THE FRUIT OF THE POISONED TREE – THE ADMISSIBILITY OF EVIDENCE IN CIVIL CASES

By NIGEL COOPER Q.C.¹

Common law principles

The phrase “fruit of the poisoned tree” or “fruit of the poisonous tree” is usually used to refer to an exclusionary rule of evidence which, in some jurisdictions (and notably in the USA) renders inadmissible evidence which has been obtained illegally.

The doctrine has no application in England. Traditionally, English judges have been prepared to eat the fruit, however poisonous the tree. However, that position is slowly changing as a result of the introduction of the Civil Procedure Rules, and the impact of the Human Rights Act 1998.

The principles applicable in civil cases developed out of the principles which have evolved in criminal law. It is therefore necessary to start with a brief overview of the position in criminal trials.

In criminal law, the general rule is that all relevant evidence is admissible. As Lord Goddard said in Kuruma v The Queen [1955] AC 197, 203, “the court is not concerned with how the evidence was obtained”. Lord Goddard made reference a remark of Crompton J in R v Leathem (1861) 8 Cox CC 498, 501, which is now often quoted. Overruling an objection to production of a letter which had been discovered in consequence of an inadmissible statement made by the accused, Crompton J said:

“It matters not how you get it; if you steal it even, it would be admissible.”

At common law, criminal courts do not even have a discretion to exclude evidence just because it has been improperly or unfairly obtained. The judge can only exclude evidence if its admission would be “unfairly prejudicial” to the accused. The underlying principle is that

¹ This paper was prepared with the assistance of Ben Coffer, barrister and also at Quadrant Chambers
it is the function of the judge in a criminal trial to ensure that the trial is fair, not to exercise
disciplinary powers in relation to the process of obtaining the evidence in question: R v. Sang

[The notable exception is that confessions obtained by torture are inadmissible against an
accused person – an exception which might be thought to have limited relevance in this day
and age, but which has resurfaced in modern terrorism cases, such as A v. Secretary of State
for the Home Department [2006] 2 AC 221.]

The strict common law principle has now been moderated in criminal cases in two ways:

Firstly, the courts will not shut their eyes to the way the accused was brought before the court
or the evidence of his guilt was obtained. In extreme cases, those methods may be such that it
would compromise the integrity of the judicial process, dishonour the administration of
justice, if the proceedings were to be entertained or the evidence admitted. In such a case the
proceedings may be stayed or the evidence rejected on the ground that there would otherwise
be an abuse of the processes of the court: R v Horseferry Road Magistrates' Court, Ex p
Bennett [1994] 1 AC 42

Secondly, in criminal cases, the common law position has now been moderated by the Police
and Criminal Evidence Act 1984 (‘PACE’), which gives the Court the power to exclude
evidence if because of the circumstances in which it was obtained its admission would have
such an adverse effect on the fairness of proceedings that it appears to the judge the court
should not admit it. There is a substantial and developing body of case law dealing with the
application of section 78 of PACE to eavesdropping by the police, and it is not yet clear
whether unlawful conduct which does not make the evidence in question less reliable can be
excluded.

For instance, in R v. Chalkley and Jeffries [1998] QB 848, the police lawfully arrested one of
the defendants and his partner on an unrelated matter, with the ancillary purpose of installing
a listening device in that defendant's home. The trial judge admitted the resulting
communications between the defendants. The judge had taken into account “the circumstances
in which the evidence had been obtained” and recognised that there had been civil trespass by
the police, certain breaches of the police Code of Practice and a possible breach of art.8 of the
European Convention on Human Rights, but compliance with the relevant Home Office guidelines. However, he performed a balancing exercise and admitted the conversations. The Court of Appeal held that section 78 of PACE was intended to be limited to situations in which the “quality” was or might have been affected, so as to make the trial unfair. The section was:

“not intended to widen the common law rule in this respect [...] that is that, save in the case of admissions and confessions and generally as to evidence obtained from the accused after the commission of the offence [...] there is no discretion to exclude evidence unless its quality was or might have been affected by the way in which it was obtained”

The common law principles developed in the criminal law cases, and in particular the principle in Kuruma v. The Queen, apply equally in civil cases.

The starting point in civil proceedings is therefore that if the evidence is relevant it will ordinarily be admissible. There is no rule of law that evidence must be excluded simply because it has been obtained illegally or improperly.

Indeed, it may be the case that, as in criminal cases, in civil cases the courts did not even have a common law discretion to exclude evidence which would otherwise be admissible (i.e. evidence which is relevant) on the grounds that it was improperly obtained:

“so far as civil cases are concerned, it seems to me that the judge has no discretion. The evidence is relevant and admissible. The judge cannot refuse it on the ground that it may have been unlawfully obtained in the beginning.”


The common law principle therefore remains that unlawfully obtained evidence will be admissible in civil proceedings.

However, that principle is now subject to several important exceptions:
1. The introduction of the CPR
2. Protection of the “administration of justice”
3. Documents obtained in breach of confidence

**The Civil Procedure Rules**

The position has been altered by the introduction of the Civil Procedure Rules, in that the court now has a power to exclude evidence in the interest of the overriding objective.

CPR Rule 32.1 provides that the Court may control the evidence before it by giving directions as to the issues on which it requires evidence, and the nature of the evidence which it requires to decide those issues, and the way in which that evidence is to be placed before the court. Rule 32.1(2) expressly gives the court the power to “exclude evidence that would otherwise be admissible”.

There is therefore now a general discretion to exclude evidence in civil cases. The judge must exercise that discretion in accordance with the overriding objective in CPR Part 1 – the objective of “enabling the court to deal with cases justly”.

The application of CPR Rule 32.1(2) to improperly obtained evidence has been most directly considered in personal injury cases. It is not uncommon for insurers to appoint agents to obtain video evidence to show that a claimant is not as seriously injured as he or she claims. Such video evidence will often be obtained without the consent of the claimant, either unlawfully or (at the very least) in an underhand manner. The question arises as to whether such evidence should be excluded.

The leading case is *Jones v. University of Warwick* [2003] 1 WLR 954. In that case, the claimant argued that she had a continuing disability in her right hand as a result of an accident at work. The defendant employed an inquiry agent, who posed as a market researcher and used a hidden camera to film the claimant in her home. The videos showed that the claimant had entirely satisfactory function in her hand.
It was accepted that the inquiry agent had been guilty of trespass – a civil tort. The claimant argued that the court should exercise its discretion under CPR 32.1(2) to exclude the video, and that medical experts who had seen the video should also be prevented from giving evidence. In making that argument, the claimant relied on the Human Rights Act 1998, and in particular Articles 6 (the right to a fair trial) and Article 8 (the right to respect for one’s private and family life, home and correspondence).

Lord Woolf CJ, the architect of the CPR explained in detail how the CPR should be applied in such a case:

“*A judge's responsibility today in the course of properly managing litigation requires him, when exercising his discretion in accordance with the overriding objective contained in CPR Pt 1*, to consider the effect of his decision upon litigation generally. An example of the wider approach is that judges are required to ensure that a case only uses its appropriate share of the resources of the court ... Proactive management of civil proceedings, which is at the heart of the CPR, is not only concerned with an individual piece of litigation which is before the court, it is also concerned with litigation as a whole. So the fact that in this case the defendant's insurers ... have been responsible for the trespass involved in entering the claimant's house and infringing her privacy contrary to article 8(1) is a relevant circumstance for the court to weigh in the balance when coming to a decision as to how it should properly exercise its discretion in making orders as to the management of the proceedings.*” (at 961)

The achieving of justice in any particular case will always favour all of the relevant evidence being before the court. On the one hand, it would be “highly undesirable” for the courts to encourage conduct on the part of insurers which constituted a civil wrong. The change brought about by the introduction of the CPR is that the courts are now required in every case to consider the impact of their decision on the administration of justice in general.

In the end, as with most aspects of civil procedure under the CPR, the Court has to perform a balancing act of all the factors:
“The court must try to give effect to what are here the two conflicting public interests. The weight to be attached to each will vary according to the circumstances. The significance of the evidence will differ as will the gravity of the breach of article 8, according to the facts of the particular case. The decision will depend on all the circumstances. Here, the court cannot ignore the reality of the situation. This is not a case where the conduct of the defendant's insurers is so outrageous that the defence should be struck out. The case, therefore, has to be tried. It would be artificial and undesirable for the actual evidence, which is relevant and admissible, not to be placed before the judge who has the task of trying the case. We accept Mr Owen's submission that to exclude the use of the evidence would create a wholly undesirable situation. Fresh medical experts would have to be instructed on both sides. Evidence which is relevant would have to be concealed from them, perhaps resulting in a misdiagnosis; and it would not be possible to cross-examine the claimant appropriately.”

The Court therefore admitted the evidence, although it did order that the defendant should pay the costs of dealing with the issue at first instance and on appeal.

In practice, surveillance footage continues to be used regularly and as long as it is disclosed in a timely manner, is generally permitted. In the cases since the decision in Jones, evidence has generally only been excluded where it has been disclosed late in the day (so-called ‘ambush’ cases).

Accordingly, while the Court of Appeal’s decision in Jones confirms that the courts can now look at the circumstances in which evidence was obtained when considering whether to exclude it, in practice there has not been a substantial departure from the pre-CPR position. In most cases, it appears that the overwhelming consideration will be that it is in the interests of justice to have all relevant evidence before the court.

An interesting example is Lifely v. Lifely [2008] EWCA Civ 904, an internecine partnership dispute between the sons of a successful farmer, as to who should take the income from his farm holdings. There was a factual dispute and at trial the judge preferred the testimony of brother Nicholas. However, after the trial one of the other brothers claimed to have found at the family farmhouse diaries belonging to Nicholas which demonstrated that his testimony
had been false. The Court of Appeal held that the finding, reading and using the diary had constituted the tort of trespass to goods. Accordingly, the evidence had been obtained unlawfully.

In the years since the Jones case, the impact of the Human Rights Act had clearly increased. While human rights played little or no role in the decision in Jones, in Lifely v Lifely the Court of Appeal approached the question of whether to exclude the evidence as a balancing act between Nicholas’ rights under Article 8 of the ECHR, and the right of the other brother to a fair trial under Article 6.

However, the outcome of that balancing exercise was still very much the same as in Jones:

In my judgment the result of undertaking this balancing exercise is plain. Here there was no trespass or burglary. The diary was left on Andrew's property and had been there for many years. Though he can, perhaps, be criticised for reading a private diary, his conduct, like the enquiry agent in Jones was not so outrageous. If Nicholas had disclosed the existence of his diary, as strictly he ought to have done, then this information would have emerged at the trial. It was not privileged and no claim to confidentiality could then have prevailed. Now to allow him to assert it and to exclude this evidence could, I say no more than that, lead to a finding which is far removed from the truth of what happened at that family meeting three weeks before David's death. It would be wholly disproportionate to exclude this evidence and I have no hesitation whatsoever in rejecting this submission advanced on Nicholas's behalf. I add this caveat. [...] My judgment will not be and should not be the last word on this expanding jurisprudence as it is deliberately fact centred and fact sensitive.

It appears that, notwithstanding the reference in the overriding objective to the interests of ‘justice’ in general, and despite the decision in Jones, the Courts are highly resistant to the injustice of excluding evidence which is material, howsoever obtained, in any particular case.

Privileged documents / court process

Even prior to the introduction of the civil procedure rules, the courts would intervene in some circumstances to protect the proper administration of justice.
Perhaps the widest statement of the potential scope of the principle is that of Lord Hoffmann in \textit{A v Secretary of State for the Home Department} [2006] 2 A.C. 221 at [87]:

“the courts will not shut their eyes to the way the accused was brought before the court or the evidence of his guilt was obtained. Those methods may be such that it would compromise the integrity of the judicial process, dishonour the administration of justice, if the proceedings were to be entertained or the evidence admitted. In such a case the proceedings may be stayed or the evidence rejected on the ground that there would otherwise be an abuse of the processes of the court.”

However, the cases in which that discretion has been exercised have required the court to intervene in order to protect the process of the court, rather than to protect any abstract principles of ‘justice’ in the general \textit{Jones v. University of Warwick} sense.

For instance, in \textit{I.T.C Film Distributors Limited v. Video Exchange Limited} [1982] Ch. 431, one of the parties arranged for a number of boxes containing video cassettes and files were left in court after a hearing. Somehow (the judgment is not clear) one of the parties managed to obtain documents belonging to the other party’s solicitors “by a trick”.

Warner J decided that he was required to balance “the public interest that the truth should be ascertained [...] against the public interest that litigants should be able to bring their documents into court without fear that they may be filched by their opponents, whether by stealth or by a trick, and then used by them in evidence.” (at 440)

The Judge concluded that “the interests of the proper administration of justice” required that he should exclude the evidence: the danger to the court system if one party was able to take possession of documents belonging to the other side within the precincts of the court would outweigh the potential injustice to the parties in any particular case.

It will be apparent that in the \textit{ITC Film} case, a similar balancing act to that conducted in the personal injury cases produces a very different result. The lesson is that the courts prize very highly indeed the need to ensure that everybody plays by the rules when using the justice system. It therefore seems much more likely that unlawfully obtained evidence will be
excluded when it is obtained in contempt of court, or in such a way as to pose a threat to the administration of justice in general.

The cases in which evidence has been excluded to protect the administration of justice have much in common with a similar set of cases in which the courts have issued injunctions to prevent parties from using documents in litigation, where those documents have been obtained unlawfully or impermissibly or where they would otherwise be privileged.

For instance:

- **In Guinness Peat Properties Ltd v. Fitzroy Robinson Partnership [1987] 1 WLR 1027** a privileged letter was included in a list of the defendants' documents. The plaintiffs obtained a copy, and the letter was referred to in their experts' report. The defendants obtained an order restraining use of the privileged document.

- **In Derby & Co Ltd v. Weldon (No. 8) [1997] 1 WLR 73** privileged documents were mistakenly made available for inspection and copying, and an injunction was granted for delivery up.

- **In Pizzey v. Ford Motor Co Ltd**, The Times, March 8, 1993, an expert medical report was mistakenly provided by the plaintiffs' solicitors pursuant to an order which required production of medical notes and records, and an injunction was refused.

These cases use a different legal device – an injunction restraining the use of a particular document – to reach the same legal result: preventing the document in question being used in evidence.

However, in **Istil Group Inc v. Zahoor [2003] 2 All ER 252**, Lawrence Collins J suggested that the courts’ power to issue such an injunction to protect privileged documents was in fact derived from a different jurisdiction: the jurisdiction that the court exercises to restrain breach of confidence and protect confidential documents.

**Breach of Confidence**
For several hundred years, it has been established that a party (Party A) will be entitled to an injunction restraining another party (Party B) from using secret or confidential information which Party B has obtained from Party A. Even if Party B has come by the information lawfully (for instance if Party A imparts trade secrets to Party B), Party B can be restrained by an injunction from misusing the information, by disclosing it to third parties or making illicit copies.

So for instance, in **Prince Albert v. Strange** (1849) 1 Mac & G 25, the courts ordered the defendant to deliver up copies of etchings of the Royal Family made by Prince Albert which the defendant had obtained “surreptitiously and improperly”.

The same principle applies where Party B passes on information which he has obtained unlawfully to Party C. Party C (unless, perhaps, he is a bona fide purchaser for value) can be restrained from using the confidential information or documents even if Party C obtained them lawfully from Party B: **Morrison v. Moat** (1851) 9 Hare 241.

20 years ago, the House of Lords extended the principle so that it applies to cases where Party B obtains information which is confidential to party A without any unlawfulness or impropriety. In **Attorney General v. Guardian Newspapers (No 2)** [1990] 1 AC 109, the House of Lords held that the ‘breach of confidence’ jurisdiction could be invoked “Where an obviously confidential document is wafted by an electric fan out of a window [...] or [...] is dropped in a public place and is then picked up by a passer-by” (per Lord Goff at [64]).

An important adjunct to the established breach of confidence jurisdiction is Article 8 of the ECHR. Since the introduction of the Human Rights Act, cases involving confidential documents almost invariably require a consideration of Article 8 of the European Convention on Human Rights: e.g., **Campbell v. MGN Ltd** [2004] 2 AC 457.

The jurisdiction of the courts to restrain use of documents obtained in breach of confidence or in breach of Article 8 is a potentially significant derogation from the principle that all relevant evidence can be admissible. Very often documents which have been obtained unlawfully will also have been obtained in breach of confidence or in such a way as to engage Article 8.
The interrelation between the ‘breach of confidence’ principle and the principle that even unlawfully obtained evidence is admissible was considered by the Court of Appeal recently in an important family law decision, Imerman v. Tchenguiz [2010] EWCA Civ 908.

The claimant was the husband, who shared an office and a computer system with his wife’s brother. When the marriage broke down, the wife petitioned for divorce. The wife’s brother, fearing that the husband would conceal his assets to prevent the wife obtaining a fair financial settlement in the divorce, accessed the husband’s computer system without his permission and copied information and documents stored there. Having removed privileged material, he passed the files to the wife’s lawyers.

In proceedings in the Queen’s Bench Division, the husband applied for an injunction restraining the wife’s brother from using the information obtained from the computer. In the family proceedings, the wife was ordered to return the documents temporarily to the husband, but only so that the husband could sift out any material which he considered to be privileged. All the parties appealed.

Lord Neuberger MR, giving the judgment of the court, had very much in mind the balance between confidentiality and the desirability of having all relevant documents before the court. He began by explaining that the appeals required the (now familiar) balance between the various rights involved. He explained that they:

“demonstrate and maintain an apparent conflict between the need to preserve Mr Imerman’s right to protect the confidentiality of the documents stored on the server and to impose sanctions for unlawful breaches of that right and the need to ensure that a just resolution of the ancillary relief proceedings is achieved on the basis of a truthful and comprehensive identification of the parties’ assets.” [6]

He then went on to consider whether the breach of confidence jurisdiction would apply to protect a party from whom evidence has been unlawfully obtained, concluding that:

“If confidence applies to a defendant who adventitiously, but without authorisation, obtains information in respect of which he must have appreciated that the claimant had an expectation of privacy, it must, a fortiori, extend to a defendant who
intentionally and without authorisation takes steps to obtain such information. It would seem to us to follow that intentionally obtaining such information, secretly and knowing that the claimant reasonably expects it to be private, is itself a breach of confidence.”

Accordingly, the Court of Appeal suggested that:

1. It would constitute a breach of confidence for a defendant, without the authority of the claimant, to examine or to make, retain or supply copies to a third party of a document whose contents are and were (or ought to have been) known by the defendant to be confidential. [69]

2. That principle would apply whether the defendant obtained the documents from the claimant directly, or through a third party.

3. A claimant who establishes a right of confidence in particular information contained in a document should be able to restrain any threat by an unauthorised defendant to look at, copy, distribute copies of, or use the contents of such a document (and force the defendant to return the documents and all copies to the claimant, or destroy them). [69]

Indeed, it was suggested by the Court of Appeal that if unlawfully obtained documents had been passed on to solicitors, the court might consider it appropriate in certain circumstances to prevent by an injunction those solicitors from representing the party to the proceedings.

Accordingly, the position appears to be as follows:

1. Unlawfully obtained evidence is prima facie admissible in civil proceedings.

2. Such evidence may be excluded by the judge exercising the discretion conferred on him by CPR Part 32. However, in practice that discretion is generally exercised in favour of admitting evidence.
3. In addition, evidence may be excluded by the court exercising its inherent discretion to prevent the court’s process being abused or brought into disrepute.

4. Even if neither of those ‘discretions’ can be invoked, there may nevertheless be an alternative remedy available to a party from whom documents have been unlawfully obtained: if that party can establish a breach of confidence, he should be entitled to an injunction restraining the use of the unlawfully obtained material.

In any event, there will be a balancing act to be performed which necessarily involves a consideration of the convention rights involved.

**Practical issues that arise**

Unlawfully obtained evidence – whether admissible or not – raises a number of unusual practical considerations.

1. **Obligation to give disclosure of illegally obtained documents**

One point which arises in practice is whether documents which have been obtained secretly or surreptitiously are subject to the usual disclosure and discovery requirements. There may be a desire to hold back evidence which has been improperly obtained for the purposes of springing it on a witness at trial - can that evidence be held back or must be disclosed first?

The question has arisen most often in relation to the covert filming of claimants in personal injury claims. CPR Rule 33.6 requires that, unless the court orders otherwise, ‘proper notice’ must be given if any ‘plans, photographs or models’ are to be used as evidence. That includes all evidence which is not in the form of a witness statement, affidavit or expert’s report (and therefore includes video evidence).

At first following the introduction of the CPR, the courts seemed prepared to allow secret video footage to be held back so that the claimant could not tailor his or her evidence so as to take the footage into account (e.g. by saying that they had ‘good days and bad days’). In *McGuiness v. Kellogg* [1988] 1 WLR 913, the Court of Appeal suggested that where there was an issue about ‘primary facts’, and it is suggested that the claimant is faking or grossly
exaggerating the symptoms of his condition, it may well be in the interests of justice that there is no prior disclosure.

However, in more recent cases the courts have emphasised that, given the ‘cards on the table’ approach encouraged in civil litigation, it will only be “in the rarest circumstances” that an order would be made permitting a party to hold back video evidence, even where the claimant’s good faith was in question: e.g., Rall v. Hume [2001] EWCA Civ 146. It is now clear that even evidence which has been obtained covertly must be disclosed in advance of trial in the ordinary way.

2. Loss of privilege

It is long established that legal privilege does not protect discussions in which advice is given as to the setting up or carrying out of criminal or fraudulent conduct. Similarly, if a party obtains material unlawfully, some or all of which it intends to rely on, that material will not be protected by privilege.

In Dubai Aluminium Co v. Al Alawi [1999] QB 1964, the Claimant had engaged agents to investigate the defendant’s finances in contravention of the data protection act 1984, and Swiss banking laws. The agents had (inter alia) taken documents from the defendant’s dustbin, and had impersonated other people during telephone calls.

The defendant applied for an order requiring the claimant to disclose the material its agents had obtained, on the basis that those documents could not be privileged. The claimant argued that, applying the ordinary principle that all relevant documents are admissible, even unlawfully obtained documents should be subject to privilege until deployed in the litigation.

Rix J held that privilege would not protect such documents:

“It seems to me that if investigative agents employed by solicitors for the purpose of litigation were permitted to breach the provisions of such statutes or to indulge in fraud or impersonation without any consequence at all for the conduct of the litigation, then the courts would be going far to sanction such conduct. […]"
In my judgment, the Kuruma principle [i.e. that all relevant evidence should be admissible] is consistent with this view rather than against it. That principle is concerned with vindicating the truth with the aid of relevant evidence, rather than excluding such evidence on the ground that it has been improperly come by. That principle cannot be said to require privilege even where crime or fraud has been committed to obtain information”

Accordingly, it may be that, while unlawfully obtained information is admissible, the usual rules of privilege do not apply in relation to that information.

3. Interim applications

In St Merryn Meat Limited v. Hawkins [2001] CP Rep 116, the Claimants had obtained two interim freezing orders and search orders without notice to the defendants. The defendants admitted involvement in significant frauds perpetrated on the claimants, but argued that in obtaining the interim orders the claimants had deliberately misled the court. In particular, they claimed that the claimants had failed to disclose the fact that evidence on which the claimants had relied in making the application had been obtained by unlawfully intercepting telephone conversations conducted from the home of one of the defendants. The defendants therefore sought the discharge of the orders.

The defendants contended that bugging of their phones constituted a criminal offence under the Interception of Communications Act 1985, and also relied on Article 8 of the ECHR. They accepted that the evidence obtained by bugging a home telephone would have been admissible (even if it had constituted a criminal offence) [9].

However, an applicant for an interim order must disclose all facts which reasonably could or would be taken into account by the judge in deciding whether to grant the application. [59]. Geoffrey Vos QC (sitting as a deputy high court judge) held that any judge heading the application would have wanted to know how the evidence had been obtained, and whether it had been obtained lawfully or illegally [78]. In particular, Article 8 of the Human Rights Act would have been relevant to the granting of the application.
Accordingly, the freezing orders and search orders were discharged [109]. That may be an important lesson for parties applying for orders without notice: if you are making use of unlawfully obtained information, make sure that the source of the information is disclosed to the court.

**A Final Thought**

We have today been concerned with the admissibility of unlawfully obtained evidence. However, as recent events involving a certain newspaper have shown, the use of unlawful means such as telephone hacking to obtain information may have financial consequences that go beyond simply the question of whether evidence obtained by those means is admissible. However, that is, perhaps, a topic for another day.

NIGEL COOPER Q.C.

Quadrant Chambers
10 Fleet Street
London EC4Y 1AU

E-mail: nigel.cooper@quadrantchambers.com