

# **CADDER AND BEYOND: SUSPECTS' RIGHTS AND THE PUBLIC INTEREST**

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## **A. INTRODUCTION**

In a system of criminal law and justice still underlain by the common law such as Scotland's, individual cases do, on occasion, effect major change in legal principle.<sup>1</sup> It is less usual, however, for such cases to have an instant and seismic effect on practice as did the Supreme Court's decision in the case of *Cadder v HM Advocate*<sup>2</sup> in 2010, though this judgment was not unexpected.<sup>3</sup> In their blog, MacQueen and Wortley described it as 'a major decision shaking the Scottish criminal justice system to its roots'.<sup>4</sup> The case concerned the system of 'detention'<sup>5</sup> for police questioning then operating in Scotland in the earlier stages of the criminal process (before arrest and charge) and its conformity to the Article 6 fair trial guarantees of the European Convention on Human Rights. *Cadder* decided that the treatment of suspects at the initial interview stage in Scotland was not adequate to ensure their right to a fair trial under Article 6(3)(c) – the right to 'defend [one]self in person or through legal assistance of [one's] own choosing or, if [one] has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require' - read in conjunction with Article 6(1)'s more general right to a fair trial.

There has already been extensive discussion, highlighting both positive and negative aspects of the merits of, and necessity for, the Supreme Court judgment<sup>6</sup> so the chapter is less concerned with this matter. *Cadder* also provoked considerable, and ultimately worthwhile, soul-searching<sup>7</sup> both as to the changes to the law required by the judgment and, more

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<sup>1</sup> For example, *Lord Advocate's Reference (No 1 of 2001)* 2002 SLT 466 on rape; *Drury v HM Advocate* 2001 SLT 1013 on the *mens rea* of murder.

<sup>2</sup> 2011 SC (UKSC) 13 (hereafter '*Cadder*').

<sup>3</sup> See *Cadder*, para. 56 on the disruption already caused to criminal practice by the decision in *Salduz v Turkey* (2009) 49 EHRR 19 (hereafter '*Salduz*') on which the Supreme Court's reasoning in *Cadder* was substantially based.

<sup>4</sup> 'Cadder as the Dust Settles', *Scots Law News* 11 December 2010: available at:

<http://www.sln.law.ed.ac.uk/2010/12/11/cadder-as-the-dust-settles/> (last accessed 30 May 2016).

<sup>5</sup> Criminal Procedure (Scotland) Act 1995 ('1995 Act'), s. 14.

<sup>6</sup> See, for example, F Leverick, 'The right to legal assistance during detention', (2011)15 *Edin LR* 152; J McCluskey, 'Supreme error', 15 (2011) *Edin LR* 276; Lord Drummond Young, 'Scotland and the Supreme Court', (2013) 2 *Cambridge Journal of International and Comparative Law* 67.

<sup>7</sup> See *The Carloway Review: Report and Recommendations* (2011): available at:

<http://www.gov.scot/Resource/Doc/925/0122808.pdf> (last accessed 30 May 2016); and the *Post-Corroborator Safeguards Review – Final Report* (April 2015), available at:

<http://www.gov.scot/Resource/0047/00475400.pdf> (last accessed 30 May 2016); and *Post-Corroborator Safeguards Review: Report of the Academic Expert Group* (August 2014): available at:

<http://www.gov.scot/Resource/0046/00460650.pdf> (hereafter '*Expert Group Report*') (last accessed 1 Sept 2016).

reflectively, as to the fit of the rights accorded to a suspect in the preliminary stages of an investigation within the overarching framework of the criminal justice system which also accommodates the interests of victims. This issue, of the balance of the rights of suspects with victims' interests, and the relationship to the public interest which takes account of both,<sup>8</sup> is discussed more fully here.

The High Court has held that the course of justice in an individual case starts at the very beginning of a police investigation even when it is not entirely clear whether an incident constitutes a crime.<sup>9</sup> This chapter moves ahead of that starting point to the time when the police first form the view that reasonable grounds have emerged to suspect that a particular individual is the likely perpetrator. It will, initially, briefly outline the facts of *Cadder*. It will then consider, from a rights perspective, the status of 'detention' which was the subject of the Supreme Court's criticism, its history and development and its perceived shortcomings, which are at the heart of the decision. From there it will examine post-*Cadder* litigation, including the so-called 'sons of *Cadder*'<sup>10</sup> taking into account the regime for provision of legal assistance to suspects, waiver of the right to legal representation generally when making a statement to the police, confession evidence, the so-called "fruit of the poisonous tree" and the rights framework at the earliest time when an individual begins to make the shift from witness to suspect. Apart from the first, these matters were not directly implicated in the case but have subsequently arisen. A key question within the chapter is whether the Scottish criminal justice system has now sufficiently addressed the *Cadder* criticisms. At the time of writing, the law is in a transitional phase in that the Criminal Justice (Scotland) Act 2016 ('the 2016 Act') which provides a framework for police investigation of crime (including questioning and search) has been enacted but (for the most part) not yet brought into force. Its provisions are examined where relevant.

### **The facts of *Cadder***

The facts of *Cadder* are not remarkable but in their relative ordinariness, they reflect clearly the practice at the time. On 13<sup>th</sup> May 2007, Peter Cadder was detained at his home and taken from there to a local police station where he was interviewed under caution in a procedure which was fully in accordance with the then Scots law<sup>11</sup> on police detention and questioning.<sup>12</sup> He was not given the opportunity to obtain, therefore nor did he have the benefit of, legal advice before the interview.<sup>13</sup> He made various admissions.<sup>14</sup> At his trial (on charges arising from an attack on two complainers by a group of youths of which he formed

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<sup>8</sup> See Crown Office and Procurator Fiscal Service, *Prosecution Code*: available at [http://www.copfs.gov.uk/images/Documents/Prosecution\\_Policy\\_Guidance/Prosecution20Code20\\_Final2018\\_0412\\_1.pdf](http://www.copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/Prosecution20Code20_Final2018_0412_1.pdf) (last accessed 30 Aug 2016).

<sup>9</sup> *Watson v HM Advocate* 1993 SCCR 875.

<sup>10</sup> See, for example, PR Ferguson and RM White, 'Sins of the father? The "sons of *Cadder*"', 2012 *Crim LR* 357.

<sup>11</sup> The matter had been considered and determined in the Crown's favour in *HM Advocate v McLean* 2010 SLT 73 (hereafter 'McLean').

<sup>12</sup> 1995 Act, ss. 14 and 15.

<sup>13</sup> *Cadder*, para. 2.

<sup>14</sup> *Ibid.* para. 5.

part), an audio recording of the police interview was played in full to the jury and they were supplied with transcripts. The sheriff made reference to the interview in his charge.<sup>15</sup> Cadder was convicted of assault to the severe injury and permanent disfigurement of one complainer, of assault of the other and of breach of the peace.<sup>16</sup> On 26<sup>th</sup> October 2010, the Supreme Court determined that the failure to offer legal advice in relation to the police interview contravened Cadder's right to a fair trial under Article 6. This was in direct contradiction of rulings about the adequacy of Scots law in this respect made by the Scottish appeal court in previous cases<sup>17</sup> and it required an immediate and emergency change to the law, effected by the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 (the 'emergency legislation') which was brought into force on 30<sup>th</sup> October 2010.

*Cadder*, then, turned a spotlight on the law of evidence, in the pre-trial stage, drawing attention to this initial period of questioning, to its central role in the criminal process as a whole, and to the key rights which the law accords to those who are held by the state in this way. The relevant legal principles are practical in that they set down the rules by which crime is to be investigated.<sup>18</sup> They are also directly underscored by more broadly drawn, somewhat aspirational, principles derived from human rights. Thus the operation of the law involves some balancing of rights and interests, to provide protection for individuals suspected of crime from unfair forms of investigation by the state without losing sight of other objectives such as ensuring that those guilty of criminal offences are identified and convicted.

The judgments in *Cadder* relied upon a previous decision of the European Court of Human Rights, *Salduz v Turkey*. That case had considered the compatibility with Article 6 of a pre-trial detention and interrogation procedure in Turkey which, at the time, also lacked any possibility of access to legal advice. Both cases recognise 'the particularly vulnerable position that the accused finds himself in at the investigation stage of the proceedings'<sup>19</sup> 'the effect of which is amplified by the fact that legislation on criminal procedure tends to become increasingly complex, notably with respect to the rules governing the gathering and use of evidence.'<sup>20</sup> The concept of vulnerability is used in a number of legal contexts for a variety of purposes<sup>21</sup> and applied in a technical sense to particular groups.<sup>22</sup> Here, however it is used non-technically to signify the exposed situation in which a suspect held in police custody for questioning finds him/herself, given the greater resources of the state, his/her potential adversary in a possible trial. It is important to bear in mind that this vulnerability underlies the suspect's position throughout the early investigative stages of the criminal process with which this chapter is concerned.

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<sup>15</sup> *Ibid.* para. 7.

<sup>16</sup> *Ibid.* paras. 6 and 7.

<sup>17</sup> *McLean; Paton v Ritchie* 2000 JC 271.

<sup>18</sup> 1995 Act, part II.

<sup>19</sup> *Cadder*, para. 33 *per* Lord Hope, making reference to *Salduz*.

<sup>20</sup> *Salduz*, para. 54.

<sup>21</sup> See, for example, VE Munro and J Scoular, 'Abusing vulnerability? Potential law and policy responses to sex work in the UK' (2012) 20 *Feminist Legal Studies* 189.

<sup>22</sup> For example, 'vulnerable witness' is defined to include children and the mentally disordered who are giving or to give evidence: 1995 Act, s. 271(1)(a) and (b)(i).

## B. THE STATUS OF ‘DETENTION’

It is necessary first of all to be clear about Cadder’s legal status at the time of his police interview. He had been detained in accordance with s. 14 of the Criminal Procedure (Scotland) Act 1995. In order to detain, a police officer must ‘ha[ve] reasonable grounds for suspecting that a person has committed or is committing an offence punishable by imprisonment’.<sup>23</sup> Currently, and at the time of *Cadder*,<sup>24</sup> detention precedes ‘arrest and charge’ which occurs once the initial suspicion justifying the detention has crystallised so that the police are reasonably sure that the suspect has carried out the offence – that is when sufficient evidence has been found (including but not limited to that obtained in interview) that s/he is the perpetrator. This matters because questioning of a suspect by the police must cease on arrest. The issue was explored in *Lukstins v HMA*.<sup>25</sup>

In that case, the suspect was arrested, following expiry of the detention period, at around 5 am. He was not, however, actually charged with the offence (rape) for a further 16 hours and he appealed his subsequent conviction on the basis that the police had no right to take an oral DNA swab from him when his status was ‘charged’ rather than ‘detained’ or ‘arrested’.<sup>26</sup> On the substantive point, the High Court took the view that such a swab was real evidence, and that taking it did not therefore breach Lukstin’s rights to silence and not to incriminate himself. There was no scope (unless he volunteered information) for him actually to *say* anything as part of the swabbing procedure.<sup>27</sup> More significantly for present purposes, the court determined that the law operated on the assumption that arrest and charge would normally happen almost simultaneously.<sup>28</sup> The key point is the judgment’s reiteration of the generally accepted principle that ‘questioning after charge, ... [is] contrary to the right to silence and the privilege against self-incrimination. After charge, the police [are] *functi* so far as questioning [is] concerned.’<sup>29</sup>

### **The evolution of detention and its relevance to *Cadder***

Clearly, then, questioning must take place in the period before arrest and charge – during detention – and the Scottish courts had, previously, been critical of any attempt to avoid arresting and charging a suspect, once suspicion had crystallised, so as to be able to continue

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<sup>23</sup> 1995 Act, s. 14(1).

<sup>24</sup> The 2016 Act replaces the status of ‘detention’ with that of arrest (s. 1) and the stage beyond that, once suspicion has crystallised to allow the suspect to be formally charged as being ‘officially accused’ (s. 63).

<sup>25</sup> 2013 JC 124 (hereafter ‘*Lukstins*’).

<sup>26</sup> S. 18 of the 1995 Act which authorises the taking of samples only applies where a person has been arrested and is in custody or is detained under s. 14(1).

<sup>27</sup> *Lukstins*, especially paras. 33 and 39 *per* Lord Carloway and paras. 66–68 *per* Lord Doherty.

<sup>28</sup> This apparently allowed it to ignore the 16-hour period between the two in the actual case and their consequent *de facto* separation.

<sup>29</sup> *Lukstins*, para. 9 (from defence pleadings). See also para. 64 *per* Lord Doherty. See also *Cadder*, para. [27] *per* Lord Hope; *McLean*, para. 27 *per* Lord Justice-General Hamilton.

questioning him/her.<sup>30</sup> The reason for this enforced cessation of questioning is based in adversarial theory and has its roots in 19<sup>th</sup> century Scottish court practice. According to Duff, at that time, as soon as an individual was suspected of an offence, s/he had to be brought before a judge for an examination, the purpose of which was ‘to help the accused explain his position [rather than] to generate incriminating evidence for any subsequent trial’.<sup>31</sup> This developed into a practice that the stage of investigating a crime came to an end once the likely perpetrator had been identified. At that point, the prosecutorial process commenced and it was not acceptable, under adversarial ideology, for the state, which would be the suspect’s adversary in the subsequent trial, to seek by further questioning to obtain evidence from him/her which could then be used against him/her by it, in its role as that adversary.<sup>32</sup>

It is clear, then, that detention for questioning is a recognised concept historically. It passed into modern Scots law in terms of s 2 of the Criminal Justice (Scotland) Act 1980, based on the recommendations of the Thomson Committee on Criminal Procedure in Scotland<sup>33</sup> which reported in 1975. The Committee’s discussion on the issue reflects the balancing between the rights of the suspect to a fair trial on the one hand and the state’s interest in conviction of the guilty on the other. Duff has helpfully examined this through the prism of Packer’s enduring dichotomy between the models of due process and crime control,<sup>34</sup> showing how Scots law has tended to move between the two.<sup>35</sup>

The due process model ultimately holds that, ‘it is far worse to convict an innocent man than to let a guilty man go free. There is no worse error in the ... criminal justice system than the wrongful conviction of an innocent man or woman’.<sup>36</sup> Its concern is with ensuring that the state proves its case fully against a suspect and that all of his/her rights within that process are properly respected. The crime control model, on the other hand is primarily concerned with efficiency so that the system should, with safeguards, operate to obtain the evidence to convict those who are guilty in a speedy and routinized fashion. As Lord Justice-General Cooper stated in *Lawrie v Muir* in 1950:

‘The protection of the citizen is primarily protection for the innocent citizen against unwarranted, wrongful and perhaps highhanded interference, and the common

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<sup>30</sup> *Wade v Robertson* 1948 JC 117, p. 120 *per* Lord Justice Clerk Thomson; *Stark and Smith v HMA* 1938 JC 170, pp. 173 – 174 *per* Lord Justice General Normand and p. 175 *per* Lords Fleming and Moncrieff. See also *Rigg v HMA* 1946 JC 1 where the police merely asked the suspect to remain at the police station and *Chalmers v HMA* 1954 JC 66 (hereafter ‘*Chalmers*’) where the accused was cross-examined unfairly by police before being charged.

<sup>31</sup> P Duff, ‘Adversarial ideology and police questioning after trial’, 2013 *Juridical Review* 1, p. 6.

<sup>32</sup> *Ibid.* p. 14.

<sup>33</sup> Scottish Home and Health Department and Crown Office, *Criminal Procedure in Scotland* (Second Report) Cmnd. 6218 (1975) (‘Thomson Committee’).

<sup>34</sup> H L Packer, ‘Two models of the criminal process’, (1964) 113 *University of Pennsylvania Law Review* 1.

<sup>35</sup> P Duff, ‘*Chalmers to Cadder*: full circle on police interrogation’, (2015) 19 *Edin LR* 186.

<sup>36</sup> R A Leo et al, ‘Promoting accuracy in the use of confession evidence: an argument for pre-trial reliability assessments to prevent wrongful convictions’, (2013)85 *Temple Law Review* 759, pp. 820 – 821, (quoting *In re Winship*, 397 U.S. 358, p. 372 (1970) (Harlan, J., concurring)) (footnote omitted).

sanction is an action of damages. The protection is not intended as a protection for the guilty citizen against the efforts of the public prosecutor to vindicate the law.<sup>37</sup>

The Thomson Committee's report clearly recognises the two, potentially conflicting, aims of due process and crime control and considers a number of important aspects of their practical application, placing itself, with admirable transparency, towards the crime control end. It stated that the situation must:

'necessarily be a compromise between these two interests – that of the public as represented by the police, and that of the individual. It must meet the requirements of the police for such powers as are necessary to enable them to carry out the duties of crime-detection in the interests of society, without giving them power to ride roughshod over individuals; it must safeguard the individual's right to go about his lawful business free from unreasonable police interference, and his right to have his personality and human dignity respected when he is in the hands of the police, without creating a situation in which criminals can render the investigation of their crimes difficult or even impossible merely by standing on their rights. ... Society must make up its mind whether or not such things as detaining and questioning suspects are acceptable, and either prohibit them, or legalise them under suitable safeguards.'<sup>38</sup>

Parts of this passage were quoted by Lord Hope in his judgment in *Cadder*<sup>39</sup> after he had stated that it was 'remarkable that, until quite recently, nobody thought that there was anything wrong with this [detention] procedure.'<sup>40</sup> In justifying detention, the Thomson Committee went on to state:

'Although a person who has been charged with an offence is entitled to an interview with a solicitor, we *recommend* that a solicitor should not be permitted to intervene in police investigations before charge. The purpose of the interrogation is to obtain from the suspect such information as he may possess regarding the offence, and this purpose might be defeated by the participation of his solicitor. It is for this reason that we recommend ... that it will be a matter of police discretion whether to allow the detainee an interview with his solicitor.'<sup>41</sup>

Lord Hope commented

'There was a clear signal here that in the committee's view the public interest in the detection and suppression of crime outweighed any disadvantage to the detainee in being subjected to police questioning in the absence of his solicitor. It did not rule out the possibility of his being given legal advice before he was questioned. But this was to be at the discretion of the police. The rights of the detainee were to take second place to the public interest in allowing the police to question him without being

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<sup>37</sup> 1950 SLT 37, pp. 39 – 40.

<sup>38</sup> Thomson Committee, para. 2.03.

<sup>39</sup> *Cadder*, para. 22.

<sup>40</sup> *Cadder*, para. 4.

<sup>41</sup> Thomson Committee, para. 7.16 (italics in original).

deflected from their task by the presence of a solicitor. The statutory procedure was framed on this basis.<sup>42</sup>

Ferguson has persuasively argued that the right of suspects is not against self-incrimination, but against *forced* self-incrimination.<sup>43</sup> This position is supported by Lord Hope in *Ambrose v Harris*,<sup>44</sup> and it is clear that, in individual cases, the Scottish courts have always exercised the function of identifying and excluding self-incriminatory statements made under undue pressure.<sup>45</sup> If, however, a legal system legislates for a situation (detention) where it is hoped that the suspect will reveal all s/he knows about the crime, and determines that, for the purposes of facilitating this, s/he should not have access to a solicitor, this suggests promotion of a culture where the balance is set towards self-incrimination. As MacQueen and Wortley stated, ‘the Scottish rule, being explicitly based upon the proposition that the accused must be given every chance to incriminate himself, could not possibly stand’.<sup>46</sup> Though *Cadder* calls Scots criminal procedure to account on the basis only that its procedural framework lacked access to legal advice in the initial stages, its corrective (the offer of legal advice) is explicitly underlain by the privilege against self-incrimination.<sup>47</sup> Any systemic tendency towards creating the conditions in which self-incrimination can flourish would seem to lie outwith the spirit of the judgment. It remains important to examine the legal principles underlying the reformed system with this in mind.

## C. THE POST-CADDER LEGAL LANDSCAPE

### 1. The Significance of Police Interviews with Suspects

In determining *Cadder* as it did, the Supreme Court was aware of the profound practical repercussions for the Scottish criminal justice system,<sup>48</sup> in that any person who had a police interview without access to a lawyer potentially now had reason to dispute any criminal process where answers from that interview were used in evidence. Cases currently in train where such evidence was to be used were similarly tainted. Indeed, ‘[I]ess than four months after *Cadder* ... was decided, it was announced that the ruling in that case had resulted in the Scottish Crown Office and Procurator Fiscal Service abandoning 867 prosecutions.’<sup>49</sup> In terms of the application of their ruling, Lords Hope and Rodger therefore stated that the court’s decision was not retrospective and (other than by a reference from the Scottish

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<sup>42</sup> *Cadder*, para. 23.

<sup>43</sup> PR Ferguson, ‘The repercussions of the *Cadder* case: the ECHR’s fair trial provision and Scottish criminal procedure’, 2011 *Crim LR* 743; Ferguson and White, ‘Sins of the father?’.

<sup>44</sup> 2012 SC (UKSC) 53, (hereafter ‘*Ambrose*’) paras. 34, 56 and 57.

<sup>45</sup> See, for example, *Paul v HM Advocate* 2014 SCL 230 (hereafter ‘*Paul*’).

<sup>46</sup> MacQueen and Wortley, ‘*Cadder* as the dust settles’.

<sup>47</sup> *Cadder*, paras. 34 and 35 *per* Lord Hope.

<sup>48</sup> *Cadder*, para. 60 *per* Lord Hope.

<sup>49</sup> Ferguson, ‘Repercussions ...’, p. 743 (footnote omitted). Fiona Raitt suggested that the figure was even higher (1,286): *Evidence: Principles, Policy and Practice* (2<sup>nd</sup> ed) (2013: W Green), para. 9-08.

Criminal Cases Review Commission ('SCCRC'))<sup>50</sup> cases which had been finally decided could not be reopened.<sup>51</sup> Lord Hope explained the position thus:

'Cases which have not yet gone to trial, cases where the trial is still in progress and appeals that have been brought timeously ... but have not yet been concluded will have to be dealt with on the basis that a person who is detained must have had access to an enrolled solicitor before being questioned by the police, unless in the particular circumstances of the case there were compelling reasons for restricting this right. As for the rest, ... the retrospective effect of a judicial decision is excluded from cases that have been finally determined ...'.<sup>52</sup>

Where the suspect had not had the offer of access to a solicitor (as in all pre-*Cadder* cases because the law did not provide for this or, indeed, require it) evidence from the police interview was simply excluded and a test was applied derived, again, from *dicta* of Lord Hope in *Cadder*.<sup>53</sup> The appeal court had to determine whether 'it was clear that there was insufficient evidence for a conviction without the evidence of the police interview or that, taking all the circumstances of the trial into account, there was a real possibility that the jury would have arrived at a different verdict had they not had that evidence before them'.<sup>54</sup>

In some respects, these are difficult questions for appeal courts to answer since they rest on matters which would be for the trier of fact to determine at trial. How can it be known, after the event, what verdict a jury would have reached if the evidence presented to them had been in any way different? Equally, through this formulation by the Supreme Court, these matters are now cast as legal rather than factual so that it becomes legitimate for the High Court (as the court of appeal) to determine them in individual cases. In *Dixon*<sup>55</sup> where the appellant's answers at police interview amounted to a denial of his involvement in the offence, the view was taken that there was a sufficient circumstantial case against him without this evidence.<sup>56</sup> It was also noted that, at the time of the trial, well before *Cadder*, the defence might have objected to any attempt to exclude the potentially exculpatory interview answers.<sup>57</sup> Similarly, in *Anoliefo v HMA*,<sup>58</sup> an appeal *inter alia* against a rape conviction, the appeal court took the view that there was sufficient evidence in support of the complainer's account, which the jury had clearly believed, to uphold the conviction once evidence from the appellant's police interview had been excluded.<sup>59</sup> In *GM v HM Advocate*,<sup>60</sup> on the other hand, the High Court determined that, since the evidence from the police interview could no longer be relied upon,

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<sup>50</sup> *M v HM Advocate* 2012 SCL 1037.

<sup>51</sup> *Cadder*, paras. 60 *per* Lord Hope and 98 *per* Lord Rodger.

<sup>52</sup> *Cadder*, para. 60.

<sup>53</sup> This test was itself based on the non-disclosure (of Crown evidence) case of *Mclnnes v HM Advocate* 2010 SLT 266.

<sup>54</sup> *Cadder*, para. 64. For application of this test in practice see, for example, *Dixon v HMA* [2012] HCJAC 50, para. 22 *per* Lady Paton.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.* paras. 26 and 30 *per* Lady Paton.

<sup>57</sup> *Ibid.* para. 32 *per* Lady Paton.

<sup>58</sup> 2013 SCL 106.

<sup>59</sup> *Ibid.* paras. 24 and 25 *per* Lord Mackay of Drumadoon.

<sup>60</sup> [2011] HCJAC 112.



the Crown was seeking to have the conviction upheld ‘on a different basis from that on which it presented its case at the trial.’<sup>61</sup> This meant, in the court’s view, that there was a real possibility that, absent the interview, the jury might have reached another verdict.<sup>62</sup> The appeal was successful on that point. Since *Cadder*, then, it has simply been accepted that police interviews conducted without the offer of access to a lawyer constitute inadmissible evidence and the appeal court has demonstrated its ability to identify those cases in which this inadmissibility creates a real possibility that the jury would have arrived at a different verdict.

This consideration of what would have happened at trial in the *absence* of interview evidence also, perhaps paradoxically, focuses attention on the significance in general, within the criminal process, of such interviews and their key function in gathering evidence (whether it is incriminating or exculpatory). To reach the point of ‘reasonable suspicion’ that an individual has committed an imprisonable offence (the test for detention),<sup>63</sup> the criminal process must already have progressed some distance. Especially from this point, as a potential suspect is emerging, Hodgson has noted the importance, for a robust defence, of continuity throughout the various phases of the process. Referring to the practice in England and Wales of using ‘accredited representatives’ (that is, not qualified lawyers) for the police station phase, she notes that such advisers

‘have no experience of court work. In this way, their work tasks are limited to one phase of the case and they lack the practical expertise to know how things that happen at the police station (such as a breach in procedure) might play out at trial. This creates a segmented system, and builds in a model of discontinuous representation for the suspect, who will be represented by someone else at court.’<sup>64</sup>

The importance of legal advice at the interview stage generally and in terms of both the letter and the spirit of the *Cadder* judgments is clear.

In principle, the 2016 Act recognises this. Indeed, it demonstrates that a protracted process of law reform, even one having its origins in an emergency situation, may eventually, following wide consultation, produce well considered legislation.<sup>65</sup> <sup>66</sup> In terms of s. 44, suspects have a right to a private consultation with a solicitor at any time after being taken to the police station. This must, however, be considered alongside the period for which a suspect may now be held in police custody before being ‘officially accused’, that is, formally charged.<sup>67</sup> Until

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<sup>61</sup> Ibid. para 25 *per* Lord Justice Clerk Gill.

<sup>62</sup> Ibid. para 26.

<sup>63</sup> 1995 Act, s 14(1).

<sup>64</sup> J Hodgson, ‘The role of lawyers during police detention and questioning: a comparative study’, (2015) 7 *Contemporary Readings in Law and Social Justice* 7, p. 10.

<sup>65</sup> On various ways to conduct law reform, and the advantages of that adopted by Lord Bonomy’s *Post-Corroborated Safeguards Review*, see J Chalmers, ‘Criminal law reform in Scotland’, (2015) 19 *Edin LR* 399, p. 403; Chalmers, Leverick and Wilson Stark, ‘The Process of Law Reform’ in this book.

<sup>66</sup> The Scottish government claimed for the Act, *inter alia*, that it would enhance the protection and the rights of suspects (and, indeed, victims). SP OR 27 February 2014, col. 28320.

<sup>67</sup> 2016 Act, s. 63.

*Cadder*, this period was six hours<sup>68</sup> though clearly without benefit of any consultation with a lawyer. Currently, the maximum period of detention (with the right to legal consultation) is 12 hours which may be extended by another 12.<sup>69</sup> Lord Carloway's review took the view that a 12 hour maximum with a review after six hours was reasonable<sup>70</sup> on the basis that '[t]he changes in available investigatory tools, such as CCTV footage and DNA, in the accuracy of police reporting and the effect of *Cadder* all point towards the necessity of a longer period than the original six hours for initial investigation, including questioning'.<sup>71</sup> It also took advice from the Association of Chief Police Officers in Scotland ('ACPOS') which indicated that very few cases required extension beyond the first 12 hours.<sup>72</sup> These periods (six hours with a further possible six-hour extension) appeared in the Criminal Justice Bill as initially published.<sup>73</sup> The 2016 Act however sticks with the emergency legislation's position – a period of 12 hours<sup>74</sup> extendable, following review, by a further period of 12 hours.<sup>75</sup> There must be reviews at six and, effectively, 18, hours, conducted by a senior police officer who has not otherwise been involved in the case.<sup>76</sup>

Arguably the sole change to the system which *Cadder* mandated was the provision of legal assistance for detainees. Accordingly, no increase (or, indeed, decrease) in the six-hour detention period was actually needed<sup>77</sup> and the (possible) quadrupling (to 24 hours maximum), is significant. The 2016 Act does hedge the exercise of the power to extend for a second 12-hour period with some safeguards. The officer making the decision must be of the rank of inspector or above;<sup>78</sup> the offence must be sufficiently serious as to be indictable;<sup>79</sup> and the authorising officer must be satisfied that the investigation is being conducted 'diligently and expeditiously'.<sup>80</sup> Lord Carloway's discussions with ACPOS suggest that this power is likely to be used rarely. It should also be borne in mind that these are the periods which have been operating in Scots law for more than five years to date. They are 'much lower than the total of 96 hours for which an English suspect can be held'.<sup>81</sup> Nonetheless, the length of the period, bearing in mind that this power applies at a time when there is insufficient evidence to charge the suspect, does represent a significant inroad into his/her liberty.

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<sup>68</sup> This was provided in s. 2 of the Criminal Justice (Scotland) Act 1980 which was consolidated into the original version of s. 14 of the 1995 Act.

<sup>69</sup> 1995 Act, ss. 14 and 14A.

<sup>70</sup> *Carloway Review*, para. 5.2.34. See also PR Ferguson and FE Raitt, 'A clear and coherent package of reforms? The Scottish Government consultation paper on the Carloway Report', 2012 *Crim LR* 909, pp. 910 – 912.

<sup>71</sup> *Carloway Review*, para. 5.2.34

<sup>72</sup> *Ibid.*

<sup>73</sup> Original ss. 9 – 12.

<sup>74</sup> 2016 Act, s. 9.

<sup>75</sup> 2016 Act, s. 10.

<sup>76</sup> 2016 Act, s. 13.

<sup>77</sup> See P Nicholson, 'Rights under question', *The Journal Online* (November 2010): available at: <http://www.journalonline.co.uk/Magazine/55-11/1008872.aspx> (last accessed 31 May 2016).

<sup>78</sup> 2016 Act, s. 11(2)(a)(i). Where there is reason to believe that the suspect is aged under 18, the authorising officer must be of the rank of chief inspector or above (s. 11(2)(a)(ii)).

<sup>79</sup> 2016 Act, s. 11(3)(b)(ii).

<sup>80</sup> 2016 Act, s. 11(3)(b)(iii).

<sup>81</sup> Stark, 'Confession Evidence', in *Expert Group Report* 67, p. 71 note 42. See Police and Criminal Evidence Act 1984, ss. 41 – 44,

The s. 44 right to a private consultation with a solicitor applies at any time during this period. As in the emergency legislation, “*consultation*”, means consultation by such method as may be appropriate in the circumstances and includes (for example) consultation by telephone.’<sup>82</sup> There is an indication that, since *Cadder*, telephone has been the predominant means by which such consultations have taken place,<sup>83</sup> though the Law Society of Scotland’s advice to solicitors concerning police station interviews is clear and robust in setting out ‘factors and circumstances where attendance will almost always be necessary’.<sup>84</sup> If a suspect can be held for 24 hours, this clearly presents logistical difficulties for even the most dedicated and well-paid lawyer in terms of being available throughout. Interviews may take place at inconvenient times for lawyers’ attendance and, there is some evidence that many suspects simply waive the right. Duff notes that ‘Data compiled by the Police Scotland Criminal Justice Bill project team, over a four week period between May and June 2013, recorded that, of 3,863 persons who were entitled to and offered solicitor access prior to interview, 2,896 waived their right’.<sup>85</sup>

Hodgson’s research raised the issue of whether a private telephone consultation with a lawyer (the basic right of anyone in police custody) is, in fact, an effective mechanism for protecting the suspect’s rights. She reports that the view of Scots defence lawyers was that, given the (still current) corroboration requirement, advising detainees to remain silent was the best course of action and this could just as easily be done over the phone. She notes that ‘[t]his of course fails to grasp the importance of the lawyer’s presence to support the suspect to maintain their silence during interrogation’.<sup>86</sup> *Cadder* called the Scottish criminal justice system to account for the lack of availability of legal advice to suspects in detention. There is no doubt that this has been formally remedied in the Scottish Government’s legislative response, which, as will be discussed below, also makes further provision for the attendance of a lawyer during actual interviews.<sup>87</sup> Hodgson’s question is concerned more with the spirit of the judgment – with whether telephone advice offers the level of protection of suspects when they are vulnerable which ensures equality of arms throughout the pre-trial and trial stages. Equally the legislation can do no more than create appropriate rights. Implementation depends to some extent on resources and, indeed, culture (in terms of the level of acceptance of telephone advice as the norm) at the Scottish criminal defence bar.

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<sup>82</sup> 2016 Act, s. 44(4) (italics in original).

<sup>83</sup> See Law Society of Scotland response on the Estimated Financial Implications of the Criminal Justice Bill (2013), p. 3: available at: [https://www.lawscot.org.uk/media/230055/written%20evidence-fm-cj\(scotland\)bill.pdf](https://www.lawscot.org.uk/media/230055/written%20evidence-fm-cj(scotland)bill.pdf) (last accessed 31 May 2016).

<sup>84</sup> The Law Society of Scotland, *Police Station Interviews: Advice and Information from the Law Society of Scotland* (2015): available at: <http://www.lawscot.org.uk/media/473309/Police-Station-Advice-and-Information-March-2015-Section-F-Division-Advice.pdf> (last accessed 31 May 2016), pp. 7 – 8.

<sup>85</sup> See Duff, ‘Full Circle ...’, p. 209, note 145. This seems also to be the experience in the United States where ‘empirical studies have consistently shown that approximately eighty to ninety percent of custodial suspects waive their *Miranda* rights, and thus legally consent to the interrogation process’: Leo *et al.*, ‘Promoting accuracy ...’, p. 789 (footnote omitted). Waivers are discussed more fully below.

<sup>86</sup> Hodgson, ‘The role of lawyers ...’, at p. 13.

<sup>87</sup> 2016 Act, s. 32.

## 2. Waivers

By virtue of s. 32 of the 2016 Act, suspects have an additional right to have a solicitor present while actually being interviewed, in police custody, about an offence,<sup>88</sup> a provision which further strengthens their position. This section addresses the issue raised before the Supreme Court in the cases of *McGowan v B*<sup>89</sup> and *Birnie v HM Advocate*<sup>90</sup> as to the effect on the admissibility of statements which they subsequently made, of waivers by suspects of their right to legal advice. In *McGowan v B*, the suspect had been fully informed of his right to a private consultation with a solicitor in terms of the emergency legislation. In *Birnie* the initial interview took place before the right to consultation had been enacted but the case related to a voluntary remark and statement which he made after the interview. Both suspects had been offered legal advice before making their statements. Both had expressly refused it. The issue was whether this refusal, made without the benefit of legal advice, could validly waive the specific right (that is to legal advice) without impacting adversely on the overarching right to a fair trial under Article 6. Lord Hope's judgment in *McGowan v B* concluded that '[t]he jurisprudence of the Strasbourg court does not support the proposition that, as a rule, the right of access to legal advice during police questioning can only be waived if the accused has received advice from a lawyer as to whether or not he should do so.'<sup>91</sup> In *Birnie*, he said 'I do not think that the Strasbourg jurisprudence requires us to hold that it would necessarily be incompatible with Art 6(1) and (3)(c) of the Convention for the Lord Advocate to lead and rely on evidence of answers given by a suspect during a police interview just because it was not ascertained why he did not want to speak to a lawyer.'<sup>92</sup> Issues of whether it was fair to admit the actual statements, in the individual circumstances of each case, were not Convention issues and were for the relevant domestic Scottish court to determine.<sup>93</sup>

In both Supreme Court cases, Lord Kerr dissented taking the view that the suspect's understanding of the implications of waiver of the right to legal assistance was as important to upholding the Article 6 right as was the need to protect him/her from forced self-incrimination,<sup>94</sup> or, in other words that the right to a fair trial required any waiver to be 'knowing and intelligent'.<sup>95</sup>

S. 32 of the 2016 Act confers on anyone being interviewed by the police (those in custody and those attending the police station voluntarily)<sup>96</sup> about an offence which s/he is reasonably suspected of having committed the right to have a solicitor present<sup>97</sup> such that, save in

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<sup>88</sup> The legislation requires that, if they wish to be interviewed without a solicitor present, they should waive the right and have it recorded that they have done so (s. 32(3) and (7)). This will be discussed further below.

<sup>89</sup> 2012 SC (UKSC) 182 (hereafter '*McGowan v B*').

<sup>90</sup> Referred to the Supreme Court with three other 'sons of *Cadder*' cases under the name of *HM Advocate v Jude* 2012 SC (UKSC) 222 (hereafter '*Jude*').

<sup>91</sup> *McGowan v B*, para. 54.

<sup>92</sup> *Jude*, para. 29.

<sup>93</sup> *McGowan v B*, para. 53; *Jude*, para. 33.

<sup>94</sup> *McGowan v B*, para. 108.

<sup>95</sup> *Jude*, para. 60.

<sup>96</sup> 2016 Act, s. 32(1).

<sup>97</sup> 2016 Act, s. 32(2).

exceptional circumstances,<sup>98</sup> the interview cannot go ahead (if the suspect exercises the right) unless the solicitor is there.<sup>99</sup> The suspect can consent to proceed without a solicitor and, in that case, the time of giving this consent, and any reason given for the waiver of the right must be noted.<sup>100</sup>

This clarifies that the norm should be for the solicitor to be present during interview thereby going further than the *Cadder*-mandated right to a private consultation with a solicitor at any time.<sup>101</sup> It also puts in statutory form that the right can be waived. It does not, however, require that there should be any inquiry into the suspect's understanding of his/her situation and it is only if s/he volunteers a reason for waiving the right that this will be recorded. As noted above, it seems that many suspects (75% in the admittedly limited sample cited by Duff,<sup>102</sup> 80 – 90% in the US)<sup>103</sup> do waive the basic right to a private consultation with a lawyer. It remains to be seen whether this formalisation of dispensing with legal advice at interview will have a practical effect in reducing the number of waivers. At the very least though, it has the advantage that suspects must be fully informed of the existence of the right in taking any waiver decision. While, this is not necessarily the same as having a full understanding of its consequences s.32's unequivocal phrasing that, without a waiver 'a constable must not begin to interview the person about the offence until the person's solicitor is present' provides a clear practical framework around which police, suspects and lawyers will operate, which is to be welcomed.

### 3. Confessions

This also brings the issue of confession evidence into sharp focus, in that a confession is, simply, a self-incriminating voluntary statement and, having waived the right to legal advice, both B and Birnie had made such statements. While *Cadder* was not directly concerned with confessions, it is clear that such incriminatory statements may be made and provided they are properly voluntary, there is no reason that the Crown may not rely on them in evidence.<sup>104</sup> Such statements may be made in a variety of circumstances,<sup>105</sup> but this chapter is concerned mainly with false confessions.

It is generally accepted in Scotland that '[a] confession is an exceptionally potent item of evidence because it is a statement made by a person against their own interests – therefore, if they do [confess], it is assumed these statements are more likely than not to be true.'<sup>106</sup> Jurors, in particular, even with the benefit of expert evidence on the potential unreliability of

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<sup>98</sup> 2016 Act, s. 32(4) and (5).

<sup>99</sup> 2016 Act, s. 32(3).

<sup>100</sup> 2016 Act, s. 32(7).

<sup>101</sup> 2016 Act, s. 44.

<sup>102</sup> Duff, 'Full circle ...', p. 209, note 145

<sup>103</sup> Leo et al, 'Promoting accuracy ...', p. 789.

<sup>104</sup> See, for example, *Manuel v HM Advocate* 1958 JC 41, p. 48 *per* Lord Justice General Clyde.

<sup>105</sup> For a full and insightful discussion see Stark 'Confession Evidence'.

<sup>106</sup> Raitt, *Evidence ...*, para. 9-04. (footnote omitted).

confessions, may still find them ‘compelling’.<sup>107</sup> The power attached to confessions is demonstrated by the fact that the corroboration requirement is applied less stringently where they exist. The point was made in *Hartley v HMA*<sup>108</sup> as follows:

‘It is well settled that where, as here, an accused person has, by means of an unequivocal confession, identified himself with an offence, little is required by way of corroboration to meet the requirements of our law. Something however is needed, and that something must point to the accused as the perpetrator of the crime to which he has confessed. An accused person who makes an admission to a murder and tells the police where the body is to be found, and the body is duly found in that place, is properly identified as the perpetrator from two independent sources, the circumstances of the finding confirming the facts in the confession ...’<sup>109</sup>

As Davidson and Ferguson have put it, ‘a confession can almost corroborate itself in the sense that corroboration can be found in the fact that the circumstances of the crime coincide with the confession.’<sup>110</sup>

The admissibility of confession evidence is judged by the overarching principle of fairness<sup>111</sup> ‘not only to the accused but fairness also to those who investigate crime on behalf of the public.’<sup>112</sup> The Scottish courts have excluded confessions where the view was taken that the ‘special knowledge’ in the confession was not something which the accused could only have known if he was the perpetrator.<sup>113</sup> Following a referral by the SCCRC, a conviction for murder and rape was quashed on the cumulative basis that much of the appellant’s confession was factually incorrect therefore not showing special knowledge, that undue pressure may have been exerted on the accused by the police and, on the basis of evidence from a professor of forensic psychology, that the appellant’s personality type was such that he would be particularly suggestible and affected by pressure from the police.<sup>114</sup>

It is this final ground which begins to suggest that, far from speaking for itself and requiring (almost) no further evidence to establish the point it vouches, a confession should be particularly closely protected by the privilege against self-incrimination because of its powerful effect, against the accused’s interests, on the jury’s perception. Research in the US indicates that even the most principled and scrupulous police investigation may ‘contaminate’ a confession by unwittingly feeding to the interviewee all of its ‘special knowledge’

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<sup>107</sup> Stark, ‘Confession Evidence ...’, p. 82.

<sup>108</sup> 1979 SLT 26.

<sup>109</sup> Ibid. p. 31, *per* Lord Grieve.

<sup>110</sup> F Davidson and PR Ferguson, ‘The corroboration requirement in Scottish criminal trials: should it be retained for some forms of problematic evidence?’ 18 (2014) *International Journal of Evidence and Proof* 1, p. 22.

<sup>111</sup> Raitt, *Evidence ...*, para. 9-29.

<sup>112</sup> *Hartley v HM Advocate* 1979 SLT 26, p. 32, *per* Lord Grieve.

<sup>113</sup> *Woodland v Hamilton* 1990 SLT 565.

<sup>114</sup> *Gilmour v HM Advocate* 2007 SLT 893.

components.<sup>115</sup> Sangero<sup>116</sup> reports findings of the 1994 (Israeli) Goldman Commission for Convictions Based Solely on Confessions.<sup>117</sup> It found that suspects might falsely confess:

1) due to their personality if they do not know the difference between fantasy and reality; they wish to make up for something else wrong (which might also be imagined) which they have done, or they are in some sense self-destructive. They may suffer from an emotional or mental disability or be under the influence of alcohol or other substances. The Commission included in this group minors (to which group Cadder and Salduz<sup>118</sup> belonged).<sup>119</sup>

2) Those who wish simply to bring the interrogation to an end given the effect it is having on them. Some may believe that they will be exonerated in subsequent proceedings.<sup>120</sup>

3) Those who feel a social pressure to confess, for example, to protect the true perpetrator.<sup>121</sup>

These are similar to the groups who are likely falsely to confess identified by the Royal Commission on Criminal Justice in the UK in 1993.<sup>122</sup>

In the context of the debate surrounding its possible abolition, Davidson and Ferguson, and Ferguson, have argued that the corroboration requirement should be retained in relation to confession evidence<sup>123</sup> and, indeed, potentially tightened.<sup>124</sup> Given the diluted form of corroboration currently applicable to this type of evidence, the argument that it should be one of only a very few areas singled out for ongoing corroborative protection demonstrates recognition of the fragility of the basis on which some confessions rest.

It is not the function of the police to solicit confessions<sup>125</sup> and the courts will strike at undue pressure in police questioning to obtain a self-incriminatory statement.<sup>126</sup> The issue is rather the power attached by the law, the courts and juries to such statements once obtained. If the suspect reveals information known to no one – say, the place where the body is buried as in *Manuel v HM Advocate*<sup>127</sup> - then this is clearly incriminating. If, however, all that is elicited is a statement of guilt, or if the so-called ‘special knowledge’ is known to a number of others including the investigating police, then such statements should be treated and tested in the same way as any other piece of evidence. In *Gilmour v HMA*,<sup>128</sup> Lord Justice-Clerk Gill

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<sup>115</sup> Leo et al, ‘Promoting accuracy ...’.

<sup>116</sup> Boaz Sangero ‘*Miranda* is not enough: a new justification for demanding ‘strong corroboration’ to a confession’, 28 (2007) *Cardozo Law Review* 2791.

<sup>117</sup> (and for Issues regarding the Grounds for Retrial): Sangero, ‘*Miranda* is not enough ...’ p. 2798, note 23.

<sup>118</sup> *Cadder*, para. 31.

<sup>119</sup> Sangero, ‘*Miranda* is not enough ...’ p. 2798.

<sup>120</sup> *Ibid.* pp. 2798 – 2799.

<sup>121</sup> *Ibid.* p. 2799. He also notes that people have confessed for bizarre reasons such as to get quickly to a university exam or an important chess game - *ibid.*

<sup>122</sup> Royal Commission on Criminal Justice, Cm 2263 (1993). See Davidson and Ferguson, ‘The corroboration requirement ...’, p. 21.

<sup>123</sup> Davidson and Ferguson, ‘The corroboration requirement ...’ especially pp. 25 – 26.

<sup>124</sup> Ferguson, ‘Repercussions ...’, p. 748.

<sup>125</sup> Thomson Committee, para. 7.13a; *Chalmers*, p. 78 *per* Lord Justice General Cooper.

<sup>126</sup> See *Paul*.

<sup>127</sup> 1958 JC 41.

<sup>128</sup> 2007 SLT 893.

acknowledged the considerable advances in forensic psychology in relation to criminal confessions which allowed, in that case, some testing of the appellant's suggestibility and compliance.<sup>129</sup> It is important that the law should continue to recognise the impact of personality type in this area and, more generally, subject confession evidence to close scrutiny rather than regarding it as speaking for itself.

#### 4. The Fruit of the Poisonous Tree

Even where a suspect's statement (or, indeed, answers to police questioning) is rendered inadmissible, the possibility remains that it will have identified a separate source of evidence on which the Crown still wishes to rely. Further post-*Cadder* appeals have also arisen around this so-called 'fruit of the poisonous tree'.<sup>130</sup> The leading cases are *HMA v P*,<sup>131</sup> in the Supreme Court, which set down the overarching Article 6 principle, and *Haggerty v HMA*, where the appeal court applied this in a domestic Scottish case.

The position emerging rests on pre-existing principles and does not, therefore, effect much (if any) change: evidence which can stand in its own right without allusion to the tainted interview can be accepted but where the evidence has meaning only by reference to the inadmissible statement, then it falls to be excluded under the same (*Salduz*) principle as the interview itself. Thus, where the discovered evidence 'would not have been relevant without linking it to what was said by the accused'<sup>132</sup> in the police interview it cannot be relied upon.<sup>133</sup> The example given<sup>134</sup> is the case of *Chalmers v H M Advocate*<sup>135</sup> where the 16-year old accused's police statement had been deemed inadmissible. Immediately following the giving of that statement, the police asked further questions resulting in the accused leading them to the spot where the victim's purse had been concealed, the matter of its location having been covered by the (renewed) questioning. Lord Justice-General Cooper stated in *Chalmers* that the discovery of the purse was 'part and parcel of the same transaction as the interrogation'<sup>136</sup> and therefore inadmissible.

By contrast, in both *P* and *Haggerty*, the interviewee had named another person as a potentially exculpatory witness. In both cases, that third party actually provided information which turned out to be incriminating and this was held to be admissible 'because the source of the evidence is quite independent of the suspect; the incrimination comes not from the suspect but from another source altogether.'<sup>137</sup> Thus the view was taken that the *Salduz/Cadder* principle was not directly engaged, though the accused continued to be

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<sup>129</sup> *Ibid.* paras. 89 – 90.

<sup>130</sup> *Haggerty v HMA* 2013 JC 75, (hereafter '*Haggerty*') para. [7] *per* Lord Drummond Young.

<sup>131</sup> 2012 SC (UKSC) 108 (hereafter '*P v HMA*').

<sup>132</sup> *Ibid.* para. 16 *per* Lord Hope.

<sup>133</sup> See also *Haggerty* para. 12 *per* Lord Drummond Young.

<sup>134</sup> *P v HMA*, para. 16 *per* Lord Hope; *Haggerty*, para. 10 *per* Lord Drummond Young.

<sup>135</sup> 1954 JC 66.

<sup>136</sup> *Ibid.* p. 76.

<sup>137</sup> *Haggerty*, para. 12.



protected by the overarching requirement that the trial should not be rendered unfair by the leading of such evidence.<sup>138</sup>

In essence, this is acceptable. While the test is of fairness, this encompasses ‘the public interest in the ascertainment of the truth and in the detection and suppression of crime’.<sup>139</sup> The fact that the statement given by the third party is, in fact, potentially incriminating (when the suspect clearly expected it to be exculpatory) serves to demonstrate its independence from the inadmissible source.

## 5. The Shift from Witness to Suspect

Finally, then, this chapter returns to where it started – the earliest point in a criminal investigation at which an individual begins to be suspected of having committed the offence in question. As mentioned in the introduction, the course of justice in individual cases is deemed to start with the police investigation of an incident which looks likely to constitute a criminal offence. This will, of necessity, involve asking questions of those who have, or may have, knowledge about that incident such that a person so questioned may make a shift from being regarded solely as a witness to being suspected of having had some criminal involvement. There is no doubt, following *Cadder* and *Salduz*, that those who are held in police custody for questioning because they are suspected of such involvement have the right to legal advice.<sup>140</sup> Indeed, this issue has never been a grey area in Scots law. It was clear that detainees did not have a right to legal advice before *Cadder* and it is equally clear that such advice must now be offered.

In the period before the suspect is formally detained, or taken into custody, however, s/he may give answers to police questions which could be construed as incriminating and, therefore, on which the prosecution will seek to rely in subsequent criminal proceedings. This issue was not directly raised in *Cadder* but clearly requires an extension of the case’s reasoning backwards in time. *Ambrose v Harris*<sup>141</sup> conjoined three Scottish cases (otherwise known as the ‘sons of Cadder’) in a reference to the Supreme Court to examine this issue.

In one reference, the case of *G*, the police were executing a search warrant at the suspect’s home in relation to firearms and drugs offences for which he had been indicted. They had to force entry and, following a struggle, they handcuffed him. He was cautioned including being advised that he did not have to say anything and was then detained and searched. He did, however, give various answers and statements<sup>142</sup> on which the Crown sought subsequently to rely.<sup>143</sup> The Supreme Court decided that these were inadmissible because ‘although *G* had not yet been formally arrested and or taken into police custody, there was a significant curtailment of his freedom of action. He was detained and he had been handcuffed. He was,

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<sup>138</sup> *Ibid.* para 12.

<sup>139</sup> *Miln v Cullen* 1967 JC 21, p. 26 *per* Lord Justice Clerk Grant.

<sup>140</sup> *Ambrose*, para. 24.

<sup>141</sup> *Ibid.*

<sup>142</sup> *Ibid.* para. 10.

<sup>143</sup> *Ibid.* para. 11.

in effect, in police custody from that moment onwards.<sup>144</sup> Clearly, there was a level of police coercion here, in that G was hand-cuffed and all formulations of the privilege against self-incrimination strike at incriminating statements obtained by such means.<sup>145</sup> In this respect, then, this was not a hard case.

The other two references were less clear-cut. In the first, *Ambrose*, the police found the suspect sitting in the passenger seat of a car following a report from a member of the public that he and his female companion, who was in the driver's seat, were drunk. Ambrose was cautioned, because one of the officers determined that he was intoxicated, but not in connection with any specific offence. He then answered three questions, produced the car keys from his pocket and failed a breath test. He was taken to a police station where a further breath test revealed a level of alcohol well over the legal limit.<sup>146</sup> In the second reference, *M*, the (ultimate) suspect, had given his details, as a witness, to the police immediately following a fight in a pub and had been allowed to leave the locus. Five days later, a police officer went to his home, cautioned him and asked him a total of seven questions. From his answers, the officer determined that it was likely that he had been involved in the incident and arranged for him to attend at the police station the following evening where he was detained under s 14 and interviewed.<sup>147</sup> In both *Ambrose* and *M* the Supreme Court determined that the Strasbourg jurisprudence had not reached a settled position, in relation to the right to a fair trial, on the admissibility of answers to questions without the benefit of legal advice, when an individual, though sufficiently suspected to have been cautioned, and 'charged' for Article 6 purposes was, nonetheless, not in police custody but being questioned by the roadside or in his own home.<sup>148</sup> Accordingly, there was no clear breach of Article 6(3)(c) taken in conjunction with Article 6(1) in not making legal assistance available. Lord Hope said:

'[q]uestions that the police need to put simply in order to decide what action to take with respect to the person whom they are interviewing are unlikely to fall into this category [of requiring the offer of legal advice to ensure that the right to a fair trial is upheld]. But they are likely to do so when the police have reason to think that they may well elicit an incriminating response from him.'<sup>149</sup>

In terms of the emerging principles of Strasbourg jurisprudence, as applied in *Cadder*, there is scope for some sympathy with the dissenting judgment of Lord Kerr in *Ambrose*. Ambrose who, in the view of the attending police officers, was drunk, was asked 'Are you going to drive the car?'<sup>150</sup> *M*, who was being questioned about an incident in a pub in which injuries had been inflicted, was asked 'I am investigating a serious assault which happened on Saturday night there, within a bar named [X]. There was a large disturbance in there too.

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<sup>144</sup> Ibid. para. 71 *per* Lord Hope.

<sup>145</sup> For example, *ibid.* para. 32. See also Ferguson 'Repercussions ...'.

<sup>146</sup> *Ambrose*, para. 4.

<sup>147</sup> *Ibid.* para. 7.

<sup>148</sup> *Ibid.* paras. 67 to 70.

<sup>149</sup> *Ibid.* para. 65.

<sup>150</sup> *Ibid.* para. 4.

Were you there?’ and ‘Were you involved in the fight?’<sup>151</sup> In each case, the chances of the question eliciting an incriminating response seem high<sup>152</sup> so that the privilege against self-incrimination would be engaged.

Equally, the European court has not said that at every point when a person passes from witness to suspect, legal representation must instantly be provided<sup>153</sup> – nor is that point necessarily easy to determine taking into account also that ‘[t]he degree of suspicion may vary from a very slight suspicion to a clearly formed one.’<sup>154</sup> It is important to avoid a situation where questions are asked once there is some suspicion of an individual but without immediately moving to detention or arrest *with the purpose that* incriminating answers may be given.<sup>155</sup> Equally, the police must have some room for manoeuvre in assessing the nature of an individual’s relationship to an apparently criminal act. There is a risk that more people would be detained if the police could ask no further questions at all, without legal representation being offered, once there was even a modicum of suspicion. Ambrose and M had both been cautioned (though Ambrose was heavily intoxicated when it was administered). *Cadder* should require a conscious recognition of any propensity in the system towards encouraging self-incrimination, even if a practice is ultimately deemed unobjectionable. In this particular situation, given the often marginal decisions to be taken in potentially pressurised situations, it seems appropriate that the High Court should apply the principles of fairness on an individual basis, as the Supreme Court has left it open for it to do.<sup>156</sup>

## D. CONCLUSION

*Cadder* brought into focus the issue of ‘balancing’ the rights and interests of the accused against those of the victim, under the overarching umbrella of the public interest, which spans both. In his judgment, Lord Rodger encapsulated the consequences of the decision in these terms. He said,

‘[i]t must follow that the recognition of a right for the suspect to consult a solicitor before being questioned will tilt the balance, to some degree, against the police and

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<sup>151</sup> *Ibid.* para. 7.

<sup>152</sup> See *ibid.* para. 153 *per* Lord Kerr.

<sup>153</sup> Indeed, in *Zaichenko v Russia* [2010] ECHR 185 (discussed in *Ambrose*) and in *Ibrahim v United Kingdom* (2015) 61 EHRR 9, where the applicants (the fourth applicant in *Ibrahim*) were each interviewed in circumstances where suspicion had clearly crystallised, the court held that there had been no breach of Article 6(3)(c) in conjunction with Article 6(1) by virtue of the failure to provide legal assistance.

<sup>154</sup> *Miln v Cullen* 1967 JC 21, p. 30, *per* Lord Wheatley.

<sup>155</sup> The Scottish courts have been critical of similar practice in the past. See, for example, *Wade v Robertson* 1948 JC 117; *Stark and Smith v HMA* 1938 JC 170; *Rigg v HMA* 1946 JC 1 and *Chalmers*.

<sup>156</sup> In *Ambrose*, the High Court ultimately determined (following the Supreme Court’s remit back) that the answer given by the accused (‘aye [or ah] well she wisnae well’) was not clearly incriminating. It allowed his appeal on the basis that his defence had not been properly considered and the sheriff had not clearly indicated on which parts of the evidence he had relied in convicting: *Ambrose v Harris* [2011] HCJAC 116.

prosecution. Although inescapable, that consequence is one that many of those who are familiar with the way the present system operates may well find unpalatable.<sup>157</sup>

At the time of the enactment of the emergency legislation, Dale-Risk commented that ‘[t]he impression is given that because the Cadder decision is perceived as enhancing the rights of those accused of crime, then a “rebalancing” is required, with other rights eroded or lost altogether’ giving rise to a ‘feeling that suspects are going to have to pay for their increased rights’.<sup>158</sup> Lord Drummond Young commented that the Crown Office perception was that ‘the non-availability of evidence obtained at police interviews has tipped the balance too far in favour of the accused’.<sup>159</sup> Ferguson’s concern throughout has been that any rebalancing to correct this perception would result in the removal of other, even more fundamental rights of suspects, such as the corroboration requirement.<sup>160</sup>

Arguably, *Cadder* required only that, during the then applicable six-hour detention period, suspects should have the benefit of the offer of legal advice. At that stage, suspects are vulnerable, the police interview is a significant part of the criminal process and Article 6(3)(c)’s express provision, in the context of the general right to a fair trial, of the right to defend oneself through legal assistance rendered this provision of access to a lawyer necessary. It is not surprising, in view of the extreme practical ramifications of the decision that the whole system of criminal justice was put under a spotlight. It is less clear, however, that providing a corrective to a recognised deficiency for suspects should require a subtraction from their other rights or the addition of other powers for the state. As Laura Hoyano has said, ‘a fair trial does not involve abstract balancing between the rights claims of the defendant and the complainant. ... Measures to protect one do not inevitably detract from the rights of the other in a zero-sum game.’<sup>161</sup> Even if the matter is perceived in this way, the provision of legal advice during detention could be said merely to bring the suspect’s end of the equation back into balance from its previous inadequacy. The overarching principle, as the Scottish courts have consistently stated, should be fairness to all participants.

In their final form, the provisions in the 2016 Act for legal advice and support to suspects have respected their rights, as required but without, as yet, trading other protections for the accused within the trial process, such as corroboration, for the purposes of balance. As such, they are cautiously welcomed.

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<sup>157</sup> *Cadder* at para. 97.

<sup>158</sup> Dale-Risk ‘*Cadder v HM Advocate: a matter of (mis)representation*’, (2010) 398 *SCOLAG* 258: available at: [http://www.scolag.org/system/files/Scolag398\\_Student\\_2010.pdf](http://www.scolag.org/system/files/Scolag398_Student_2010.pdf) (last accessed 31 May 2016), p. 259.

<sup>159</sup> Drummond Young, ‘Scotland and the Supreme Court’, p. 72.

<sup>160</sup> Ferguson, ‘Repercussions ...’, p. 748.

<sup>161</sup> Hoyano, ‘Reforming the adversarial trial for vulnerable witnesses and defendants’, (2015) *Crim LR* 107, p. 107.