion is the remedy by which the individual is compensated for the effects of the rights violation. If the violation has not had any effect, in terms of the nature and strength of the prosecution case, then exclusion is unwarranted.

The "but for" theory of causation may also be consistent with the enforcement objective. This depends on whether the deterrent effect of exclusion is limited to situations where the violation is the "but for" cause of obtaining the evidence. If so, the adoption of the enforcement objective also necessitates adoption of the "but for" theory.[31]

*(iii) Problems with the theory*

One practical difficulty with the "but for" theory is that it contains no inherent time limitation upon past events which can be labelled as causative of a present event. This means that a violation of the accused's rights many years ago may be held to be a cause of the obtaining of an item of evidence in the present. As Mahoney points out: [32]

> Remove one piece of [the accused's prior] history, such as a police impropriety in the long distant past, and it cannot be certain that the accused's life would have followed the same path which led to the police later obtaining the evidence in question in some quite innocuous fashion.

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29 See Jull, "Remedies for Non-Compliance With Investigative Procedures: A Theoretical Overview" (1985) 17 Ottawa LR 525, 531.

30 Paciocco, supra at note 4, at 53 (emphasis added).

31 In the United States, the deterrence rationale has been used to support the creation of the inevitable discovery exception to the exclusionary rule, demonstrating the compatibility of the rationale with the "but for" theory of causation. See text, infra at pp 11-12.

32 Mahoney, supra at note 6, at 462.

A finding that the causation requirement is established in such circumstances appears unreasonable. There must be some point at which the effect of the prior violation is spent. In order to circumvent this problem, some kind of limitation must be placed upon the scope of its application.

One way of limiting the application of the "but for" theory is to superimpose a substantive analysis of the strength of the causal connection between the violation and the obtaining of the evidence. This is the sufficient strength theory of causation.[33]

*(iv) Practical implications of the theory - 'independent source' and 'inevitable discovery' arguments*

Evidence which has been lawfully obtained via a source that is completely independent of the rights violation will be admissible. Known as the "independent source" doctrine, this principle has been expressly adopted as an exception to the United States exclusionary rule. In *Silverthorne Lumber v United States*,[34] the US Supreme Court prohibited the government from using against the defendant any knowledge gained from an unlawful search of his premises. However, Justice Holmes stated the following proviso: [35]

> Of course this does not mean that the facts thus obtained [illegally] become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others...

While the "inevitable discovery" doctrine will most often be relied upon after an unlawful search and seizure, it is also potentially applicable to breaches of other rights.[36] The doctrine was first recognised by the US Supreme Court in *Nix v Williams*,[37] which involved a violation of the accused's right to counsel. His confession led searchers to a young girl's body. However, it was held that the comprehensive grid search already under way prior to the confession would inevitably have led to the discovery. On the basis of this finding, the Court admitted the evidence, stating that: [38]

> [T]he interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse*, position that they would have been in if no police error or misconduct had occurred...[the] exclusion of evidence that would inevitably have been discovered would...put the government in a worse position, because the police would have obtained that evidence if no misconduct had taken place.

33 See text, infra at section *(c)*.

34 251 US 385 (1920).

35 Ibid, 392.

36 For a discussion of the general scope and development of the inevitable discovery doctrine see Girese, "They Would Have Found It Anyway: *United States v Eng* and the 'Inevitable Subpoena'" (1993) 59 Brooklyn L Rev 461.

37 467 US 431 (1984).

38 Ibid, 443-444, (emphasis in original).

The inevitable discovery doctrine is clearly designed to restore both the police and the accused to the position which they would have been in "but for" the breach.[39] Further, if an item of evidence would inevitably have been discovered, then the violation of the right was not a "but for" cause of the obtaining of the evidence.[40]

### *(c) "Sufficient strength" test*

#### *(i) Nature of the test*

Under this theory, the "but for" test must first be satisfied, as a necessary condition for finding causation. In addition, the court must conduct a substantive assessment of the nature and strength of the causal connection between the violation and the obtaining of the evidence. Only if the court concludes that the violation is both a "but for" cause and a "sufficiently strong" cause of the obtaining of the evidence, will the exclusionary rule be available. The "sufficient strength" test in this way places a limit upon the scope of the "but for" test.

A finding that the causal connection between the violation and the obtaining of the evidence is sufficiently strong to justify exclusion, is clearly of a conclusory nature. To be more than a hollow theory, the test must also define the principles and criteria which lead to such a finding.

#### *(ii) United States attenuation analysis*

In the United States, a similar type of theory has been adopted, bearing the label of "attenuation analysis". Consideration of the factors which have emerged as relevant under that theory may be useful in the task of identifying those which are most relevant to a "sufficient strength" theory, if adopted in New Zealand.

The attenuation principle was first articulated by the Supreme Court in *Nardone v United States*:[41]

> Sophisticated argument may prove a causal connection between information obtained through [illegal conduct] and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint.

The factors which may support a finding of attenuation were set out in the later case of *Brown v Illinois*.[42] These are:

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39 See Maguire, "How To Unpoison the Fruit - The Fourth Amendment And The Exclusionary Rule" (1964) 55 Jnl of Crim L 307, 313-317. He states that the inevitable discovery doctrine establishes that the violation is not a *sine qua non* of the discovery of the evidence.

40 Mahoney, supra at note 6, at 477, accepts that the inevitable discovery doctrine is derived from the "but for" theory of causation. However, he appears to reject the application of the "but for" theory in this context, because it yields a conclusion that he labels "absurd".

41 308 US 338, 341 (1939). Also see *Wong Sun v United States* 371 US 471, 488 (1963).

42 422 US 590 (1975).

(i) the temporal proximity between the breach and the evidence;
(ii) any intervening factors or circumstances; and
(iii) the purpose and flagrancy of the illegal conduct.

The most important feature of the attenuation principle is its insistence that all surrounding circumstances be taken into account, in each individual case, in order to assess whether the causal link is *sufficiently strong* to support the exclusion of the challenged evidence.

*(iii) Relationship to remedial objectives*

As outlined previously, the "but for" theory of causation is directly related to the rights objective, and is probably also consistent with the deterrence objective. Hence, the adoption of "but for" causation as part of the "sufficient strength" theory suggests that it is also predicated upon either, or both, of these rationales.

This conclusion is not altered by an assessment of the second limb of the "sufficient strength" theory. Clearly, the choice of relevant factors under this limb can be altered according to the prevailing approach to remedial objectives. In the United States, the purpose and flagrancy of the violation has assumed primary importance in the attenuation analysis, due to that country's emphasis on the deterrence objective. A lesser emphasis on the deterrence objective could lead to a reduced emphasis on the purpose and flagrancy of the violation. As a whole, the "sufficient strength" test for causation appears to fit comfortably within an exclusionary rule that recognises the importance of either the vindication of rights objective, the deterrence objective, or both.

## 3. Preferred Approach To Causation

The "sufficient strength" theory of causation appears to fit best with the New Zealand courts' current approach to remedial objectives under the Bill of Rights. This theory takes the features of the "but for" theory, and superimposes an assessment of the nature and strength of the causal connection between the breach and the finding of the evidence. This provides the necessary limitation upon the scope of the "but for" theory. Relevant factors include the time elapsed between the breach and the obtaining of the evidence, any intervening circumstances, and the purpose and flagrancy of the breach. Overall, the theory affirms the rights objective, as it limits the application of the exclusionary rule to those situations where the violation has resulted in the obtaining of evidence against the accused, creating an unfair advantage which must be remedied. In addition, it recognises that there are situations where the causal link has become sufficiently weakened by other factors, such that the remedy of exclusion will be unjustifiable. This determination contains scope for the remedial objective of deterrence to play a role

in the exclusionary rule. For these reasons, the "sufficient strength" test is best suited to the general approach which the New Zealand courts have taken to remedial objectives under the Bill of Rights.

## IV: CURRENT APPROACH TO CAUSATION IN NEW ZEALAND

### 1. Fitting Causation Into The Framework Of The Exclusionary Rule

*(a) The prima facie rule*

The New Zealand Court of Appeal has adopted a prima facie rule of exclusion once a violation of the Bill of Rights has been established. In *MOT v Noort* it was stated that:[43]

> The prima facie rule is that a violation of rights protected by the Bill of Rights Act should result in the rejection of evidence obtained in breach of those rights.

The following approach was formulated by Richardson J in *R v Te Kira*:[44]

> Anyone invoking the Bill of Rights has an initial obligation to point to the particular provision or provisions claimed to have been breached, and unless it is sufficiently apparent from the material already in the case, to provide an evidential foundation for that claim. Where that position is reached the onus then rests with the Crown...to establish that the alleged breach did not occur....

*(b) The "real and substantial connection" test*

If a breach of the Bill of Rights is established, evidence is not automatically excluded. The Court of Appeal has accepted the need for a causal connection between the breach and the obtaining of the item of evidence in question. At first, this requirement was not expressly recognised, but was nonetheless implicit in the judgments. For example, in *R v Kirifi* Cooke P spoke about the exclusion of confessions obtained "in consequence"[45] of a breach of s 23(1)(b). Similarly, in *R v Butcher* the President said, "Prima facie, however, a violation of rights should result in the ruling out of evidence *obtained thereby*."[46] From that point on, the Court of Appeal began to expressly refer to the concept of causation, but did not elaborate upon what this concept actually involved until *Te Kira*. In that case Richardson J proposed the following definition of the causation requirement:[47]

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43 *MOT v Noort; Police v Curran* [1992] 3 NZLR 260, 285 (CA) per Richardson J.

44 [1993] 3 NZLR 257, 273.

45 [1992] 2 NZLR 8, 12 (CA).

46 [1992] 2 NZLR 257, 266 (CA), (emphasis added).

47 [1993] 3 NZLR 257, 272 (CA).

> What is both necessary and sufficient is that there be a real and substantial connection between the violation and the obtaining of the evidence. To treat a slender temporal link as sufficient in circumstances where it cannot be said that the breach affected the obtaining of the evidence is in my view contrary to the statutory intent.

This formulation clearly rejects the temporal proximity theory of causation; a mere proximity in time between the breach and the obtaining of the evidence is not enough to satisfy the causation requirement. Rather, a "real and substantial connection" test for causation has been adopted. The Court will draw the conclusion that there is no real and substantial connection between the breach and the obtaining of the evidence, if the prosecution successfully establishes that the breach was *inconsequential*,[48] or that the evidence would have been *inevitably discovered*.[49] The discussion of causation in the New Zealand cases has largely revolved around these two factors, which are examined below.

## 2. Content Of The Causation Requirement: Inevitable Discovery

### *(a) Adoption of the inevitable discovery doctrine in New Zealand*

The inevitable discovery doctrine has been accepted in New Zealand as rendering an item of evidence admissible, despite violation of the Bill of Rights.

The issue first arose for consideration by the Court of Appeal in *R v Butcher*.[50] That case involved two persons accused of aggravated robbery, who had suffered violations of their s 23(1)(b) right to counsel,[51] and had subsequently made inculpatory statements. Cooke P observed that there was no suggestion that the two accused would still have made the damaging admissions if accorded their proper rights, so the statements were clearly inadmissible.[52] The relevant aspect of the case for present purposes is that the confessions directed the police to the weapons and clothing that had been used in the robbery. Counsel for the two accused argued that these items were also inadmissible, because discovery was derived from the confessions. The President accepted this argument in relation to items of clothing that had been found at a roadside location, on the basis that these would not have been found without the assistance of the accused. However, His Honour ruled that the weapons and a balaclava found at the home of one of the defendants were admissible, stating:[53]

48 In *Te Kira* , ibid, 261, Cooke P stated that "[a] 'real and substantial' connection test between the breach and a subsequent damaging statement is another way of putting the inconsequentiality test already mentioned."

49 See *R v Pratt* [1994] 3 NZLR 21, 25-26 per Richardson J.

50 [1992] 2 NZLR 257 (CA).

51 Section 23(1)(b) contains two limbs: first, the police must *inform* the accused of his or her right to a lawyer; second, the police must allow the accused to *exercise* that right. These have been called the "lawyer information right", and the "lawyer access right", respectively: *Herewini v MOT* [1993] 2 NZLR 747, 751 (HC). In the instant case, the accused Burgess was deprived of his lawyer information right, while the accused Butcher (who initiated a request for a lawyer) was deprived of his lawyer access right.

52 [1992] 2 NZLR 257, 266 (CA).

53 Ibid, 267.

> [I] would accept that the police would have made in any event a thorough search of the house and garden where Burgess was living and would have discovered the air pistol and the various parts of the shotgun.

While the Court did not expressly adopt the terminology of 'inevitable discovery', it is clear that the decision involved a substantive application of the doctrine.

*(b) "Would" have been discovered vs "could" have been discovered*

Richardson J made an important statement about the scope of the inevitable discovery doctrine in *R v Pratt*.[54] That case involved a strip search of the accused in broad daylight on a public thoroughfare. Prior to the removal of his clothes, the accused emptied his pockets to reveal a set of keys. These keys unlocked a hall which had already been under police surveillance, and also unlocked a locker in the hall which contained a kilogram of cocaine. The Court of Appeal held that the strip search was unreasonable, and that the keys were therefore inadmissible. The Crown argued that the accused would inevitably have been arrested anyway, as he was known to be associated with the activities at the hall, and that the keys would have been found in a lawful search at the time of such arrest. Richardson J stated that this argument had not been proven as a matter of fact: [55]

> The police were satisfied with their unreasonable search and there is no factual basis for a conclusion that, that aside, the keys would inevitably have been discovered in the appellant's possession.

More importantly, Richardson J made the following observation on the legal scope of the inevitable discovery doctrine: [56]

> The inevitable discovery principle does not extend a blanket of protection to cases where the police *could*, not *would*, have discovered the evidence by lawful and reasonable means.

Neither is it sufficient for the prosecution to show that they could have conducted the same search in a reasonable manner.[57] This was made clear in *R v H*[58] where the accused, a director of a fishing company, was charged with corruptly giving money to a MAF official. An employee of the company, acting as an informer, had supplied the police with company documents for some twenty months, which the Court held to be an unreasonable search and seizure in terms of s 21 of the Bill of Rights. The Crown argued that the documents were admissible because the police could have obtained a search warrant and found these

54 [1994] 3 NZLR 21, 25-26.

55 Ibid, 26.

56 Ibid, 25 (emphasis added).

57 Forbes, "The Inevitable Discovery Exception, Primary Evidence and the Emasculation of the Fourth Amendment" (1987) 55 Fordham L Rev 1221, 1232.

58 [1994] 2 NZLR 143 (CA). Also reported as *R v Accused (CA 453/93)* (1994) 11 CRNZ 410.

documents in any event.[59] However, because the sole factor making the search unreasonable was the failure to obtain a valid warrant, it was not enough for the police to argue that they *could* have obtained one. The situation did not fall within the scope of the inevitable discovery doctrine, which only embraces evidence that would have been discovered "by *independent* and lawful means irrespective of the unreasonable search."[60] Where the Crown argues that they could have performed the same search in a reasonable manner, they fail to identify an *independent* hypothetical source of the evidence.

This point was overlooked by McKay J in the earlier case of *R v Jefferies*.[61] Having found that a search of the defendant's car was unreasonable,[62] his Honour held that drugs found in the course of the search were admissible, reasoning that the same evidence could have been found if the police had conducted a reasonable search. The aspect of the search that was unreasonable was the constable's failure to identify himself properly and advise the occupants of the vehicle that he was acting pursuant to the search provisions in the Arms Act 1983. Had these requirements been complied with, the drugs would still have been found. The difficulty with this reasoning is that it effectively accepts the Crown's argument that the same search could have been conducted reasonably; the very argument that was subsequently rejected in *R v H* and *R v Pratt*.[63] A straightforward application of the inevitable discovery doctrine would have required the Crown to prove that the police would inevitably have conducted an independent lawful search, and that such a search would inevitably have unearthed the drugs. Such a finding was not available on the reported facts in *Jefferies*.

*(c) A good faith requirement?*

There is some concern in the New Zealand cases that the police should not be allowed to cynically breach the Bill of Rights in order to hasten the discovery of evidence.[64] Optican suggests that this concern has led to the imposition of a requirement in New Zealand that the prosecution prove an absence of "bad faith" on the part of police officers, as a prerequisite to the application of the inevitable discovery doctrine.[65] Support for this view may be derived from the words of Richardson J in *R v H*:[66]

59 The police did in fact eventually search the premises under a warrant, but the Court excluded evidence found in this search also, on the basis that the knowledge gained from the unlawfully seized documents had formed the chief basis for the warrant application.

60 *R v Pratt* [1994] 3 NZLR 21, 25 per Richardson J (emphasis added).

61 [1994] 1 NZLR 290 (CA).

62 And therefore in breach of s 21 of the Bill of Rights. The other six members of the full bench of the Court of Appeal concluded that the search was in fact reasonable.

63 For further comments on McKay J's reasoning in *Jefferies* see Mahoney, "Evidence" [1994] NZRLR 82, 112-113.

64 *R v Jefferies* [1994] 1 NZLR 290, 317 (CA) per McKay J; *R v H* [1994] 2 NZLR 143, 150 (CA) per Richardson J.

65 Optican, "Warrantless Police Searches and the Fourth Amendment to the United States Constitution: *Jefferies* from the United States Perspective" [1994] NZRLR 168, 170 n15.

66 [1994] 2 NZLR 143, 150 (CA). Mahoney, supra at note 10, at 479, also accepts the view that a good faith requirement was established in *R v H*.

> It does not follow that the evidence must be admitted. Otherwise the police may feel entitled to ignore the law and make warrantless searches and seizures secure in the knowledge that the evidence obtained will be admitted provided the police can show they could have obtained a warrant if they had sought one...Where there is a deliberate decision by the police to act without a warrant, any Court must be loath to conclude that the interests of justice nevertheless require the admission of the evidence.

Considered in isolation, these words might indicate a good faith limitation upon the inevitable discovery doctrine. However, it must be remembered that his Honour was dealing with a situation where the Crown were simply arguing that they *could* have performed the same search reasonably by obtaining a warrant. The inevitable discovery doctrine did not encompass that situation because the Crown were unable to demonstrate that they *would* have obtained the evidence by independent lawful means. It is arguable that Richardson J was not introducing a good faith requirement, but simply demonstrating the consequences of extending the inevitable discovery doctrine to situations where the police *could* have obtained the evidence lawfully; such a development would encourage police misconduct.

If Richardson J was introducing a good faith requirement in *R v H*, it is doubtful whether this is in fact compatible with either the rights objective or the enforcement objective. In *Nix v Williams*,[67] the United States Supreme Court rejected a good faith requirement in this context, stating that: [68]

> [It] would place courts in the position of withholding from juries relevant and undoubted truth that would have been available to police absent any unlawful police activity. Of course, that view would put the police in a *worse* position than they would have been in if no unlawful conduct had transpired.

Clearly, a good faith requirement would also have the potential to put the accused in a better position than they would have been in without the illegality. This is unjustifiable under the rights objective. If the "sufficient strength" test for causation is adopted, any evidence that would have been obtained in any event must be admitted. Exclusion cannot be justified on the grounds of police bad faith, if the breach was not a "but for" cause of the obtaining of the evidence.

*(d) Evidential basis for a finding of inevitable discovery*

It is clear that the prosecution bears the onus of establishing that the evidence would have been found in any event. In the United States, the prosecution is expected to adduce evidence which shows that (a) a lawful investigative procedure was already taking place, or would have subsequently been employed by the particular police department, and (b) that procedure would inevitably have uncovered the evidence. However, as one United States commentator points out:[69]

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67 467 US 431 (1984).

68 Ibid, 445 (original emphasis).

69 Novikoff, "The Inevitable Discovery Exception To The Constitutional Exclusionary Rules" (1974) 74 Colum L Rev 88, 93.

> The prosecution does not satisfy this burden by mere speculation that such procedures would have been used and such results obtained.

In contrast, the inevitable discovery doctrine has been applied in New Zealand to situations where the prosecution has offered no evidence to affirmatively establish the means by which the challenged item of evidence would have been found. Instead, an argument by counsel, or merely an assumption by the judge, has sufficed. In *R v Butcher*, Cooke P was happy to surmise that a thorough search of a house would have been made, and a shotgun would have been recovered. This was despite the fact that it had been separated into three parts; the barrel was under the house, the butt was hidden under a bush, and the stock was buried in a flower garden. The Court of Appeal's decision in *R v Pratt* is also relevant on this point. While the keys found in the course of the strip search were inadmissible, it was held that the cocaine itself would have been discovered in any event. [70]

The difficulty with this finding is that none of the facts relied upon by the Court were actually adduced in evidence. The police should have been required to affirmatively prove that they would have searched the hall, and explain just how they would have inevitably found the cocaine in the locker. By simply surmising that this would have occurred, the Court deprived the accused of an opportunity to challenge the factual basis of the Crown's claim of inevitable discovery.

It is important that findings of inevitable discovery rest on a solid foundation of evidence, given their potential impact upon the outcome of the trial. The Court of Appeal's current approach to this issue is difficult to reconcile with its stated desire to vindicate the accused's rights.

### 3. Content Of The Causation Requirement: Inconsequentiality

#### *(a) Adoption of the inconsequentiality principle in New Zealand*

The Court of Appeal has also recognised the inconsequentiality principle which renders evidence admissible despite violation of the Bill of Rights. In *R v Goodwin*[71] Cooke P described the nature and function of the principle as follows:[72]

> New Zealand cases have already yielded a number of examples of good reasons for departing from the prima facie exclusion rule. They include...inconsequentiality, in the sense that the Court can be satisfied that the admission would have been made without a breach...

The principle appears to be derived from the President's obiter comments in *Kirifi*[73] and *Butcher*.[74] In the former case, his Honour stated that:[75]

> There may be cases where, although the suspect has not been informed of his right, the conclusion can be drawn that some such information would have made no difference: that even if told of his right he would nevertheless have made an admission.

70 [1994] 3 NZLR 21, 26 per Richardson J.

71 [1993] 2 NZLR 153 (CA).

72 Ibid, 171.

73 [1992] 2 NZLR 8, 12 (CA).

74 [1992] 2 NZLR 257, 266 (CA) per Cooke P.

75 Supra at note 73.

In *Te Kira*, the link between the inconsequentiality principle and the real and substantial connection test was clarified by the Court of Appeal:[76]

> A 'real and substantial' connection test between the breach and a subsequent damaging statement is another way of putting the inconsequentiality test...

Hence, proof of inconsequentiality rebuts the existence of a real and substantial connection between the breach and the obtaining of the evidence. The inconsequentiality principle, like the inevitable discovery doctrine, is grounded on the "but for" theory of causation. If the accused's confession "would have been made without a breach",[77] then the breach was not a "but for" cause of that confession.

*(b) Scope of the inconsequentiality principle*

In practice, the courts have allowed the inconsequentiality principle to become intertwined with the concept of waiver, generally in the context of alleged breaches of s 23(1)(b). Theoretically, the two notions are distinct, and operate at different stages of the exclusionary rule. The concept of waiver applies where the accused has been informed of his or her right to a lawyer, and chooses to waive it; this rebuts the existence of a breach of the Bill of Rights.[78] However, the principle of inconsequentiality is one which operates in the context of the real and substantial connection test for causation, which is predicated on the fact that a breach of the Bill of Rights has already been established. The cases in New Zealand have not always recognised this distinction.

In *R v Duran*,[79] the Court of Appeal held that there had been a failure to inform the accused of his right to a lawyer, in breach of s 23(1)(b), but that the accused was aware of the right and had effectively waived it.[80] A similar decision was made in *R v Pinkerton*,[81] where it was held that the accused's use of a lawyer in an earlier interview indicated that he knew his rights, and telling him again would have made no difference. In the High Court, Penlington J interchangeably referred to the inconsequentiality of the failure to accord the accused his rights, and the notion of waiver.[82] In both of these cases, the most that can be said is that the accused would probably have waived the right to a lawyer, if told about it. As Mahoney argues:[83]

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76 [1993] 3 NZLR 257, 261 (CA) per Cooke P.

77 *R v Goodwin* [1993] 2 NZLR 153, 171 (CA).

78 This point was apparently recognised by the Court of Appeal in *R v Biddle* (1992) 8 CRNZ 488, 490, where McKay J confirmed that the accused's right to consult a lawyer could not be breached after it had been waived.

79 (1992) 8 CRNZ 350 (CA).

80 The knowledge and waiver of the right were inferred from the accused's statement that "[i]f I had a lawyer here he would be having apoplexy that I told you anything at all."

81 Reported as *R v P (T 176/91)* (1992) 9 CRNZ 119 (HC); affirmed in *R v Pinkerton*, CA 342/92, 23/3/93 (Cooke P, Richardson, Hardie Boys, Gault and McKay JJ).

82 Ibid, 135 (HC).

83 Mahoney, "Evidence" [1993] NZ Recent L Rev 57, 82.

> [This] allows a decision to be made against an accused's interest in what can be no more than an ex post facto determination of a choice an accused might have made in a situation that didn't happen: would the accused have waived her rights had she been advised of them[?]

In such situations, it is illogical to treat the accused as having waived a right that was never accorded to him or her in the first place. If the Court accepts that a violation has occurred, the current formulation of the exclusionary rule dictates that the inquiry then shift to the "real and substantial" test for causation. This would require the Court to consider whether the violation was inconsequential, in the sense that the violation did not cause the evidence to be obtained. For the purposes of clarity in the scope of the inconsequentiality principle, it is important that this inquiry does not become mixed with the logically prior determination of whether the accused has actually waived his or her rights.

### *(c) Application of the inconsequentiality principle to confessions*

Another difficulty with the inconsequentiality principle is the very fact that it has been applied in the context of confession evidence at all. Most often, the principle will allow the admission of confessions obtained following a violation of either s 23(1)(b), or the right of charged persons under s 23(3) to be brought before a court as soon as possible.

*R v Grant* [84] concerned a person who had been detained on a drug charge and then questioned in relation to several burglaries. He confessed to two of them before he was given a written warning of his rights under s 23(1)(b). Later, he was taken on a tour of the city and pointed out 16 other properties which he admitted to having burgled. The Court of Appeal ruled that all the statements were admissible, on the basis that the accused would not have acted any differently if he had been told of his rights earlier.

The decision in *Grant* highlights the difficulties associated with such a determination in the context of confession evidence. Confronted with the highly speculative inquiry of whether the accused would have confessed in any event, the Court was forced to search for facts that would assist in that inquiry. Normally, these facts reside within the mind of the accused. It will often be impossible for the trial judge (let alone an appeal court) to get inside the accused's head, find out what made him or her confess, and then engage in the hypothetical experiment of considering whether he or she still would have confessed if he or she had been accorded his proper rights.[85]

In *Grant*, the Court attempted to overcome this difficulty by basing their decision on observable facts: the accused declined to consult a lawyer after the information of that right was eventually given, and voluntarily confessed to 16 more burglaries. These facts were used to draw the inference that the accused would still have made the same decision to confess if he had been informed of his rights at the proper time. However, it is arguable that the only reason the accused

84 (1992) 8 CRNZ 483 (CA).

85 See Black, "The Poisoned Tree: Inadmissible Confessions, Subsequent Facts, and Reliability" (1991) 4 Canterbury L Rev 356, 366.

failed to consult a lawyer later, and made further confessions, was because he had already 'let the cat out of the bag'.[86]

The problems associated with the application of the inconsequentiality principle to confessions are even more pronounced in the context of violations of s 23(3) of the Bill of Rights. That section states that:

> Everyone who is arrested for an offence and is not released shall be brought as soon as possible before a court or competent tribunal.

If there is a delay in bringing the detainee before a court, and he or she makes a confession in the meantime, the issue of admissibility will turn on whether there is a real and substantial connection between the violation and the making of the confession. The question was first considered in *R v Te Kira*.[87] In that case the accused was arrested one morning and charged with knowingly receiving a stolen jacket. The paperwork for a court appearance had been completed by early afternoon, but the accused was not in fact taken to court at all that day. Officers were making investigations with a view to laying a further charge of robbery against him. At 6pm that day, in the police cell block, the accused confessed to his involvement in the robbery. He was taken to court the next morning, and was ultimately convicted of the offence.

The Court of Appeal unanimously held that s 23(3) had been breached and that the confession should be excluded. Richardson J paid the closest attention to the problems surrounding the application of the real and substantial connection test to the situation before him. His Honour ultimately relied on two important factors.[88] First, he noted that the accused was being held, unlawfully, in an *inherently coercive environment*. This seemed to have affected the accused, whose uncooperative manner gradually subsided, and may have contributed to the making of the confession. Second, the accused's *availability to the police* must have contributed to the confession; the investigating officer would have been unlikely to have sought out the accused if he had been remanded to prison.

In *R v Pora*[89] the result was different. The accused was arrested on a minor charge but, to the surprise of the police, he told them that he had some information about an unsolved murder. After being cautioned he made several incriminating statements. These continued after the time at which he should have been taken to court, and after he was actually taken to court; the police cells were being used for remand prisoners at the time. The Court of Appeal admitted the statements, on the basis that the accused had first raised the matter, had been treated fairly, had spoken just as freely after the court appearance as before, and had indicated that he wanted to 'get things off his chest'. Furthermore, the delay had no effect on his

86 Holland J adopted this reasoning in *R v Smith* (1993) 11 CRNZ 72 (HC), a decision in which *Grant* was not cited. This approach was also adopted by the Supreme Court of Canada in *R v I (L.R.)* (1994) 26 CR (4th) 119. Had this reasoning been applied in *Grant*, both statements would have been inadmissible.

87 [1993] 3 NZLR 257 (CA).

88 Ibid, 275.

89 (1994) 11 CRNZ 544 (CA).

availability to the police. Therefore, the breach did not lead in any real and substantial way to the obtaining of the confessions.

These decisions indicate that the courts are deciding cases by asking whether the confession would have been obtained without the breach. This is effectively the same as the inconsequentiality principle which the courts have developed in the context of s 23(1)(b). By asking the Crown to prove that they would have obtained the confession in any event, the courts are requiring the affirmative elimination of the breach as a "but for" cause of the confession. This once again raises the difficulty of entering the mind of the accused to ascertain what factors led to the confession. But, even more importantly, in the context of s 23(3) the violation will almost always be a "but for" cause of the obtaining of the confession. This is because compliance with the section would have either led to the release of the accused on bail, or remand to the local prison. In such circumstances, it will normally be impossible for the Crown to argue that the confession would have been obtained in any event. In the words of Thomas J in *Te Kira*, "the test will tend in practice to be absolute in its application." [90]

*(d) Inadequacy of the inconsequentiality principle*

The shortcomings of the inconsequentiality principle as applied to confessions were highlighted by the decision of the Court of Appeal in *R v Greenaway*.[91] That case involved an accused who was arrested on a Friday night in relation to an aggravated robbery. After three interviews, which went into the early hours of Saturday morning, he was formally charged and told that he would be kept at the police station until a court hearing on Monday morning (about which he was clearly unhappy). At 3pm on Saturday he asked to speak to the officer in charge, and subsequently made a confession.

Casey J, giving the judgement of the court, held that s 23(3) had been breached because the accused should have been given the option of a Saturday morning appearance in court. However, his Honour ruled the statement to be admissible, distinguishing the prior cases by saying that the present case lacked "the undesirable features present" [92] in *Te Kira*. In other words, this was not a case of detention for the purposes of further investigation. The fact that the detention made the accused more available to the police was given little weight. This was despite the fact that he would have been remanded to the local prison, and Crown counsel's concession that the accused would not have sought the final interview while in prison. It was also said that the cooperative mood of the accused in seeking the final interview actually negated the presumption that the inherently coercive environment had taken its effect. It should be remembered at this point that in *Te Kira* the cooperative mood of the accused was presumed to have been caused by the inherently coercive environment. His Honour concluded that the confession "was not caused in any real and substantial sense" [93] by the violation of s 23(3).

90 Supra at note 87, 282.

91 [1995] 1 NZLR 204 (CA). For comments on the case see Mahoney, "Evidence" [1995] NZ Law Review 58, 76-77.

92 Ibid, 208.

93 Ibid, 209.

In *Greenaway*, the court was faced with a situation where the violation was undeniably a "but for" cause of obtaining the confession; the accused would have been at the local prison and the interview in question would never have happened but for the violation. Given the inconsequentiality test endorsed in similar circumstances in *Te Kira*, the court in *Greenaway* would have been bound to exclude the evidence had they found that this causative link was established. The violation was clearly not inconsequential. Yet the Court still felt able to come to the conclusion that there was no real and substantial connection between the breach and the obtaining of the evidence. The difficulty with the decision is that the Court failed to identify the principles which enabled them to reach this conclusion. While the good faith of the police and the voluntariness of the decision to confess were referred to, the court did not explain exactly why these factors were relevant to the causation question, and how they contributed to the finding of no real and substantial connection.

## 4. Problems With New Zealand's Approach To Causation

It is clear that the current approach to causation in New Zealand is deficient in a number of respects.

First, while the courts have paid some regard to the issue of remedial objectives under the Bill of Rights, they have not yet explicitly made the link between their choice of objectives and the implications of this choice upon their approach to the causation issue. The principles of causation developed by the courts are almost exclusively linked to a "but for" theory of causation, but the courts have not explained why this theory promotes their chosen remedial objectives. Neither has there been any principled statement as to the circumstances in which this theory will be rejected as over-inclusive.

Second, while the 'real and substantial connection' test is adequate as a label for concluding that there is sufficient causation to warrant exclusion, it is only as useful as the principles used to reach that conclusion. If the principles developed by the courts in this context are inadequate, then this invites unprincipled conclusions on the issue of causation. The Court of Appeal has largely relied upon inevitable discovery and inconsequentiality as the principles identifying when the real and substantial connection test is not met. In addition to the problems surrounding the scope and application of these two principles, the result in *Greenaway* suggests that they are insufficient on their own; other principles are required to provide content to the 'real and substantial connection' test.

Third, the adoption of the inevitable discovery doctrine in New Zealand has been clouded by uncertainty as to its scope and application. In addition, the courts have yet to explain why the doctrine is consistent with the remedial justification for the exclusionary rule.

Finally, the inconsequentiality principle represents little more than an application of the "but for" theory of causation to confession evidence. This is problematic because confessions are inherently ill-suited to a "but for" causation analysis. Moreover, the principle will tend to invite an automatic application of the

exclusionary rule in the context of breaches of s 23(3). Also, the principle has at times been inappropriately applied in circumstances where the court believes that an accused would have waived their rights if they had been informed of them.

## V: FORMULATING A COHERENT THEORY OF CAUSATION IN NEW ZEALAND

### 1. Linking Remedial Objectives To The Theoretical Approach To Causation

New Zealand has generally accorded primacy to the rights objective as the principle remedial rationale under the Bill of Rights.[94] In addition, some emphasis has also been placed upon the deterrence objective as a supplementary remedial rationale.[95] This article has demonstrated that the "sufficient strength" theory of causation is the most appropriate way of giving effect to these objectives.

### 2. Implications For The "Real And Substantial" Test

In order to admit an item of evidence, the Crown is required to prove that there is *not* a real and substantial connection between the breach and the challenged item of evidence. The Crown should be able to do this in one of two ways, if the "sufficient strength" theory is adopted. First, they may lead evidence to show that the violation was not a "but for" cause of obtaining the evidence. This rule embraces both the independent source and inevitable discovery doctrines. Second, they may show that, even though the violation was a "but for" cause of the obtaining of the evidence, the causal link is not sufficiently strong to support its exclusion.

### 3. Rebutting "But For" Causation

The Crown may establish that there is no real and substantial connection between the breach and the obtaining of the evidence by rebutting "but for" causation. This analysis is most readily applicable to real evidence; there are major practical difficulties in the context of confession evidence.[96]

#### *(a) Independent source doctrine*

The independent source doctrine has not yet been expressly recognised in New Zealand, probably because no case has squarely raised the issue.[97] If the courts adopt a sufficient strength theory of causation, the independent source doctrine would be a valid means of rebutting the existence of but for causation.

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94 See text, supra at Part IV.

95 Ibid, 95.

96 See text, supra at Part IV.

97 However, the adoption of the inevitable discovery doctrine in New Zealand strongly suggests that the independent source doctrine would also be adopted on the current approach of the courts.

The application of the doctrine is best demonstrated by considering a variation upon the facts in *R v H*.[98] If the police had made the decision to obtain a warrant without considering the tainted evidence that had already been found, *and* had not in fact used that evidence in the warrant application, the independent source doctrine would allow the admission of evidence obtained in the course of the valid search. It is crucial for the Crown to prove that the tainted evidence has not affected the subsequent search in any way.

*(b) Inevitable discovery doctrine*

The inevitable discovery doctrine has already been employed in New Zealand; adoption of the "sufficient strength" theory would not alter this. However, the scope and application of the doctrine in this country is, in some respects, inconsistent with the rights and deterrence objectives.

First, it should be clarified that the doctrine only applies when it is established that the police *would* have obtained the evidence by independent lawful means, not that they merely *could* have done so. Establishing that the evidence *could* have been obtained by acting properly does not rebut "but for" causation. Hence, admission of such evidence would be inconsistent with the rights objective. Moreover, as pointed out by Richardson J in *R v H*,[99] extension of the doctrine in this way would lessen the deterrent effect of the exclusionary rule upon police misconduct.

Second, the imposition of a good faith pre-requisite to the application of the doctrine would be inconsistent with both the rights objective and arguably also the deterrence objective. Adoption of such a requirement would lead to the exclusion of evidence in some situations despite the rebuttal of "but for" causation. Where it can be established that the evidence would inevitably have been found, it is not necessary to exclude that evidence to vindicate the accused's rights.

Third, the courts should insist that a sound evidential foundation be offered by the Crown in support of an argument of inevitable discovery. Speculation by Crown counsel (or the judge) without a factual basis should not be sufficient for a finding adverse to the accused on such an important issue.

## 4. Proving That The Causal Connection Is Not Sufficiently Strong

If a causal connection is established between the breach of the Bill of Rights and a challenged item of evidence, the Crown may still argue that this connection is not sufficiently strong to justify exclusion. The factors relevant to this determination are:

(i) the temporal link between the breach and the obtaining of the evidence;

(ii) any intervening factors or circumstances; and

98 [1994] 2 NZLR 143 (CA). See text supra at p14 for a discussion of the facts of the case.

99 Ibid, 150.

(iii) whether the causal link between the breach and the evidence falls within the type of mischief the right was designed to prevent, including an assessment of the purpose and flagrancy of the breach.

The test is primarily designed to place realistic limitations upon the over inclusive nature of the "but for" theory of causation. In addition, it obviates the need for problematic factual determinations necessary to apply the "but for" theory to confession evidence. General comments can be offered to demonstrate the application of the test in two typical situations.

*(a) Confessions obtained after a section 23(1)(b) violation*

As outlined above,[100] the Court of Appeal's current approach to these situations is to ask whether the accused would have waived their rights if informed of them, and/or whether they would have confessed anyway. Adoption of a "sufficient strength" theory would move the inquiry away from speculation about the accused's decision-making processes, toward the determination of objectively ascertainable facts.

In the context of s 23(1)(b), the temporal proximity between the breach and the confession will generally be irrelevant. This is because a failure to accord the accused their rights under the section has a continuing effect, disadvantaging the accused until such point in time as the failure is remedied. Confessions obtained before the lawyer information and access rights have been granted will generally be inadmissible. Also, any confessions obtained after the s 23(1)(b) rights have been granted may still be inadmissible if they are linked to a prior confession.[101]

The most relevant factor in this context will generally be the presence or absence of intervening circumstances. Normally, the issue will be whether the confession is a sufficiently independent act of free will to weaken the causal link.[102] Clearly, this requires more than mere voluntariness, which is a threshold requirement for the admission of all confessions. The additional element is simply that the accused made an informed decision to confess, with knowledge that he or she had the right to a lawyer.[103] This takes into account part of the test currently employed in New Zealand, but disposes of the speculation into whether the right would have been waived, or whether a confession would have been made anyway. Trial judges would simply be required to decide whether the accused knew that he or she had the right to a lawyer at the time the confession was made. If so, the confession is more likely to have been an independent act of free will, and the

100 See text, supra at Part IV.

101 This adopts the approach taken in *R v I (L.R.)* (1994) 26 CR (4th) 119 (SCC); and *R v Smith* (1993) 11 CRNZ 72 (HC).

102 See *Wong Sun v United States* 371 US 471, 491 (1963).

103 Rishworth appears to be in favour of a similar inquiry; "The New Zealand Bill of Rights Act 1990: The First Fifteen Months" in *Essays on the New Zealand Bill of Rights Act 1990* (Legal Research Foundation, 1992) 7, 31.

violation is likely to have played a lesser role as a factor contributing to the accused's decision to confess.[104]

Having said this, the purpose and flagrancy of the violation may negate the effect of the accused's independent act of free will in confessing.[105] If the police have deliberately refrained from informing the accused of his or her rights, and/or prevented the accused from exercising those rights, then it must have been thought at the time that this course of action would be advantageous in the investigation process. This would tend to rebut the Crown's claim that the causal link is not sufficiently strong to warrant exclusion of the evidence.

*(b) Confessions obtained after a section 23(3) violation*

Confessions obtained after a violation of s 23(3) are arguably the most difficult area under the Court of Appeal's current approach to causation. The courts encounter the same difficult factual determinations as arise under s 23(1)(b). Moreover, the application of the "but for" theory points toward exclusion of nearly all confessions obtained after a s 23(3) violation, tending to result in an automatic exclusionary rule. These difficulties can be overcome by consideration of the following factors under the "sufficient strength" theory.

First, the time factor will normally be important. This comprises two aspects. First, how long after the accused *should* have been taken to court was the confession obtained? The longer the amount of time, the stronger the causal connection, because the breach is continuing, and any effect on the accused will be cumulative. Second, how long was the delay between the court appearance which *should* have occurred and the accused's actual court appearance? The greater the delay, the stronger the causal connection. There can be a significant psychological effect on an accused simply from being told how long they are going to be held in custody. This point was recognised by Hardie Boys J in *Te Kira*,[106] and should have been considered in *Greenaway*. In the latter case, the accused was told upon being charged that he would be held for a further 55 hours, when he should have only been held for about 8-10 hours. The knowledge of such a situation may contribute to a confession even though only a small amount of time has in fact elapsed.

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104 Of course, if the accused possesses this knowledge and asks to speak to a lawyer, but is not allowed to exercise the right, this will constitute a fresh breach of s 23(1)(b), and any subsequent confession must be excluded. An example of this situation is *Butcher*, where the accused clearly tried to exercise his right but was prevented from doing so. Although the *failure to inform* the accused of his right was not a sufficiently strong cause of the confession (because the accused knew it anyway), the *prevention of exercise* of the right did constitute a real and substantial cause of the confession.

105 Conversely, the good faith of the police would not on its own be sufficient to justify the admission of the evidence, if the accused confessed at a time when they were unaware of their right to a lawyer. While the deterrence objective points to admission in such situations (*US v Leon* 468 US 897 (1984)), the rights objective points to exclusion of the evidence. Given the primacy of the rights objective in New Zealand, the conflict between the two rationales in this situation would be resolved in favour of the accused's rights, hence requiring exclusion.

106 [1993] 3 NZLR 257, 277 (CA).

Second, the presence of any intervening circumstances will be relevant. The purpose of s 23(3), to protect arrested persons from iniquitous police conduct,[107] is not advanced if evidence is excluded in situations where the accused actually seeks out the officer in charge of the case to make a confession. This factor was present in *Greenaway*, and could have been more effectively relied upon to support the admission of the statement in that case. Another example of a relevant intervening circumstance would be where the accused consults his or her lawyer immediately prior to the confession. This would tend to indicate that the decision to confess is a rational, informed, independent act of free will which bears little relation to the breach.

Finally, it will be relevant to consider whether the circumstances surrounding the breach fall within the type of mischief which the right was designed to prevent. This necessarily involves consideration of the motivation of the police, in accordance with the deterrence objective. If the delay was deliberate, then the purpose of the delay will also be relevant. Where the delay is to facilitate further investigation of the crime, or assemble other evidence against the accused, this will tend to support exclusion. On the other hand, if the deliberate delay is for the purpose of allowing the accused to remain asleep before taking him or her to a later court hearing, then this will not warrant the exclusion of a confession obtained after waking.[108]

## VI: CONCLUSION

The New Zealand courts have not yet adequately come to terms with the role of causation in the context of the Bill of Rights, or developed any general theory as to when a sufficient degree of causation will warrant the exclusion of evidence. Adoption of the "sufficient strength" theory of causation would substantially flesh out the current "real and substantial connection" test, while remaining consistent with the remedial objectives of the Bill of Rights. The "sufficient strength" theory requires assessment of several factors, including time, the presence of intervening circumstances, and whether the chain of events falls within the mischief which the right was designed to protect against. The latter element implicitly incorporates consideration of the purpose of the right and the objective of the remedy, factors which have been often overlooked in the New Zealand jurisprudence so far. It would also clarify some of the principles already espoused by the courts, and provide a much firmer theoretical foundation and remedial justification for the role of causation within the exclusionary rule.

107 See *Te Kira*, ibid, 266.

108 See *State v Ferola* 518 A 2d 1339 (1986) (Supreme Ct of Rhode Island).