The inclusion of inevitably discoverable evidence

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ABSTRACT

In 2004 the Supreme Court of Appeal adopted the doctrine of inevitable discovery in the case of S v Pillay. In terms of this doctrine unconstitutionally obtained real evidence that would inevitably have been discovered by alternative means should not be excluded. It is submitted that it was wrong and unnecessary to allow this speculative and arbitrary doctrine to gain entrance into our law. Although an application of this doctrine might be possible in limited circumstances, it is essential to place this doctrine in its proper context. If this is not done, the potential is created to oversee serious violations of the Bill of Rights by effectively sidestepping the exclusionary rule. It should not be forgotten that the exclusionary rule embodied in s 35(5) of the Constitution is mainly there to prevent or deter the violation of constitutionally guaranteed rights. Even if exclusion is not a perfect remedy, it is the optimal one to ensure police respect for constitutional rights.

Introduction

Constitutional exclusionary rules often cause highly relevant or otherwise admissible evidence to be withheld from court. This outcome is justified on various grounds that are not necessarily beyond criticism.1 Some commentators feel that the exclusion of unconstitutionally obtained evidence should be kept separate from the issue of guilt and that the accused must rather have some other recourse against those who acted unconstitutionally.2 Such notions, however, have to play second fiddle to an exclusionary rule that is an important way of ensuring

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2 A code of conduct for law enforcement officers and an independent system of determining breaches and applying sanctions would form the backbone of such a proposition — see Davis op cit (n1) 183. Also see Penney op cit (n1) 120; PJ Schwikkard & SE van der Merwe Principles of Evidence 2 ed (2002) 173.
'the value system created and guaranteed by a bill of rights',\textsuperscript{5} which 'may or may not include the reliability of evidence'.\textsuperscript{4} It is against this backdrop that problems surrounding the interpretation and application of the exclusionary rule in s 35(5) of the Constitution\textsuperscript{5} should be approached.\textsuperscript{6}

Getting away from the thought of releasing a factually guilty accused is not easy. Courts and commentators throughout the world struggle to find a middle ground between the mentioned extremes. Maybe this is due to a failure to recognise that it is not about the finding of a middle ground, but more importantly about ensuring the values created by the Constitution. If we forget about typifying evidence and focus on the true reason behind the exclusionary rule, we might end up with a more simplistic and common sense approach to the exclusion of unconstitutionally obtained evidence. The practice of over-eagerly adopting unnecessarily complicated principles from comparable foreign jurisdiction might also be something of the past.

Some time ago, the Supreme Court of Appeal applied the doctrine of inevitable discovery in \textit{S v Pillay}\textsuperscript{7} by relying on Canadian jurisprudence in this regard. This doctrine essentially entails that unconstitutionally obtained real evidence that would inevitably have been discovered by alternative means should not be excluded. In this discussion it is submitted that the Supreme Court of Appeal wrongly and unnecessarily allowed this speculative and arbitrary doctrine to get a foothold in our law. The doctrine creates the potential to sidestep the true purpose behind the exclusionary rule, thereby unjustifiably undermining the value system guaranteed by the Constitution. An application of this doctrine might be possible in very limited circumstances, but it is necessary to properly place such circumstances in context.

\textbf{Brief exposition of s 35(5) of the Constitution}

A brief look at the elements that currently make up the test for the exclusion of unconstitutionally obtained evidence in s 35(5) of the

\textsuperscript{3} Schwikkard & Van der Merwe op cit (n2) § 12 4 2.
\textsuperscript{4} R Mahoney 'Problems with the current approach to s. 24(2) of the Charter: an inevitable discovery' (1999) 42 CrimLQ 443 at 456.
\textsuperscript{5} Constitution of the Republic of South Africa, 1996. Section 35(5) states that: 'Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.'
\textsuperscript{6} See generally T Lynch 'In defense of the exclusionary rule' (1999/2000) 23 HarvJL&PubPol'y 711.
\textsuperscript{7} \textit{S v Pillay} 2004 (2) SACR 419 (SCA).
Constitution is necessary to place the doctrine of inevitable discovery into context.

The first part of the rule indicates that a causal relationship between the Bill of Rights violation and the obtaining of the evidence must be established before a court will consider whether to exclude evidence in terms of this section. Once such a causal link has been established, the court must then consider whether admission of the evidence would render the trial unfair (the first leg of the test) or whether admission would otherwise be detrimental to the administration of justice (the second leg of the test). Steytler remarks about the test in s 35(5) that:

'It should be noted that there is principally one test — whether the admission of evidence would be detrimental to the administration of justice. The test relating to the fairness of the trial is a specific manifestation of this broader enquiry; to have an unfair trial is demonstrably detrimental to the administration of justice. Having said this, it should be emphasized that s 35(5) has created two tests which should be kept separate; rules applicable to one are not necessarily applicable to the other.'

Canadian jurisprudence has to some extent influenced the way in which our courts have interpreted the different elements of s 35(5). This is due to the similarity between s 35(5) and s 24(2) of the Canadian Charter of Rights and Freedoms. Although a lot can be gained from their experience, it is dangerous to accept their views without careful consideration, since many of them have been adopted from the USA where there is no constitutionally entrenched exclusionary rule and hence a lot of confusion. They further seem to compartmentalize the elements of their test. Their fair trial requirement, for example, has a specific meaning and content, whereas the fair trial requirement in s 35(5) can be said to be more flexible and broad. Schwikkard and Van der Merwe note:

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8 Constitution of the Republic of South Africa op cit (n5).
9 Schwikkard & Van der Merwe op cit (n2) § 12 8 2.
10 Schwikkard & Van der Merwe op cit (n2) § 12 9.
11 Schwikkard & Van der Merwe op cit (n2) § 12 10.
13 See generally Schwikkard & Van der Merwe op cit (n2) § 12 8 and the cases referred to by them.
14 The Canadian rule states: '24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. 24(2) Where, in proceedings under subsec (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice in disrepute.' These two sections are similar to s 38 and s 35(5) of our Bill of Rights respectively.
15 Schwikkard & van der Merwe op cit (n2) § 12 9 4.
'N]otions of basic fairness and justice, must be applied with reference to the facts of the case and have an inherent flexibility which links up neatly with the fact that s 35(5) provides a court with a discretion to determine whether the impugned evidence would render the trial unfair.'

In terms of this view it is therefore impossible to draw up a fixed list of factors that must be considered when determining whether admission of evidence would deprive the accused of his or her constitutional right to a fair trial. The court has a discretion that must be exercised on the basis of the facts of each case and by taking into account considerations such as the nature and extent of a constitutional breach, the presence or absence of prejudice to the accused, the interest of society and, also, public policy. It is true that certain rights, such as the right not to be compelled to give self-incriminating evidence form an important part of the right to a fair trial, but because the right to a fair trial is so broad, it cannot be applied in the abstract, but must be interpreted and applied in factual context. Viewing the right to a fair trial narrowly could create problems that will become apparent later on in this discussion.

A full exposition of the meaning of the fair trial requirement in Canada (for purposes of exclusion of evidence) is given in the Canadian Supreme Court case of R v Stillman. Firstly, the impugned evidence must be classified as ‘non-conscriptive’ or ‘conscriptive’. The court stated:

'The crucial element which distinguishes non-conscriptive evidence from conscriptive evidence is not whether the evidence may be characterized as "real" or not. Rather, it is whether the accused was compelled to make a statement or provide a bodily substance in violation of the Charter. Where the accused, as a result of a breach of the Charter, is compelled or conscripted to provide a bodily substance to the state, this evidence will be of a conscriptive nature, despite the fact that it may also be “real” evidence. Therefore, it may be more accurate to describe evidence found without any participation of the accused, such as the murder weapon found at the scene of the crime, or drugs found in a dwelling house, simply as non-conscriptive evidence; its status as “real” evidence, simpliciter, is irrelevant to the s. 24(2) inquiry.'

The court noted that the admission of non-conscriptive evidence will rarely operate to render the trial unfair and the court should move on to consider the other factors that make up the test for exclusion. If the evidence is found to be conscriptive, the court must then consider whether admission of the evidence would render the trial unfair. Conscriptive evidence refers to ‘self-incriminating evidence in the form of statements or bodily substances conscripted from the accused in violation of the

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16 Section 35(3)(j) of the Constitution.
17 R v Stillman 1997 42 CRR (2d) 189 (SCC).
18 R v Stillman supra (n 17) at 219.
19 R v Stillman supra (n 17) at 227.
Charter and evidence derived from unlawfully conscripted statements.\textsuperscript{20} The admission of such evidence will, as a general rule, render the trial unfair. However, if it can be shown (on a balance of probabilities) that the impugned evidence ‘would have been discovered in the absence of the unlawful conscription of the accused,’\textsuperscript{21} admission of the conscriptive evidence will not render the trial unfair. The court noted that there are two principal grounds upon which it can be shown that the evidence would have been discovered absent a Charter violation:\textsuperscript{22}

‘(a) if the evidence would have been obtained, in any event, from an independent source; in other words, there were alternative non-conscriptive means by which the police would have seized the evidence and the Crown has established that the police would have availed themselves of those means … or

(b) if the evidence would inevitably have been discovered … ’

A finding of either of these two grounds means that the admission of the evidence will not render the trial unfair and the court must proceed to consider the other elements of the test for exclusion (the seriousness of the Charter breach and the impact of exclusion on the repute of the administration of justice).

**Defining inevitable discovery**

The Supreme Court of Appeal endorsed the doctrine of inevitable discovery in the case of *S v Pillay*.\textsuperscript{23} This doctrine becomes relevant when the exclusion of real evidence, whether in terms of the first or second leg of the test in s 35(5), is considered.\textsuperscript{24} If it can be said that unconstitutionally obtained real\textsuperscript{25} evidence would inevitably have been discovered by (alternative) lawful means, such evidence should not be

\textsuperscript{20} Ibid.

\textsuperscript{21} Ibid.

\textsuperscript{22} *R v Stillman* supra (n 17) at 230-1.

\textsuperscript{23} *S v Pillay* supra (n7).

\textsuperscript{24} Schwikkard & Van der Merwe op cit (n2) § 12 9 & § 12 10 for a discussion of the factors that are relevant under a s 35(5) application. The court in *S v Pillay* supra (n7) also considered inevitable discovery under both legs of the test in s 35(5) — see from 431.

excluded. A hypothetical source is therefore relied upon to include evidence that was actually obtained in violation of the accused’s constitutional rights. In such a situation it is agreed that a breach of the Bill of Rights caused the evidence to be obtained, but the state argues that an alternative lawful method of obtaining the evidence existed.

Inevitable discovery is often confused with what is known as the ‘independent source doctrine.’ Mahoney explains the difference:

‘[I]n a case where the independent source doctrine applies, the prosecution is able to demonstrate that even though a breach of rights has occurred, the evidence was actually obtained through an independent, proper source. While this enquiry may involve delicate factual determinations, it has nothing to do with the hypothetical enquiry of discoverability.’

26 See Schwikkard & Van der Merwe op cit (n2) § 12 10 6. Also see ML Luukkonen ‘Knock, knock. What’s inevitable there? An analysis of the applicability of the doctrine of inevitable discovery to knock and announce violations’ (2004) 35 McGeorgeLRev 153 at 168 for a general discussion. At first glance the ‘lawful means requirement’ should not create any difficulties. However, it could become problematic where a so-called ‘vicarious exclusionary challenge’ is at issue. In such an instance an accused will attempt to exclude incriminating evidence that was illegally obtained from someone else — see J Liljestrom ‘Lawful to the world: protecting the integrity of the inevitable discovery doctrine’ (2006) 58 HastingsLJ 177 for a general discussion in this regard. It is agreed with Liljestrom that the lawful means requirement should be interpreted to mean lawful to the world and not only lawful to the accused before court. Liljestrom notes (at 205): ‘The police cannot escape liability by pointing to an alternative unlawful source, as the officers have a duty to the public at large in the context of a hypothetical reconstruction of the facts in the inevitable discovery realm.’

27 Mahoney op cit (n4) note 44.

28 Created by the Supreme Court of the United States in Silverthorne Lumber Co v US 251 US 385 (1920) at 392. For a general discussion in this regard see Liljestrom op cit (n26) 181; Luukkonen op cit (n26) 166; Golden op cit (n25) 109.

29 Mahoney op cit (n4) 466.

30 Also see in this regard Murray v US 487 US 533 (1988) at 481 where Scalia J notes: ‘The inevitable discovery doctrine … is in reality an extrapolation from the independent source doctrine. Since the tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered.’ The inevitable discovery doctrine can therefore be described as ‘a speculative or hypothetical version of the independent source doctrine.’ (Golden op cit (n25) 98). With an independent source there is no causative link between the Bill of Rights violation and the obtaining of the evidence. In the case of inevitable discovery, however, there is such a causative link — see Wong Sun v US 371 US 471 (1965) at 487 (quoting from Silverthorne Lumber Co v US supra (n28) at 392). In Nix v Williams 467 US 431 (1984) at 459, Marshall J (dissenting) noted: ‘The “inevitable discovery” exception … differs in one key respect from its next of kin: specifically, the evidence sought to be introduced at trial has not actually been obtained from an independent source, but rather would have been discovered as a matter of course if independent investigations were allowed to proceed. … The inevitable discovery exception necessarily implicates a hypothetical finding that differs in kind from the factual finding that precedes application of the independent source rule.’
The doctrine of inevitable discovery was first applied by the United States Supreme Court in *Nix v Williams* as an exception to its judicially created exclusionary rule. In this case the location of a murder victim's body was discovered as a result of illegal questioning of the accused while in custody. At the same time the accused's rights were being violated, a search party of over 200 community volunteers was close to locating the body. The prosecution relied upon this fact to show that the body would have been inevitably discovered even if the police had never illegally questioned the accused. The Supreme Court allowed evidence of the condition of the body and in the process adopted the inevitable discovery doctrine. The court noted that if it can be established by a preponderance of the evidence that the relevant information ultimately would have been discovered by lawful means, then the deterrence rationale has so little basis that the evidence should be received. It can therefore be said that the evidence would have been found despite, and independent of, the particular violation.

The doctrine has certain important characteristics that are easily misunderstood. In *Hudson v Michigan* Breyer J explains the principles underlying the inevitable discovery doctrine:

‘That rule does not refer to discovery that would have taken place if the police behavior in question had (contrary to fact) been lawful. The doctrine

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32 *Nix v Williams* supra (n30) at 444.

33 *Hudson v Michigan* 547 US 1096 (2006). In this case police executing a search warrant for narcotics and weapons entered the petitioner’s home in violation of the Fourth Amendment’s ‘knock-and-announce’ rule and discovered both drugs and a weapon. The petitioner was subsequently charged with unlawful drug and firearm possession. The Supreme Court had to decide whether violation of this rule required the suppression of all evidence found in the subsequent search. The Court decided that it did not. Although the majority of the court based its decision on a lack of causality between the specific violation and the obtaining of the evidence, the dissenting opinion of Breyer J is very insightful as far as inevitable discovery is concerned.

34 In a dissenting opinion and with reference to *Silverthorne Lumber Co v US* supra (n28).
does not treat as critical what hypothetically could have happened had the police acted lawfully in the first place. Rather, “independent” or “inevitable” discovery refers to discovery that did occur or that would have occurred (1) despite (not simply in the absence of) the unlawful behavior and (2) independently of that unlawful behavior. The government cannot, for example, avoid suppression of evidence seized without a warrant (or pursuant to a defective warrant) simply by showing that it could have obtained a valid warrant had it sought one. … Instead, it must show that the same evidence, “inevitably would have been discovered by lawful means.” Nix v. Williams, 467 U.S., at 444 (emphasis added). “What a man could do is not at all the same as what he would do.” Austin, Ifs And Cans, 42 Proceedings of the British Academy 109, 111-112 (1956).

Inevitable discovery in S v Pillay

As was noted previously, the Supreme Court of Appeal applied the principle of inevitable discovery in S v Pillay by relying on Canadian jurisprudence in this regard. The relevant facts in S v Pillay are about the admissibility of certain evidence obtained as a result of the illegal monitoring of telephone conversations by the police. The evidence consisted of stolen money that was hidden in the roof of the accused's house. It was contended that evidence about the discovery of this money should not be admitted, since it was obtained as a result of a violation of the accused's rights. She was found guilty as an accessory after the fact to robbery. The state, however, contended that the evi-

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35 S v Pillay supra (n7).
36 S v Pillay supra (n7) at 432c-d where the court refers with approval to R v Burlingham (1995) 28 CRR (2d) 244 where the Canadian Supreme Court inter alia noted that (at 263): ‘It was held … that the “but-for” test will be met by the Crown when it satisfies the court on a balance of probabilities that the law enforcement authorities would have discovered the impugned derivative evidence regardless of the information arising from the unconstitutional conduct.’ Later on (at 433i-j) the court in S v Pillay refers with approval to another Canadian Supreme Court case (R v Collins [1987] 1 SCR 265) where the court listed a consideration of whether impugned evidence would have been obtained in any event as one of the factors to be considered in the determination of whether the admission of evidence will bring the administration of justice in disrepute. (Both these cases were also referred to by the Canadian Supreme Court in R v Stillman supra (n17)). Also see S v Hena 2006 (2) SACR 33 (SECLD) at 41d-f where the court considers ‘whether the evidence would otherwise have been discovered …’ as one of the factors to be taken into account in the exercise of its discretion to exclude unconstitutionally obtained evidence in terms of the second leg of the test in s 35(5). At 42h-i the court notes: ‘Finally, there was no evidence on record on which it could be concluded that the evidence of Lucas would have been discovered in any event … it would be speculative to conclude that this would have happened as a matter of probability.’ Also see S v Mkhize 1999 (2) SACR 632 (WLD) at 637j-638a. See SK Fenton ‘Recent developments in s. 24(2) jurisprudence’ (1997) 39 CLQ 279 at 304; CB Davison ‘Connecting real evidence and trial fairness: the doctrine of discoverability’(1993) 35 CrimLQ 493 at 496, 499 about the origins of this doctrine in Canada.
dence was real evidence (or derivative evidence) and thus admissible. (Such evidence will normally be admissible in terms of s 218(1) of the Criminal Procedure Act, but a court must still consider s 35(5) of the Constitution before such evidence will be admissible.)

The Supreme Court of Appeal decided that there could be no doubt that the money was found as a result of a violation of, first, the accused's right to privacy, in that her private communications had been illegally monitored, and second, a violation of her right to remain silent and her right against self-incrimination, in that she had been induced to make the statement that led to the finding of the money in the ceiling of her house without being informed of her rights. This statement showed that she had knowledge of relevant facts which prima facie operated to her disadvantage. This is a typical situation that arises under s 218(2) of the Criminal Procedure Act. The state, however, conceded that evidence about the content of this statement was inadmissible. The question remained, as is usually the case with s 218(1), whether evidence about the whereabouts of the money (the real or derivative evidence) should be admissible. The majority of the court decided with reference to s 35(5) of the Constitution that the evidence should have been excluded.

With reference to the first leg of the test in s 35(5) — trial fairness — the court relied upon the doctrine of inevitable discovery to conclude that the police would have found the money in the accused's house. However, with reference to the second leg of the test in s 35(5) — the repute of the administration of justice — the court decided that the evidence should have been excluded. In coming to this conclusion, the court inter alia referred to the fact that other means of investigation were available at the time of infringement of the accused's rights as

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37 Criminal Procedure Act 51 of 1977. Section 218(1) states: 'Evidence may be admitted at criminal proceedings of any fact otherwise admissible in evidence, notwithstanding that the witness who gives evidence of such fact, discovered such fact, or obtained knowledge of such fact only in consequence of information given by an accused appearing at such proceedings in any confession or statement which by law is not admissible in evidence against such accused at such proceedings.

38 S v Pillay supra (n7) at 430e-g.

39 Criminal Procedure Act 51 of 1977. Section 218(2) states: 'Evidence may be admitted at criminal proceedings that anything was pointed out by an accused appearing at such proceedings or that any fact or thing was discovered in consequence of information given by such accused, notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissible in evidence against such accused at such proceedings.

40 S v Pillay supra (n7) at 430c.

41 S v Pillay supra (n7) at 432i-433a.
a factor that made the violation more serious and the exclusion of evidence therefore more likely.42

While the outcome in S v Pillay is agreed with, it is difficult to understand the court’s reasoning in its consideration of the first leg of the test in s 35(5). The doctrine of inevitable discovery is applied when there was some other lawful means of obtaining the impugned evidence at the time of infringement. However, the court states in its conclusion of this aspect that: ‘We are prepared to accept that the police, armed with information gained from the illegal monitoring, would probably have searched the house, although they admittedly had no search warrant, and would have found the money.’43 Without the illegal monitoring the police would not have been in the house and there would have been no discovery. It is therefore not a question of what the police might have done had they not acted unlawfully, but a question of what they did do. Did they ‘set in motion an independent chain of events that would have inevitably led to the discovery and seizure of the evidence despite, and independent of, that behaviour?’44 The answer is in the negative.

Applying the doctrine of inevitable discovery under the first leg of the test in s 35(5) is also troubling in another respect. It can rightly be asked how a finding of inevitable discovery can ever change an unfair trial back into a fair one.45 In addition, if it is accepted that the ‘driving legal purpose’46 of exclusion is to deter constitutional violations, then the fact that the evidence could have been obtained otherwise is at best irrelevant here.47 Perhaps this confusion is due to the fact that a finding of true inevitability would simply mean that there is no causal connection between the Bill of Rights violation and the obtaining of

42 S v Pillay supra (n7) at 434e-f.
43 S v Pillay supra (n7) at 432i (own emphasis).
44 Per Breyer J in Hudson v Michigan supra (n33) at III A.
45 Mahoney op cit (n4) 449 gives a possible explanation for this. He states: ‘Once good legal minds began to expand the potential scope of evidence that could be described as conscriptive, and thus automatically inadmissible under Collins, … the result was Stillman’s sanctification of the discoverability escape valve. Somehow, the court concluded that if the tainted evidence would have been discovered through some alternative, proper means, this changed an unfair trial back into a fair one.’ Maybe there are problems here because of the restricted view that the Canadian Supreme Court has of the right to a fair trial. Schwikkard & Van der Merwe op cit (n2) also note about this aspect that: ‘It is difficult to follow the court’s reasoning in this regard. A better explanation might be that one must assume that admission of the evidence cannot affect the fairness of the trial because the “independent source” or “inevitable discovery” creates the “situation” — or even hypothesis — that the accused’s trial is no longer based on conscriptive evidence.’
46 See the dissenting opinion of Breyer J in Hudson v Michigan supra (n33) at II.
47 Penney op cit (n1) 131. Of course these arguments would not hold water if a broader and more flexible view of the right to a fair trial is adopted.
the evidence. It is an issue that should be considered at the start of a s 35(5) application, therefore it has no place in a consideration of the trial fairness requirement.

It is also somewhat confusing that one would consider the availability of other means of investigation as a factor favouring the admissibility under a consideration of the first leg of the test in s 35(5), but see it as a factor favouring exclusion under a consideration of the second leg of the test in s 35(5). Maybe it is simply a question of whether the police knew about the existence of other investigatory techniques at the time of infringement.48

It is submitted that the application of the inevitable discovery doctrine was unnecessary in this case. There was no indication of any other lawful means of obtaining the evidence and the court could have excluded the evidence after considering the first leg of the test in s 35(5). It is further submitted that the violation of the accused's right to privacy (the illegal monitoring of her conversations) should not be judged as separate from the violation of the accused's right to remain silent and her right against self-incrimination (the inducement to make

48 There seems to be a contradiction between the factors listed in R v Collins supra (n36). On the one hand, the fact that the evidence would have been obtained in any event is seen as one of the factors that goes in favour of admitting the evidence. (Also see the later decision of R v Stillman supra (n17) at § 72 in this regard.) However, when the seriousness of an infringement is considered, Lamer J suggests (at 285) that the availability of other investigatory techniques and the fact that the evidence could have been obtained without the infringement tend to render the violation more serious and therefore is a factor favouring exclusion. It is submitted that the question here should be whether the police in fact knew about their option to proceed properly at the time of the infringement. If they knew, their failure to proceed properly when that option was open to them would indeed indicate a blatant disregard for the Bill of Rights. This would then be a factor supporting the exclusion of evidence — see R v Accused (CA453/93) (1993), 11 CRNZ 410 at 417 where the New Zealand Court of Appeal stated that: 'If the police had chosen to do so they could have put themselves in a position to obtain a search warrant after the first meeting with (the informer). Had they done so they would probably have uncovered virtually all the documentary evidence they later obtained. 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 that the police can show they could have obtained a warrant if they had sought one. That is not an approach which in terms of the Long Title of the Bill of Rights would affirm, protect, and promote the right to be free from unreasonable search and seizure. Rather it would encourage warrantless searches and seizures.' (See Forbes op cit (n25) 1232 for examples in this regard.) Also see Fennelly op cit (n31) 1101. GC Olson 'North Carolina adopts the inevitable discovery exception to the exclusionary rule: - State v. Garner' (1993) 15 CampbellLRev 305 at 330 proposes that a requirement be read into the doctrine of inevitable discovery (in the American context) that would require that the prosecution demonstrate an absence of bad faith on the part of the investigating officers in order to deter intentional misconduct. Recent American cases seem to indicate the contrary — see generally Shapiro op cit (n25).
a statement that led to the finding of the money), but that it should be seen as part of a larger transaction in which a violation of rights occurred. Perhaps it is best if our courts steer clear of the doctrine of inevitable discovery. Elsewhere a number of commentators have pointed to the pitfalls in this doctrine. It is necessary to briefly consider the obvious ones.

Problems with inevitable discovery

First, the application of the doctrine could be seen to be arbitrary. If the circumstances in two cases are the same except for the fact that there is an alternative method by which the incriminating evidence would otherwise have been obtained in the one case, but no such alternative method in the other, the one person goes free, since his or her conviction was not otherwise inevitable. The two accused persons are equally guilty and in each case a constitutional right was infringed, but only one of the two accused receives a remedy. The discovery inquiry furthermore largely depends upon the accused’s diligence in covering up his or her tracks after the crime. Evidence that is well hidden away will therefore be excluded, whereas evidence will be admitted where an accused under the same circumstances was less careful in choosing how to dispose of evidence. It is therefore agreed with Mahoney that it is hard to support ‘a doctrine that openly rewards the extent of the damage control exercised by offenders …’

The relatively low standard of proof upon a balance of probabilities has also rightly been criticized as unacceptable for a doctrine that relies on a hypothetical reconstruction of the facts. In the end the outcome in a specific case might depend more upon ‘the intellectual callisthenics engaged in by the parties and the judge than upon the actual facts

49 Mahoney op cit (n4) 472.
50 Mahoney op cit (n4) 473.
51 Mahoney op cit (n4) 474.
52 See generally WD Delaney ‘Exclusion of evidence under the Charter: Stillman v. The Queen’ (1997) 76 CBR 521 at 527. The dissenting opinion in Nix v Williams supra (n30) at 458-60 would not join the majority because they would have required the prosecution to provide proof by clear and convincing reasons. In State v Garner 331 N.C. 491 (1992) at 510 Frye J noted the inconsistency of a preponderance standard with the question of inevitability of discovery: ‘Inevitability means “unable to be avoided, evaded, or escaped; certain; necessary.” Random House Webster’s College Dictionary 688 (1991). It thus seems inconsistent to ask whether it is “more likely than not” that evidence would have been “inevitably” discovered.’ Also see Shapiro op cit (n25) 309-311.
of the circumstances as presented to the court.\textsuperscript{53} A court will never know whether the police actually would have discovered the evidence. This ‘inherently speculative’\textsuperscript{54} nature of the doctrine demands a higher standard of proof, especially in view of the fact that a constitutional violation is at issue.\textsuperscript{55}

Perhaps the biggest problem will be a question of where to draw the line with the application of this doctrine. We might end up with a situation similar to that in the USA where courts will admit evidence obtained through a flagrant disregard for the law even if it cannot be said that there truly was an independent discovery.\textsuperscript{56} For example, the state might be able to prevent exclusion of evidence obtained without a warrant simply by showing that it could have obtained a valid warrant

\textsuperscript{53} Davison op cit (n35) 505. BS Coneely & EP Murphy ‘Inevitable discovery: the hypothetical independent source exception to the exclusionary rule’ (1976) 5 HofstraLRev 137 at 155 remarks: ‘[I]t is very difficult to hypothesize what the police response would be to a given situation because “it is extremely rare to find a normal, lawful police procedure which is regularly followed and inevitably would have produced the same exact information.” Just as there is a danger that sophisticated legal argument will be used to show a causal connection between the initial illegal conduct and the discovery of derivative evidence, the same “sophisticated argument” aided by hindsight can be used to show what the police would have done in a given situation.’ Also see Forbes op cit (n25) 1230.

\textsuperscript{54} JA Fishkin \textit{Nix v. Williams: an analysis of the preponderance standard for the inevitable discovery exception’ (1985) 70 IowaLRev 1369 at 1379. Grossman op cit (n31) 352 remarks: ‘[T]he inevitable discovery doctrine, by its very nature, calls upon a court to hypothesize or speculate about something that did not in fact occur …’. P Brooks “‘Inevitable discovery’ — law, narrative, retrospectivity’ (2003) 15 YaleJLaw&Human 71 at 76 notes: ‘[I]nvisible discovery perhaps has less to do with the way things happen in the world than with our narrative expectations. The body was there, waiting for the search party to discover it … To call discovery inevitable is to view the story from the perspective of the end and to subscribe to a possibly mechanistic notion that plots grind on to their logical outcome, …’

Brooks points out that (at 78): ‘Standing at the vantage point of the end of the story, the proof that the suspect was in fact guilty of illegal activity, the post-hoc logic of the inevitable discovery doctrine can be used to justify practically anything. It simply espouses the very logic of narrative, which makes sense by way of its end.’ Even though the American Supreme Court in \textit{Nix v Williams} supra (n30) at 444-445 notes that ‘inevitable discovery involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment …,’ it is difficult to see how such an application will be possible, since the end result will always be speculative. As Hessler op cit (n31) points out: ‘[A] showing of inevitable discovery is necessarily based on hypothetical circumstances.’ See PE Johnson ‘The return of the “Christian Burial Speech” case’ (1983) 32 EmoryJ 349 at 361 for criticism on the finding of inevitability in \textit{Nix v Williams} supra (n30).

\textsuperscript{55} In \textit{People v Payton} 380 N.E.2d 224 (1978) at 230 the court remarks about inevitable discovery: ‘The doctrine does not call for certitude as the literal meaning of the adjective “inevitable” would suggest. What is required is that there be a very high degree of probability that the evidence in question would have been obtained independently of the tainted evidence.’

\textsuperscript{56} See generally the dissenting opinion of Breyer J in \textit{Hudson v Michigan} supra (n33).
had it sought one. In such a situation it will be argued that impugned evidence would have been discovered legally pursuant to a warrant — the issuance of which was inevitable.57 If this becomes possible, it would take away a considerable amount of incentive to abide by the value system created by the Bill of Rights.58 Here the deterrent effect of the exclusionary rule should not be forgotten. Grossman59 notes about the inevitable discovery doctrine that:

‘The mechanical application of the inevitable discovery doctrine as espoused by the Supreme Court in Williams II is based on a combination of faulty logic and an unpersuasive reliance upon previous court decisions. ... What is particularly disturbing about such an open-ended, inevitable discovery doctrine is its potential, if not likely, effect of diminishing significantly the deterrent impact of the exclusionary rule.’

Deterrence as rationale for exclusion

It is agreed with many that it is possible to identify a central rationale for the exclusion of unconstitutionally obtained evidence: that of preventing or deterring the violation of constitutionally guaranteed rights.60 In this way the exclusionary rule ensures legality in the criminal process.61 The police and prosecution must operate within a system in which civil liberties and due process are constitutionally guaranteed. It further ensures that courts act in accordance with its constitutional duty and therefore makes a valuable contribution to the upholding of constitutional principles which govern the criminal justice system as a whole.62 In the long run social justice prevails over individual justice and ensures that citizens are not deprived of their constitutional rights. Related to this, is the principle that a person should not be held guilty of a crime just because in all probability, based upon reliable evidence,
he or she factually did what he or she is said to have done. Someone should be held guilty only if these factual determinations are made in a procedurally regular fashion, and by authorities acting within competencies duly allocated to them. Even though the factual determinations are, or may be, to his or her detriment, he or she is not to be held guilty if the various rules designed to protect him or her, and to safeguard the integrity of the process, are not given effect.

Such a notion would mean that the various aspects surrounding s 35(5) be interpreted with deterrence foremost in mind. This does not mean, however, that deterrence will be the only basis upon which unconstitutionally obtained evidence should be excluded: the discretionary test in s 35(5) is still the starting point. Thus, regardless of the effect on future police conduct, impugned evidence must be excluded if it will render the trial unfair or otherwise be detrimental to the administration of justice.

A full consideration of the popular reasons for the existence of an exclusionary rule is beyond the scope of this article. Such discussions are particularly worthwhile in countries that do not have an exclusionary rule entrenched in a constitution, but since s 35(5) firmly establishes such a rule in our Constitution, the mere embodiment of the test in the Constitution tells us a lot about the rationale behind our rule. Deterrence can be the only justification for excluding unconstitutionally obtained, albeit reliable, evidence. If we want to promote and ensure the value system created by the Constitution, we have to deter or prevent constitutional violations as far as possible. However, as with sentencing, it is not about ‘maximum’ deterrence, but about

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63 Also known as the ‘doctrine of legal guilt’ — see Schwikkard & Van der Merwe op cit (n2) § 12 4 3.
64 See HL Packer The limits of the criminal sanction (1968) 166.
65 In has been done on numerous previous occasions — see generally SE van der Merwe ‘Unconstitutionally obtained evidence: towards a compromise between the common law and the exclusionary rule’ (1992) 2 Stellenbosch Law Review 173. There are a number of possible rationales for excluding unconstitutionally obtained evidence, but it is possible to identify three main categories: judicial integrity, the corrective justice rationale and deterrence — see Penney op cit (n1) 110; Schwikkard & Van der Merwe op cit (n2) § 12 4. With judicial integrity, evidence is excluded in order to avoid judicial approval of police misconduct. Authors, however, agree that this rationale does not in itself justify the exclusion of unconstitutionally obtained evidence. In fact, it can be said that excluding illegally obtained evidence causes greater public outcry than admitting it does — see the remarks by Scott JA (dissenting) in S v Pillay supra (n7) at 451a-c. With corrective justice, evidence is excluded to compensate victims of police misconduct and in order to repair the original relationship between the state and the individual (see K Jull ‘Remedies for non-compliance with investigative procedures: a theoretical overview’ (1985) 17 OttawaRev 525 at 530). It can be said that this rationale provides excessive compensation to an accused person in the sense that exclusion of evidence will be much more valuable to an accused than avoiding the harm caused by constitutional violations.
‘optimum’ deterrence. Sanctions for constitutional violations should, accordingly, only be awarded when their benefit (increased deterrence) is more than their social costs (lost convictions). Because of this result deterrence as rationale for excluding unconstitutionally obtained evidence has been criticized on many occasions. It is generally said that its social costs are too high and that there are other more effective methods of deterring constitutional violations.

Exclusion is not seen as an effective method of deterring police misconduct for a number of reasons, such as the fact that police are often unaware of complex and ever changing constitutional law relating to their daily functions; the fact that the police are often not informed about the eventual exclusion of evidence they have collected and the fact that they do not always understand the reasons for exclusion when informed about it. There is also some empirical evidence that could be interpreted to show that exclusion has little deterrent impact. Notwithstanding these arguments, one has to agree with Penney that ‘logic and intuition suggest that the prospect of evidentiary suppression and the concomitant loss of convictions must have some impact on police behaviour.’ Exclusion may not be as effective as for example a fine or imprisonment, but it has a definite effect. It serves as a basis for performance evaluations and will cause police to increase their training efforts. In turn this will ensure greater compliance with and respect for the law.

Proponents of alternatives to exclusion claim that such methods would achieve as much deterrence as the exclusionary rule without producing any lost convictions. However, there are many practical problems with the implementation and application of such schemes. It is in any event doubtful whether further restriction of police power will be tolerated in the crime-ridden society we currently live in. The most convincing argument against instituting alternatives to exclusion is the fact that these alternatives would not produce the same balance between deterrence and truth-seeking.

67 Penney op cit (n1) 113 and the sources referred to by him.
68 Studies in the USA have indicated that conclusions in this regard are generally exaggerated and that the portion of convictions lost because of evidentiary exclusion is actually very low — see Penney op cit (n1) 119.
69 Penney op cit (n1) 114.
70 Penney op cit (n1) 117.
71 The majority, however, do recognise that the usual criminal, civil, and administrative remedies have not been effective in deterring misconduct — Penney op cit (n1) 120.
Penney\textsuperscript{72} points out that such schemes are very likely to generate either too little or too much deterrence. Most infringements of rights by the police are of a minor nature that would not entitle a victim to much compensation. Not only would most victims be unwilling to go through the tedious process of obtaining such compensation, but the police would also see this as a small price to pay for a desired end result. On the other hand, having an alternative remedy that would impact police conduct severely enough to influence future conduct, would likely cause police to be overcautious where they think that they are entitled to use certain investigative methods, but are not certain. Rather than risk the severe consequences of an alternative to exclusion, they would forego the opportunity to obtain possible vital evidence. Such a mindset would, in view of ‘criminal procedure’s inevitable complexity’, prevent too many legal intrusions.\textsuperscript{73}

In addition to the previous arguments, it has often been said that alternatives to exclusion do not really provide an alternative.\textsuperscript{74} If these alternatives deterred effectively, evidence that could only have been obtained illegally would never have been discovered. Factually guilty suspects would therefore also escape conviction. The closer one gets to perfect compliance, the less evidence will be gained, regardless of the remedy involved. Even though exclusion is not a perfect remedy, one has to agree that it is the optimal one to ensure police respect for constitutional guarantees.

### Conclusion

The doctrine of inevitable discovery creates the potential to oversee a serious violation of the Bill of Rights, thereby making unnecessary inroads into the value system created by the Constitution. If one accepts, however, that there could be instances where it is possible to demonstrate inevitability in such a compelling way that it is possible to say that discovery of evidence would have taken place, and not merely could have taken place, the doctrine may still have a place

\textsuperscript{72} Penney op cit (n1) 121. In the American context it has been noted that the deterrent effect of damage actions ‘can hardly be said to be great,’ because such actions are ‘expensive, time consuming, not readily available, and rarely successful.’ (P Stewart ‘The road to Mapp \textit{v} Ohio and beyond: the origins, development and future of the exclusionary rule in search and seizure cases (1983) 83 ColumLRev 1365 at 1388).

\textsuperscript{73} Penney op cit (n1) 122.

in our law as part of the independent source doctrine. In such an instance the inevitable discovery doctrine is actually subsumed by the independent source doctrine, except that there was no actual discovery of evidence. The prosecution will therefore have to prove beyond reasonable doubt (and not merely on a balance of probabilities), that evidence would have been obtained from an independent and proper source that stand separate from the constitutional misconduct and which was not disclosed by the unlawful conduct. Because it can be said that unconstitutionally obtained evidence was in such a case obtained from an independent and proper source, there is simply no causative link between the Bill of Rights violation and the challenged evidence. A proven hypothetical independent source will therefore break the causal connection between the illegality and the challenged evidence. In such an instance the deterrent function of the exclusionary rule will be overemphasised.

75 *US v Boatwright* 822 F.2d 862 (9th Cir. 1987) at 864 the court notes: ‘There will be instances where, based on the historical facts, inevitability is demonstrated in such a compelling way that operation of the exclusionary rule is a mechanical and entirely unrealistic bar, preventing the trier of fact from learning what would have come to light in any case.’

76 Such a standard of proof would confine the inevitable discovery doctrine to circumstances that are functionally equivalent to an independent source — see the dissenting opinion of Judge Brennan in *Nix v Williams* supra (n30).