

VIII

BAD CHARACTER OF THE ACCUSED

This chapter complements Chapter VII, and its subject matter is now almost wholly governed by the provisions of Pt XI c 1 of the Criminal Justice Act 2003.¹ The origins of that legislation will be considered first, then its structure, the gateways it provides for admissibility, followed by the briefest mention of other statutes, and concluding with a brief appraisal.

SECTION 1. ORIGINS OF THE MODERN LAW

This section will comprise, first, the nature of the problem of the admission of evidence of the bad character of the accused; then attempts at reform, at common law, by recommendations of law reform bodies, and by legislation, an indication of the principal forms of continuing dissatisfaction; and finally the intentions and techniques designed to remedy them.

NATURE OF THE PROBLEM

It is hardly surprising to find that the issue of the admissibility in evidence of the accused's bad character has always been regarded by both prosecution and defence as being of vital importance in criminal proceedings. The reason is simply that such evidence is believed to be very influential in its effect upon a jury.² It is likely both to help prove the guilt of the accused, and to prejudice the jury against him. The prosecution justifiably seeks its

¹ Some parts of which, concerned with rebuttal of good character of the accused, the use of bad character in relation to a co-accused, and the bad character of non-defendants, have already been considered in Chapter VII. There are, in addition, a few statutory provisions, authorizing the admission of such evidence, which have been left unaffected by the Criminal Justice Act 2003, since s 99(1) purports to abolish only the common law rules governing the admissibility of evidence of bad character in criminal proceedings. For further detail of the old law, see previous editions of this work.

² This commonly held belief is largely confirmed by the results of such empirical investigation as has been possible given the straitjacket imposed by s 8 of the Contempt of Court Act 1981: see Law Com Con Pap No 141 App D, as supplemented by Law Com No 273 (Cm 5257, 2001) App A. In *R v Bills* [1995] 2 Cr App Rep 643, a conviction was quashed because the jury attempted to change its verdict after hearing for the first time of the accused's record at the sentencing stage; in *R v Johnson* [1995] 2 Cr App Rep 1, the Court of Appeal thought that there was no case to answer without the disputed evidence, but that with it, a conviction was inevitable.

inclusion for the former purpose, and the defence equally justifiably seeks its exclusion for the latter reason.³

An exclusionary rule was established by the beginning of the nineteenth century, and stated in recognizably modern terms in *R v Cole*:⁴

... in a prosecution for an infamous crime, an admission by the prisoner that he had committed such an offence at another time and with another person, and that he had a tendency to such practices, ought not to be admitted.

Its application was uncertain throughout the nineteenth century,⁵ and first considered by a final appellate court in *Makin v A-G for New South Wales*,⁶ with guidance provided by Lord Herschell in cryptic and vague terms. It comprehended situations in which evidence was relevant by way of the alleged repetition of very similar conduct in the past by the accused;⁷ situations in which previous commission was less clearly attributable to him, but the number of such cases in which he was one of few possible participators made coincidence implausible;⁸ and situations where there was direct evidence of the commission of relevant acts by the accused, or his presence at the scene of the crime, but contested issues as to his intent,⁹ or the nature of his involvement in relation to the crime charged.¹⁰ Despite the complexity of the problem, and the imprecision of Lord Herschell's language, attempts were made to construe it as if it were a statutory provision, which generated still further layers of uncertainty.

It is hardly surprising given the difficulty of the problem, and deficiencies of attempts to provide a solution, that similar problems afflicted the entirely new situation of determining the limits of cross-examination upon bad character when the accused was first made generally competent to testify in his own defence by the Criminal Evidence Act 1898, perhaps exacerbated by parliamentary perception of the general hostility of cross-examination at that time. What emerged was, in broad terms, a ban on cross-examination relating to the commission of crimes, convictions, charges, or evidence of bad character,¹¹ unless such evidence were admissible to show guilt,¹² rebutted a claim for good character,¹³ or amounted to retaliation for an imputation upon the character of the prosecutor or his witnesses,¹⁴ or for an attack upon another accused charged with the same offence.¹⁵ The drafting of the provision was complex, and its relationship to the terms of the abolition of the privilege of self-incrimination obscure.¹⁶

³ It was accordingly extremely rare, but not quite unknown (see e.g. *R v McKenzie* [1991] Crim LR 767), for a conviction to be upheld despite the wrongful admission of such evidence, or in the face of a misdirection as to its relevance; but for an exception, see *R v B (CR)* [1990] 1 SCR 717. On the other hand, the mere knowledge by the jury from sitting in a different case of the association of the accused with those convicted on that occasion was not necessarily fatal: *R v BM* [2003] EWCA Crim 2952.

⁴ As reported in Phillips *Evidence* (1814), 69. The trial judge's original note is appended to the judgment in *R v Sims*, as reported in [1946] KB 531, 544.

⁵ Compare the reasoning in the poisoning cases of *R v Geering* (1849) 18 LJMC 215, *R v Winslow* (1860) 8 Cox CC 397, and *R v Hall* (1887) 5 NZLR 93, for example. Nor did these varieties exhaust the possibilities; in the infamous case of *Neill Cream*, the evidence of other poisonings was admitted by Hawkins J 'as corroboration': *Shore Trial of Neill Cream* (1923), 154.

⁶ [1894] AC 57. For additional facts and social background, see Palmer (1993) 67 *Law Inst J* 1171.

⁷ As in *R v Straffen* (n62). ⁸ As in *R v Robinson* [1952] 2 All ER 334. ⁹ As in *R v Cole*.

¹⁰ As in *R v Ball* (n22).

¹¹ Section 1(f). ¹² Section 1(f)(i). ¹³ Section 1(f)(ii) first limb.

¹⁴ Section 1(f)(ii) second limb. ¹⁵ Section 1(f)(iii). ¹⁶ Section 1(e).

In both situations, the law was regarded as capable of leading to injustice to the accused, and was mitigated by discretion to exclude evidence the prejudicial effect of which exceeded its probative value.¹⁷

ATTEMPTS AT REFORM

Common law

It is somewhat tendentious to describe the process of the common law as an attempt to reform the law, but there seems little doubt that towards the end of the twentieth century the House of Lords was trying to establish a more satisfactory basis for it. Thus in *DPP v Boardman*, an authoritative restatement of principle was attempted.¹⁸ The accused schoolmaster was charged with homosexual offences against some of his pupils, a few of the incidents as described by the youths indicating that the accused envisaged playing the passive role. Their Lordships all held the evidence to have been rightly considered relevant and cross-admissible to counts involving that characteristic. The speeches are inconsistent in some aspects of their reasoning, but unanimous in requiring the 'similar fact' evidence, as it was then called, to be more than barely relevant to guilt.¹⁹ This decision was accepted elsewhere by the highest courts in the Commonwealth,²⁰ but in England the courts increasingly took the view that the restrictions on admissibility in chief of evidence of the bad character of the accused had been too tightly restrained by the formulation in *Boardman*. This led both to some redefinition of the scope of the rule, and to a series of decisions in the House of Lords,²¹ having the broad effect of eroding the protection it offered against the admissibility of such evidence. In addition, it became increasingly common to side-step any restrictions on admissibility by categorizing the evidence as 'background' material assisting only in the understanding of the situation in which the events constituting the charge occurred.²²

¹⁷ In the case of evidence in chief, it became uncertain whether this was a supplementary discretion or inherent in the inclusionary exception to the exclusionary rule: see e.g. *R v Clarke and Hunt* [2002] EWCA Crim 2948, [70].

¹⁸ [1975] AC 421, [1974] 3 All ER 887. See also commentaries by Hoffmann (1975) 91 *LQR* 193; Cross [1975] *Crim LR* 62; Tapper (1975) 38 *MLR* 206.

¹⁹ It should be 'of close or striking similarity' (Lord Morris, 441, 895); 'striking similarity' (Lord Wilberforce, 444, 897); 'striking resemblance' (Lord Hailsham, 455, 907); 'exhibit very striking peculiarities' (Lord Cross, 460, 911); and 'be uniquely or strikingly similar' (Lord Salmon, 462, 913). The phrase 'striking similarity' is derived from *R v Sims* [1946] KB 531, [1946] 1 All ER 697; 540, 701.

²⁰ See *Sutton v R* (1984) 152 CLR 528 (Australia); *R v Hsi En Feng* [1985] 1 NZLR 222 (New Zealand); *R v Robertson* [1987] 1 SCR 918 (Canada).

²¹ *DPP v P* [1991] 2 AC 447, [1991] 3 All ER 337 (relaxation of enhanced relevance required by *Boardman*); *R v H* [1995] 2 AC 596, [1995] 2 All ER 865 (presumption of truth of allegations of previous bad character); *R v Christou* [1997] AC 117, [1996] 2 All ER 927 (no rule of severance because evidence on one count inadmissible on another); *R v Z* [2000] 2 AC 483, [2000] 3 All ER 385 (permission to use evidence of bad character despite acquittal of accused on charges involving the use of such evidence).

²² *R v Pettman* (2 May 1985, unreported), CA, could be regarded as the origin of such a line of argument, although it might be argued that it was inherent in the decision of the House of Lords in *R v Ball* [1911] AC 47 (incestuous behaviour and inclination of the accused at an earlier time admitted to prove the crime of incest at a later date), and of the High Court of Australia in *O'Leary v R* (1946) 73 CLR 566 (assaults at earlier time during a series of brawls culminating in the events constituting the crime charged).

Statutory provision

Perhaps the longest running and most contentious piece of law reform in this area was making the accused competent to testify in his own defence in criminal proceedings. The issue was first seriously raised in the late 1850s and subsided in England, many bills and some legislation later, only with the passage of the Criminal Evidence Act 1898, s 1(f).²³ It took the courts some time to construe its internal structure,²⁴ how far it was limited to credit,²⁵ the meaning of its terminology,²⁶ and the extent to which it was subject to any exclusionary discretion.²⁷ It was also necessary to enact formal amendment to correct the application of the provision as between co-accused.²⁸

Proposals for legislative reform

At no stage in its development was this area of the law regarded with admiration or enthusiasm. The first sustained attack was made by the Criminal Law Revision Committee in its comprehensive 11th Report,²⁹ renewed in more recent times by the Law Commission in a consultation paper,³⁰ and some years later in its final report.³¹

The law of evidence in criminal proceedings was referred to the Criminal Law Revision Committee in 1964,³² although its final report was not submitted until 1972. It found this part of the subject 'far the most difficult of all the topics we have discussed'.³³ The Committee proposed no radical change, and, in particular, retention of the general division in the then current law between evidence of bad character adduced in chief, and in cross-examination of the accused.³⁴ It did, however, propose the repeal and replacement of the relevant provisions of the Criminal Evidence Act 1898. Here it felt that the conflict between majority and minority in *Jones*, on the relation between s 1(e) and 1(f), needed to be resolved, which it proposed to do by adopting both views, namely by exposing the testifying accused to cross-examination about any matter relevant to guilt, including any evidence admissible in chief,³⁵ and by permitting cross-examination on any matter already

²³ For an account of this history, see Tapper in Tapper (ed) *Crime, Proof and Punishment* (1981).

²⁴ See *Jones v DPP* [1962] AC 635, [1962] 1 All ER 569 (relationship of enacting part and exceptions, including privilege against self-incrimination); *R v Anderson* [1988] QB 678, [1988] 2 All ER 549 (refinement of *Jones*).

²⁵ See *Maxwell v DPP* [1935] AC 309; *R v McLeod* [1994] 3 All ER 254, [1994] 1 WLR 1500.

²⁶ See *Maxwell v DPP*, above (effect of acquittal of previous offence on meaning of 'charge'; *Stirland v DPP* [1944] AC 315, [1944] 2 All ER 13 (meaning of 'charge')).

²⁷ See *Selvey v DPP* [1970] AC 304, [1968] 2 All ER 497 (when invoked against prosecution); *Murdoch v Taylor* [1965] AC 574, [1965] 1 All ER 406 (when invoked against co-accused); *R v Britzman and Hall* [1983] 1 All ER 369, [1983] 1 WLR 350, 374, 355 (guidelines for direction).

²⁸ Criminal Evidence Act 1979 (from 'charged with the same offence' to 'charged in the same proceedings').

²⁹ Cmnd 4991, (1972).

³⁰ *Evidence in Criminal Proceedings: Previous Misconduct of a Defendant* (1996). For detailed appraisal, see Roberts, McEwan, and Darbyshire [1997] *Crim LR* 75, 93 and 105.

³¹ *Evidence of Bad Character in Criminal Proceedings* (Cm 5257, 2001). For detailed appraisal, see Mirfield (2002) 6 *E&P* 141; McEwan [2002] *Crim LR* 180.

³² The law of evidence in civil proceedings was simultaneously referred to the Law Reform Committee. The Conservative government, then coming to the end of its term, hoped thereby to pre-empt part of the attraction of the new Law Commission proposed to be established by the Labour Party if it secured power, since among the topics it proposed to refer to it was the whole of the law of evidence.

³³ [70].

³⁴ Although the effect of its amendment and codification of the existing law was to some extent designed to reduce the differences between the two situations.

³⁵ Thus, as noted above, achieving a greater measure of coherence between admissibility of bad character in chief, and in cross-examination.

adduced in evidence. It also felt that the ambiguity of the term 'character' should be eliminated, and proposed to do so by eschewing use of the generic term, and instead, in its draft provisions, referring to 'disposition', 'reputation', or 'credibility' as appropriate.

The Committee was deeply divided as to its policy in relation to the cross-examination of the accused who made imputations. It canvassed numerous objections, including the anomalies of treating admissibility in chief and in cross-examination differently, and also in so treating cases in which the impugned individual had, and had not, testified for the prosecution. It was concerned that the risk of exposing his own bad character would inhibit the accused in deploying his true defence, and might turn the trial into a tactical battle, akin to a game.³⁶ In the end, it opted to permit cross-examination of a testifying defendant,³⁷ but only to impair credibility, because both prosecution and defence should equally be able to test the credit of the other side's witnesses.

The Committee's proposals attracted some criticism on account of its policy, some on account of its method, which was strictly non-empirical,³⁸ and some on account of the complication of its draft provisions. The proposals were never enacted in the form recommended by the Committee since other provisions of its draft bill encroaching on the right to silence were then still politically unacceptable. The significance of this report in establishing an agenda for change should not however, be underestimated.

In 1994 the whole issue of character evidence in criminal proceedings was referred to the Law Commission, and its Consultation Paper was published in May 1996,³⁹ containing very full and generally persuasive analysis and criticism of the then existing law. Its robust statement⁴⁰ of principle included the promotion of simplicity, and the exclusion of any evidence for which no coherent instructions as to weight and use could be given to juries or magistrates.

It differed from the Criminal Law Revision Committee both in its overall policy and in its method. It explicitly disavowed the Committee's equation of the desirability of convicting the guilty and acquitting the innocent, by regarding the latter as taking priority.⁴¹ It also made some attempt to use empirical studies.⁴² It followed the lead of the Committee, however, in keeping separate the rules relating to admissibility of evidence of previous misconduct in chief and in cross-examination, which it justified on the basis that the latter is directed more to credibility, the decision is made later in the trial process in a different evidential context, and is directed to show character at a different time.⁴³ Its suggestions and preferences for reform were, however, overtaken by the final report, which took a rather different approach.

Reform of this area had figured as an issue in the general election of 2001, the manifesto of the winning Labour Party committing to preservation of the rash of decisions of the House of Lords in the previous decade or so⁴⁴ on the admissibility of evidence of bad character in chief. Meanwhile, the issue had been mentioned in a number of policy papers,⁴⁵

³⁶ For a particularly striking example in Australia, see *TKWJ v R* [2002] HCA 46, 212 CLR 124.

³⁷ But only where the imputation went beyond the facts of the case and was intended merely to attack credibility. ³⁸ For spirited defence of the Committee in this respect, see Cross [1973] *Crim LR* 400.

³⁹ Response was required urgently, presumably with a view to a bill being included in the Queen's speech for the next session of Parliament. ⁴⁰ [1.14].

⁴¹ [13]. ⁴² See [1.20] et seq. ⁴³ [1.35]. ⁴⁴ nn21, 22.

⁴⁵ For example, *Criminal Justice: The Way Ahead* (Cm 5074, 2001).

and in the far-reaching Auld Report into criminal procedure.⁴⁶ The general tenor of such opinion favoured increased reliance upon the ability of juries to deal with evidence of the accused's bad character, and placed some emphasis on securing a different balance between the interests of victims and society more generally, and those of the accused. On the other hand, the delay and change of government had led to a new context, in the shape of the enactment of the Human Rights Act 1998 with its promotion of the influence of the European Convention on Human Rights on English law.

The most significant difference from the two previous reports was determination to assimilate to a much greater extent the law relating to the use of bad character⁴⁷ evidence in chief and in cross-examination. Another important extension lay in the interpretation of the terms of reference to embrace all evidence of bad character, whether or not of the accused or co-accused.

It promoted an approach based on degrees of relevance, and rejected one based on prohibited categories, or certainly a prohibited category of propensity. It devoted some attention to the scope of the rule, and in particular to the difficulty of distinguishing between 'background' evidence, which lay outside the exclusionary rule, and that for other misconduct, which was subject to it. Like the Consultation Paper, it devoted more of its elaboration of the defects of the law to the rules relating to the use of such evidence in cross-examination than to its use in chief, and also like its predecessor, it saw reliance on discretion to avoid the worst effects of the provision not only as a telling indictment of it, but also as an unsatisfactory method of mitigation. It rejected as justifications for the general-approach arguments based on comparative credibility,⁴⁸ fairness,⁴⁹ or deterrence of unjustified attack.⁵⁰ It remained troubled by the anomaly that the sanction of use of the accused's record operated only against a *testifying* accused.⁵¹ It noted that not only was the law inconsistent, but that prosecution practice, for example in determining whether or not itself to bring out the misconduct of its own witnesses,⁵² was also inconsistent.

DISSATISFACTION

It is proposed here to retrace some of the ground covered above, but also to amplify a few of the main areas of difficulty and dissatisfaction that emerged during the development of this area of the law of evidence. The areas mentioned below in no way seek to be

⁴⁶ *Criminal Courts Review* (2001). Although in view of the then imminent publication of this final report, no firm recommendations for reform of this area of the law were propounded.

⁴⁷ It is interesting to note the change from refusal to use the phrase 'bad character' in the 11th Report to the reference to 'misconduct' in the Consultation Paper, and then finally to 'bad character' in the final Report. Much of the more popular discussion had been cast in terms of evidence of 'convictions'.

⁴⁸ The imputation might not affect credibility, and its rebuttal might well not be used by the jury only to weaken the credibility of the accused, whatever direction were given.

⁴⁹ Because it might let in evidence that was more prejudicial than probative to rebut a true and necessary part of the defence.

⁵⁰ Partly because it would be ineffective in preventing attack where the accused had no record, taking the view that this was better remedied by direct provision.

⁵¹ On the basis of the rule in *R v Butterwasser* [1948] 1 KB 4, [1947] 2 All ER 415, notwithstanding the pressure upon the accused to testify imposed by s 35 of the Criminal Justice and Public Order Act 1994.

⁵² So relieving the accused of the need to do so, and so to bring himself within the ambit of retaliation.

comprehensive, but may provide some perspective for evaluation of the provisions of the Criminal Justice Act 2003 to be elaborated in the next part of this chapter.

It must initially be confessed that there is little hard empirical evidence of the operation of the old law. The very first recommendation of the Royal Commission on Criminal Justice was that s 8 of the Contempt of Court Act should be amended so as to allow research into the reasoning of juries. It has not been, and may never be, implemented. In its absence, attempts to reform, or to appraise, this area of the law struggle in a sea of ignorance.⁵³ Simulations have the obvious defect that those participating in them know that they are simulations,⁵⁴ so impinging on the behaviour of participants.⁵⁵ Quite apart from lack of access to the jury, it is also the case that there is a dearth of empirical research and accessible statistical analysis,⁵⁶ for example on such matters as the incidence of testimony by the accused, or the incidence of re-offending or of serial or differential law-breaking.

Scope

As noted above, there was an increasing tendency to remove evidence described as 'background' from the impact of the basic exclusionary rule. Although this discussion was usually confined to the admissibility of such evidence in chief, it also applied where similar factors underlaid the debate about the relationship of ss 1(e) and 1(f) of the Criminal Evidence Act 1898 in the context of cross-examination. At first, a narrow approach was adopted under which only those matters so closely connected that the very facts in issue could not be understood at all without reference to them were included, but almost inevitably the idea of background was extended to matters that merely assisted the understanding of the facts in issue, such as the relationship between the parties as they had developed over the years, and it became highly problematic where the line between background and relevance was to be drawn.

Another difficult problem of scope related to the application of the inclusionary 'similar facts' exception to evidence that, while it undoubtedly showed bad conduct on other occasions, was nevertheless not introduced or used on that account. Thus, if a car were stolen in order to commit a robbery, the fact of such stealing is relevant to whether the person who stole it was involved in the robbery, but as a piece of ordinary evidence rather than as illustrating the accused's disposition to crime. It would be just as probative to show that the accused solicited a consensual loan of the car for the same purpose.⁵⁷

It was also claimed at times that the 'similar facts' rule was not engaged when the reasoning process went, not from the disposition of the accused to commit crimes such as the one charged to his having committed the one actually charged, but rather in the other direction from his having committed the actual crime charged to his having the disposition to commit such crimes.⁵⁸ Thus, in relation to *Makin*, it was argued that the accused's

⁵³ Most especially on the real incidence of prejudice, and the effectiveness of directions. But see *R v Smith* [2005] UKHL 2, [2005] 2 AC 176, [11] for a rare reported insight into what one member claims to have transpired in the jury's deliberations.

⁵⁴ Which are difficult to stage in even a remotely similar way to the conduct of a real trial.

⁵⁵ It may be thought that this might also apply to patent observation of real juries.

⁵⁶ Despite the admirable Crown Court Survey conducted by the Royal Commission, and the questionnaires used and research commissioned by the Law Commission in preparing its final report.

⁵⁷ In these situations, there is scope for bowdlerization of the evidence, perhaps by formal partial admission. See, for a similar approach in the United States, *Old Chief v United States* 519 US 172 (1997).

⁵⁸ Similar reasoning justifies the aggregating approach to identification.

commission of the crime charged stemmed from the statistical incidence of the deaths of children in houses the accused had occupied, and that their disposition to commit such crimes played no part in the argument to show that they had done so in any one case.⁵⁹

If such cases did fall outside the rule, they escaped being subject to any enhanced standard, and were admitted on a basis of no more than simple relevance, subject only to rarely exercised discretionary exclusion. As noted in the previous chapter, this unembellished standard already applied to evidence of bad character of the accused adduced by a co-accused, and to evidence of the bad character of third parties adduced by the accused.

Test

The test eventually adopted for the admission of evidence of the accused's bad character in chief was roughly⁶⁰ that it should be more probative than prejudicial. As noted above, one of the complaints advanced against the rule was that this formulation was too vague to give much guidance. Sometimes it was claimed that previous convictions, for example, were in themselves of no relevance at all,⁶¹ but this view was rather inconsistent with authorities such as *R v Straffen*.⁶² It certainly seemed that a different view was taken of relevance in different contexts.⁶³ The courts generally ignored attempts of commentators to dissect and label various elements of probative force, or different forms of prejudicial effect. It could indeed be argued that the test, as formulated in terms of weighing probative force against prejudicial effect, was incoherent. It was clear that 'prejudicial effect' must mean more than that the admission of the evidence would tend to lead to an increased chance of conviction, and it was usually accepted that it meant that the trier of fact would attach more weight to the evidence than it deserved. The problem is that the weight it deserved was nothing other than its true probative force, so any notion of weighing prejudicial effect against probative force must already have taken place in order to determine that the evidence was prejudicial at all. It was also remarked that the concepts of prejudicial effect and probative value were left undeveloped in the case law, and, operating as they did in the different realms of emotion and logic, resisted convincing comparison with each other.⁶⁴ The result was in effect to leave the application of the rule at the mercy of the court's instinctive reaction.⁶⁵

Procedure

If, however, the test for admissibility was nevertheless to be one of the balance of probative force and prejudicial effect, there were procedural difficulties, since the application of

⁵⁹ Although the counterargument is that a statistical premise can lead only to a statistical conclusion, in this case, that the Makins killed most of the children, and that the necessary linkage to the particular death was accomplished only by way of an argument relying upon the disposition indicated by the statistical conclusion.

⁶⁰ Minor differences of formulation appeared in the cases.

⁶¹ See Lord Hailsham LC in *DPP v Boardman* (n18), 451, 904.

⁶² [1952] 2 QB 911, [1952] 2 All ER 657, in which about the only evidence apart from Straffen's propensity was his being in the general area where the crime had been committed, and so having had an opportunity to commit it.

⁶³ Compare, for example, the strict view taken of relevance in *R v Slender* [1938] 2 All ER 387 with the lax view taken in *R v West* [1996] 2 Cr App Rep 374.

⁶⁴ Memorably categorized by Mirfield as an attempt to balance 'apples and Thursdays': (2002) 6 *E&P* 141, 148.

⁶⁵ It is symptomatic that the number of murder cases in which the evidence has been excluded is very small indeed.

these concepts in the context of a trial might involve the determination of matters of fact, which were, in general, the province of jury rather than judge. The problem was exacerbated by those very facts governing admissibility being, in many cases, effectively indistinguishable from those that the jury would ultimately have to determine in order to arrive at its verdict.

Matters were complicated by the fact that, even when some misconduct of the accused was irrelevant to some other misconduct, he might nevertheless be charged with both on the same indictment if there was sufficient connection between them.⁶⁶ Matters were capable of further complication and unfairness when more than one person was tried in the same trial, and evidence admissible against one not strictly admissible under the similar fact rules against another, but might nevertheless be prejudicial to him.

Nor did the position remain static during the trial itself. As further evidence emerged, sometimes quite different from what was initially expected, evidence of other misconduct, which seemed initially admissible, or inadmissible, might change from one category to the other.

Then the whole pattern of the trial was capable of being itself affected by the perceived operation of the rules. For example, the accused with a bad record might choose not to advance his true defence,⁶⁷ or might choose not to testify.⁶⁸ Nor was this vital decision an easy one since the disparity between the rules governing evidence in chief and evidence in cross-examination⁶⁹ meant that the decision to testify had to be taken in ignorance of whether cross-examination would be allowed. It was also the case that, even if a particular question in cross-examination about other misconduct were not permissible, it might not be obvious to prosecuting counsel that it would not be allowed, and a damaging and disallowable question might be put without the accused having had an opportunity to protest in advance in the absence of the jury, perhaps placing the accused in the difficult position of either protesting after the event and running the risk of the jury's attention having become concentrated on the inadmissible evidence, or not protesting and so allowing it to have been heard without demur despite its inadmissibility.

Discretion

This whole subject was considered in Chapter IV above, but it may be re-emphasized here that, in this vital area, it introduced inconsistency and uncertainty, and, to the extent that it was explicitly invoked, removed whole swathes of the area from effective appellate control. This was particularly unfortunate in an area in which emotions run high, and when trials are often conducted without adequate preparation, without ready recourse to authority, and sometimes at a relatively low level, both in terms of the experience of the advocates and the competence, or even fairness, of the tribunals.

⁶⁶ Indictment Rules 1971, r 9, which is subject to discretionary control under s 5(3) of the Indictments Act 1915, but which operates on different principles from those governing only the admissibility of evidence.

⁶⁷ Rebuttal by reference to the bad character of the accused was permissible, even though an attack on a prosecution witness was completely true: see *R v H* [2003] EWCA Crim 1300, [19].

⁶⁸ In *Ebanks v R* [2006] UKPC 11, [2006] 1 WLR 1660, [17], it was stressed that any decision not to testify should be recorded in writing, and signed.

⁶⁹ And especially the heavy use of judicial discretion to mitigate the severity of the operation of the rules.

Consequences

There were also a number of unfortunate by-products of the old rules, in terms of the logistics of trials, their collateral impact, and the dangers they could pose more generally to the criminal system.

Since the focus is on *other* misconduct of the accused, it may often happen that its investigation and presentation will have the effect of increasing the expense, and prolonging the duration, of a trial. These factors will become more serious, the longer the period over which the alleged misconduct occurred.⁷⁰ Then there is the paradox that the more central the allegation of other misconduct to proof of guilt, the more attention will need to be devoted to its correct determination, and the greater the chance of distracting the jury from the matters upon which it is required to arrive at a verdict.

Where the other misconduct has itself already been tried,⁷¹ it creates some risk of inconsistency; where it is concurrently being tried,⁷² it creates some risk of anomaly; where it has not been tried or charged,⁷³ it creates some risk of abuse of process by prior publicity.

Quite apart from such effects, the ready use of previous misconduct could have the result of distorting the criminal process by increasing the power of the police to manipulate the investigation of crime both in selection of suspects, and their treatment under interrogation. Nor does undue reliance upon previous convictions promote policies of rehabilitation.

In many such situations, there is an obvious danger of unfairness, and since the passage of the Human Rights Act 1998, an increasing likelihood of recourse to the European Court of Human Rights, with still greater risks of prolonging the criminal process, and whenever such recourse were successful, of bringing the English system into disrepute, or in extreme cases, of causing further distortion if particular parts then require hasty adaptation in the light of such decisions.

DESIGN

Although the Law Commission had appended draft legislation drafted to implement its recommendations, that draft was not enacted⁷⁴ for a number of reasons. As noted above the whole issue had become embroiled in the political process, and much of the lay debate had been cast in crude terms of the aim of increasing the extent of the admissibility of the accused's criminal convictions. While it is true that there had been reluctance⁷⁵ under the old law to admit evidence of convictions in chief,⁷⁶ this reflected the absence of probative force of the bare record, when what was required was similarity of factual detail.

Nevertheless, the drive to achieve this aim caused some distortion of the debates in parliament, sometimes by dictating acceptance of other areas of amendment, from those

⁷⁰ As will the likelihood of achieving an accurate result.

⁷¹ Whether resulting in conviction or acquittal.

⁷² Different counts in the indictment, or a joint trial.

⁷³ Allegations of commission of other crimes.

⁷⁴ Although interestingly an amendment to substitute it for the government bill as it had become, was defeated only at its very final stage in the House of Commons.

⁷⁵ See *DPP v Kilbourne* [1973] AC 729, [1973] 1 All ER 440, where the whole case turned on the admissibility of similar allegations in different counts, and the accused's convictions for similar offences seem to have been ignored.

⁷⁶ As opposed to cross-examination.

presenting a credible threat to the passage of the legislation if their chosen amendments were rejected. It also dictated a tougher attitude to the interests of the accused, and a more generous one to the interests of the prosecution than had inspired the final report of the Law Commission, which had sought a more even balance between them. Ironically enough the polarization of the debate, and the strength of the opposition to the use of convictions, compelled the government to abandon the form of its original bill constituting them as a separate gateway to admissibility, although the government's determination to expand admissibility in that respect determined a further amendment to make specific, and complex, reference to the admissibility of convictions in relation to the principal gateway to admissibility, namely an important matter in issue between the defendant and prosecution.

One of the principal aims of the Law Commission had been to clarify the law, by assimilating the rules both relating to the bad character of the accused with that of other participants, such as witnesses or co-accused, or third parties where their bad character was relevant, and by assimilating the rules relating to the admission of evidence of bad character whether adduced in chief, in cross-examination, or in rebuttal. It further sought to eschew any undue technicality both in the substance of the law by the use of ordinary language,⁷⁷ and procedurally by making evidence of the accused's bad character admissible by the prosecution without the need for application to the court in every case.

It is, however, rarely the case that departure from a carefully drafted form arrived at after considerable preparation and consultation, and then an amendment on a continuing basis during parliamentary passage, contributes to clarity and coherence. Thus, in the very first case to consider the new provision, the Court of Appeal was driven to bemoan its complexity and its drafting.⁷⁸

SECTION 2. STRUCTURE OF THE MODERN LAW

As noted above, although inspired and informed by the recommendations of the Law Commission, the new provisions of Part 11 c 1 of the Criminal Justice Act 2003 depart in both letter and spirit from those recommendations in significant respects. They were intended to replace both common law and most existing general statutory provisions. Their purpose was judicially described in one early case as being:⁷⁹

...to assist in the evidence based conviction of the guilty, without putting those who are not guilty at risk of conviction by prejudice.

In another, their passage was described as 'a sea-change',⁸⁰ and it was asserted that:⁸¹

... the important change is that whereas previously evidence of the defendant's propensity to offend in the manner now charged was prima facie inadmissible, now it is prima facie admissible.

⁷⁷ *R v Bullen* [2008] EWCA Crim 4, [29].

⁷⁸ *R v Bradley* [2005] EWCA 20, [2005] 1 Cr App Rep 397, [38]; apparently accepted as the standard view soon after in *R v Isichei* [2006] EWCA Crim 1815, [32].

⁷⁹ *R v Hanson* [2005] EWCA Crim 824, [2005] 2 Cr App Rep 299, [4].

⁸⁰ While recognizing that some of the concepts of the old law would still be applicable, and the result often the same; for similar terminology but a different approach to the use of the old law see *R v Saleem* [2007] EWCA Crim 1923, [23].

⁸¹ *R v Chopra* [2006] EWCA Crim 2133, [2007] 1 Cr App R 225, [12].

Subsequent experience seems to have borne out this effect as the then Lord Chief Justice noted in the opening words of his judgment in the important case of *R v Campbell*:⁸²

Prior to the Criminal Justice Act 2003 it was rare for a jury to be given details of a defendant's previous criminal record. Since that Act has come into force it has become much more common.

It is now proposed to discuss first the general framework, concepts and procedure embodied in the Act before going on to the detail of the various gateways to admissibility.

FRAMEWORK

The broad outline of the Law Commission's recommendation that the old law should be abolished and replaced, and the accused's bad character defined and admitted on the same basis, and through a number of defined gateways, whether in evidence in chief or in cross-examination,⁸³ subject only to limited exclusionary conditions, was retained, although as will be seen there was considerable variation in detail; some induced by change of policy, and some by the hazard of parliamentary passage.

It is useful to begin by reciting CJA 2003, s 101(1), the principal provision setting out the 'gateways' for the admissibility of evidence of the defendant's bad character:

In criminal proceedings evidence of the defendant's bad character is admissible if, but only if—

- (a) all parties to the proceedings agree to the evidence being admissible,
- (b) the evidence is adduced by the defendant himself or is given in answer to a question asked by him in cross-examination and intended to elicit it,
- (c) it is important explanatory evidence,
- (d) it is relevant to an important matter in issue between the defendant and the prosecution,
- (e) it has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant,
- (f) it is evidence to correct a false impression given by the defendant, or
- (g) the defendant has made an attack on another person's character.

These provisions were brought into force, somewhat prematurely,⁸⁴ in December 2004. The new rules were, despite some unhelpful drafting, held to apply to all trials⁸⁵ that commenced after that date, irrespective of proceedings being already in train,⁸⁶ or of their taking the form of a rehearing after reference from the Criminal Cases Review Tribunal of a case initially determined under the old rules.⁸⁷

Section 99 abolished all common law rules governing the admissibility of evidence of bad character in criminal proceedings.⁸⁸ Most general statutory provisions relating to the

⁸² [2007] EWCA Crim 1472, [2007] 2 Cr App Rep 361, [1].

⁸³ Although the Law Commission's draft exclusion of propensity to be untruthful from matters in issue between prosecution and defence (cl 8(5)) was reversed by its express inclusion in the Act (s 103(1)(b)), at least in the vast majority of cases.

⁸⁴ No transitional provisions, as promised, had been drafted, and no judicial instruction, as arranged, had been undertaken.

⁸⁶ *R v Bradley* (n78), [34].

⁸⁷ *R v Campbell* [2006] EWCA Crim 1305, (2006) 150 SLB 1527.

⁸⁵ And *Newton* hearings.

⁸⁸ Although s 99(2) preserved the common law rule relating to proof of reputation as a means of proving bad character, and rules excluding bad character evidence on other grounds are preserved by s 112(3)(c).

admissibility of evidence of bad character were also repealed.⁸⁹ While it is clear that the intention was to substitute the new provisions relating to the admissibility of evidence of bad character for the old, this was a curious way of doing it, since the target was obviously the old rules of *inadmissibility* of evidence of bad character,⁹⁰ and it is clear that the most substantial rule of the old law relating to evidence of bad character, namely that it was admissible if relevant and not excluded by a rule of inadmissibility, has in fact been retained.⁹¹ The abolition only of *rules* of admissibility further left obscure the position relating to exclusion by discretion,⁹² or under rules of practice.⁹³

CONCEPTS

The most important concept is that of bad character itself, which the Act defines in s 98 as:

...evidence, of, or of a disposition towards, misconduct on... [a person's] part, other than evidence which—

- (a) has to do with the alleged facts of the offence with which the defendant is charged, or
- (b) is evidence of misconduct in connection with the investigation or prosecution of that offence.

This is supplemented by the definition of misconduct in s 112(1) to mean:

The commission of an offence, or other reprehensible behaviour...

In the Law Commission's draft bad character had been differently defined,⁹⁴ and the two conditions had been specified as those where exceptional leave to adduce the evidence of bad character did not need to be sought. It is important to note that the function of s 98 is to exclude what it contains from the definition of bad character, both for the purposes of the admissibility of the evidence of the bad character of the accused or co-accused sought by the prosecution or co-accused under the gateways specified in s 101, and that of witnesses or third parties, usually sought by the accused under s 100. This means that evidence within the conditions specified in s 98 is admissible, not under the terms of the Act but under the old conditions applying before its passage, principally at common law, since the abolition of the rules of inadmissibility by s 99 is itself governed by the terms of s 98. It was nevertheless at first held that evidence falling outside this definition will be admissible 'without more ado'.⁹⁵ This was soon corrected by its propagator's simply changing the

⁸⁹ Sch 7, Pt 5.

⁹⁰ The distinction between rules of admissibility and of inadmissibility is recognized elsewhere in the Act: see s 62(9), was emphasised in *R v Y* [2008] EWCA Crim 10, [2008] 2 All ER 484, [47], and further endorsed in *R v O* [2008] EWCA Crim 463, [29].

⁹¹ See *R v Highton* [2005] EWCA Crim 1985, [2006] 1 Cr App Rep 125 (*Van Nguyen*), [42]; *Weir* [2005] EWCA Crim 2866, [2006] 2 All ER 570 (*Somanathan*), [36]; *R v Bullen* (n77), [29].

⁹² See Police and Criminal Evidence Act 1984 s 82(3). Nor has s 78 of that Act been either repealed, or by contrast to s 126(2) in relation to hearsay, explicitly retained. See further, 618.

⁹³ See *Practice Note* [2002] 3 All ER 904 (use of spent convictions).

⁹⁴ In cl 1 as 'evidence which shows or tends to show that – (a) he has committed an offence, or (b) he has behaved, or is disposed to behave, in a way that, in the opinion of the court, might be viewed with disapproval by a reasonable person'.

⁹⁵ *R v Edwards and Rowlands* [2005] EWCA Crim 3244, [2006] 3 All ER 882, [1](i); *Weir* (n91) (*Manister*), [95].

rule from 'will be admissible without more ado' to 'may be admissible without more ado'.⁹⁶ Under the revised formulation, evidence of the accused's reprehensible behaviour may, if inadmissible under the Act, perhaps remain governed by the enhanced relevance requirement of the common law, and certainly may be excluded if more probative than prejudicial. In *R v Fox*, the trial judge regarded the evidence as admissible either at common law if s 98(a) applied, or under s 101 if it did not, without much discrimination between them. The Court of Appeal held this too cavalier an approach, instead requiring careful consideration of which was to apply, and the proper direction in either case.⁹⁷ It took a narrow view of the scope of s 98(a), restricting it to evidence of actus reus rather than mens rea. It also took the view that where it did exclude the other statutory provisions, the common law still applied, as suggested above.⁹⁸ Because of the application of the definition to the operation of both s 100 and s 101 as indicated above, neither a broad nor a narrow interpretation will always tend to further the interests of prosecution or accused. Occasionally, evidence can be relevant only if it does show bad character.⁹⁹

It is proposed to examine first the notion of what amounts to 'reprehensible' behaviour, and then the operation of s 98, including the meaning to be attached to its two conditions.

Exactly what counts as 'reprehensible' conduct for these purposes remains obscure.¹⁰⁰ The difficulty stems from the need to cater for conduct not itself necessarily constituting an offence, and the rejection during parliamentary passage of the Law Commission's circumlocution. In *R v Campbell* it was equated with 'blameworthy', although some may think that has a different nuance of meaning. Perhaps the most extensive interpretation so far is the suggestion that conduct is reprehensible even though, when tried for it, the accused was found unfit to plead,¹⁰¹ which must surely raise at least the possibility that it was unintended. That it extends well beyond criminality is illustrated by the finding that female promiscuity can be enough.¹⁰² On the other hand, a sexual relationship between a man aged 34 and a girl aged 16 has been thought not reprehensible, nor remarks of that man to a girl aged 15 indicating sexual interest.¹⁰³ This striking contrast between the categorization of male and female sexuality¹⁰⁴ suggests that conventional stereotyping, however unjustified, may play a role. Simply having been found in the vicinity of a crime, arrested, and having refused to make a witness statement,¹⁰⁵ has been held not to be reprehensible, and nor has an exaggeration by a witness of violence by a schoolteacher for the purposes of s 100.¹⁰⁶ In *R v Osbourne*¹⁰⁷ an allegation of shouting at a partner was not regarded as sufficiently 'reprehensible' on a charge of murder, perhaps¹⁰⁸ suggesting the application

⁹⁶ *R v Watson* [2006] EWCA Crim 2308, [19].

⁹⁷ [2009] EWCA Crim 653, [33]; cf *R v Marsh* [2009] EWCA Crim 2696, [46] where another constitution of the Court of Appeal seemed to adopt the position criticized in *Fox*.⁹⁸ [30], [34].

⁹⁹ As in *Weir* (n91) (*He and He*), [120] (as between co-accused).

¹⁰⁰ See further and fuller, Munday [2005] *Crim LR* 24, Goudkamp (2008) 12 *E&P* 116.

¹⁰¹ *R v Renda* [2005] EWCA Crim 2826, [2006] 1 Cr App Rep 380, [24]; cf *R v Davarifar* [2009] EWCA Crim 2294, [11] where personality problems leading to a possibly false sexual complaint were regarded as making it dubiously reprehensible.¹⁰² *Ibid* (*Ball*), [35].

¹⁰³ *Weir* (n91) (*Manister*), [94], [97].

¹⁰⁴ Despite the rather closer connection between rampant male sexuality and violence.

¹⁰⁵ *Weir* (n91) (*He and He*), [118].¹⁰⁶ *R v V* [2006] EWCA Crim 1901, [41].

¹⁰⁷ [2007] EWCA Crim 481, [34].

¹⁰⁸ The evidence was, however, tendered as explanatory evidence under gateway s 101(c), and perhaps for that reason was more strongly linked than otherwise to the nature of the offence charged.

of a scale varying with the seriousness of the offence charged. Ostensibly neutral conduct has been held 'reprehensible' as merely the observable part of a larger clearly reprehensible whole.¹⁰⁹ This seems questionable when the inference is of the very same conduct with which the accused is on trial.

The terminology and operation of s 98 has been regarded as difficult,¹¹⁰ no doubt partly because the whole section had had to be drafted for the first time to cater for the departure from the Law Commission's scheme, partly because it had been subjected to amendment during parliamentary passage, and partly because of an apparently deliberate attempt to use non-technical language¹¹¹ such as 'has to do with' and 'connected with'. If read literally, without regard to its origins, context or extent, it might be thought to describe relevance either to issue or credit at trial, but so to read it would deprive this whole part of the Act of effect, since it is fundamental that only relevant evidence is admissible. So it must be given a more limited meaning;¹¹² the difficulty is to establish just how limited.

Such little authority as there is¹¹³ has mainly concerned the interpretation of s 98(a). It seems clear that the Law Commission had had in mind misconduct which formed part of the crime charged,¹¹⁴ and was relevant as background or circumstantial evidence, or difficult to disentangle from the crime itself, such as in the case of a bank robbery that the thief stole a car as a get-away vehicle, or assaulted customers as well as staff of the bank in the course of the robbery. Complication is created in its application to cases where there are co-accused, either because the bad character has to do with the case against only one of the two co-accused,¹¹⁵ or where the evidence is of the bad character of one, when it does have to do with the issue involving the other on the defence argument, but not on that of the prosecution.¹¹⁶ An attempt to construe the opening words of s 98 so as to eliminate cases in which the evidence was to be relevant only otherwise than circumstantially was rejected in *R v Wallace*, despite finding some support from the Judicial Studies Board in its suggestions for direction of the jury.¹¹⁷ It has thus been circumscribed as needing to be part of the *res gestae*,¹¹⁸ or to have taken place at the same time and location as the crime itself.¹¹⁹ It is rather more startling to find that such contiguity may be sufficient as well as necessary.¹²⁰ The time component seems to have varied from case to case, sometimes apparently needing to be 'contemporaneous',¹²¹ sometimes 'reasonably contemporaneous',¹²² sometimes enough to have occurred two days earlier or later,¹²³ and sometimes to have occurred in the 'aftermath' of the crime charged.¹²⁴

¹⁰⁹ *R v Rossi* [2009] EWCA Crim 2406.

¹¹⁰ See *R v Edwards and Rowlands* (n95) [19]; *R v Wallace* [2007] EWCA Crim 1760, [38]; *R v Lewis* [2008] EWCA Crim 424, [13] ('notoriously').

¹¹¹ Said in *R v Tirnaveanu* [2007] EWCA Crim 1239, [23] to be 'a fact specific exercise involving the interpretation of ordinary words'.
¹¹² *Ibid.* ¹¹³ *Ibid.*, [22].

¹¹⁴ As in *DPP v Agyemang* [2009] EWHC 1542 (driving while disqualified shown memorandum of previous conviction resulting in that disqualification).
¹¹⁵ As in *R v AJR* [2006] EWCA Crim 3196, [19].

¹¹⁶ As in *R v Lewis* (n110), [13] where the complication seems to have excited the Court's use of an alternative, and, it is submitted, plainly erroneous, justification.
¹¹⁷ (n110), [36]–[39].

¹¹⁸ *R v Lowe* [2007] EWCA Crim 3047, [18](a).

¹²⁰ *R v Machado* [2006] EWCA Crim 837, [16].

¹²² *R v McNeill* [2007] EWCA Crim 2927, [14].

¹²⁴ *R v McKintosh* [2006] EWCA Crim 193, [24].

¹¹⁹ *Tirnaveanu* (n111), [23] ('some nexus of time').

¹²¹ *Ibid.*, [13].

¹²³ *Ibid.*, [15].

Since s 101 contains gateway (c) dedicated to explanatory evidence of bad character, and in relation to gateway (d) expressly¹²⁵ admits evidence going beyond that of propensity, it is difficult¹²⁶ to construe the meaning of s 98 exclusively from that of s 100 and s 101. If there is an overlap between evidence having to do with the alleged facts of the offence, and evidence relevant under one of the gateways specified in s 100 or 101, which is to prevail, and does it matter? It can be argued that it does not, since even if s 98 were to apply exclusively it would not as indicated above, prevent inadmissibility on the basis of irrelevance, or under s 78 of the Police and Criminal Evidence Act 1984.¹²⁷ It is not, however, completely clear that in this context relevance under the old law was exactly the same as relevance under the new, and it is clear that the new legislation brings with it a completely new apparatus of notices, for leave, and stopping for contamination which did not apply in exactly the same way under the old law. For example, it could be argued that if the accused were to allege that the crime with which he is charged, say causing a death by dangerous driving, were committed by a prosecution witness, say another driver involved in the incident, such an allegation would clearly come within s 98(a), so take him outside the provisions of s 100, and preclude the necessity to seek leave to tender evidence of that driver's bad character. So loosely worded a provision may also provide a bolt-hole for those disinclined to wrestle with the complexities of the more detailed provisions of this part of the Act, and of the rules and procedures it prescribes. It is accordingly submitted that it may be dangerous to take an extended view of the ambit of s 98(a), especially when a restricted view is taken of the exclusionary rigour of the common law. Sometimes the Court seems close to holding that any evidence relevant to facts in issue is 'to do with' them, and hence admissible without reference to the 'gateways';¹²⁸ and sometimes that any evidence relevant to showing that a prosecution witness is telling the truth about the alleged facts is similarly automatically relevant.¹²⁹

S 98(b) is cast in similarly vague terms, especially in the use of the term 'in connection with'. This part of the provision has so far hardly surfaced at all, except to have been said¹³⁰ by the Lord Chief Justice to have been clearly applicable so as to eliminate any need for one co-accused to seek leave under s 100 to attack a co-accused and his solicitor on the basis that they had sought to pressure him into supporting that co-accused's defence.

PROCEDURE

Because, the substance of the provisions now differs so radically from that of the old common law, it has been necessary to devise new procedures, and for the courts to spell out their detailed operation. Since these are matters of general application it is proposed to mention them first, before going on to consider the substance of individual 'gateways'. This

¹²⁵ S 103(1) 'include'.

¹²⁶ Cf Rix LJ, *Tirnaveanu* (n111), [24] 'there is a potential overlap'; Rix LJ, *R v McNeill* (n122), [16] 'evidence within the exception of section 98(a), and therefore not... within the bad character provisions of the 2003 Act' (emphasis supplied).

¹²⁷ Now recognized as equivalent in effect to s 101(3) of the Criminal Justice Act 2003 despite the different terminology: *R v Tirnaveanu* (n111), [28].

¹²⁸ As in *R v Lewis* (n110), [13], although the Court found it unnecessary to make a final determination.

¹²⁹ As in *R v McKintosh* (n124), [24].

¹³⁰ *R v Ibrahim* [2008] EWCA Crim 880, [2008] 4 All ER 208, [124].

somewhat arbitrary selection of topics will include matters concerning leave to adduce evidence of bad character; the use of the *voir-dire* and, more generally, means of proof of such bad character, including the problem of avoiding satellite litigation; multiple counts and cross-admissibility; exclusion of evidence of bad character as unfair or contaminated; direction of the jury; and the approach to appeal and review.

Leave and notice

Deliberately departing from the recommendations of the Law Commission for the form of definition adopted in the Act, leave to adduce evidence of his bad character is not required in the case of the *accused*, despite its retention in relation to the bad character of others. On the other hand, *notice* of intent to adduce evidence of the accused's bad character is required,¹³¹ and elaborated in the provisions of the Criminal Procedure Rules, which require the prosecution to notify the defence of its intention to do so in detail,¹³² and notably to specify the particular gateway, the relevance of the evidence, and in the case of convictions, whether the fact, or facts, of the conviction are relied upon.¹³³ It is in fact frequently treated, and referred to, as an application.¹³⁴ Given the danger of 'satellite' litigation,¹³⁵ the Court of Appeal has warned against routine prosecution¹³⁶ applications,¹³⁷ or the adoption of devious tactics to secure relevance,¹³⁸ but has instead urged compliance with the spirit as well as the letter of the requirements.¹³⁹

It was said in *Hanson* that where the evidence is of convictions it may be necessary to give no more than a list, allowing the nature of the crime to indicate its relevance to the accused's propensity. It seems also that any notice should not only indicate the 'gateway' invoked, but that in the most common case of (d) should distinguish between relevance to issue and to credibility, which can cause difficulty when the evidence is capable of going to both.¹⁴⁰ The amount of detail required will be considered further below in relation to the means of proof of the basis for allegations of bad character.

The rules specify¹⁴¹ that the prosecutor give notice of intention to adduce or elicit evidence of the accused's bad character in a specified form no more than fourteen days after committal,¹⁴² although the court may waive the requirement as to form, or vary the time limit.¹⁴³ It has been stressed that justice will normally demand strict adherence to these limits so as to give the accused a chance to consider, and to respond by way of application to prevent the admission of the evidence.¹⁴⁴ It has also been remarked¹⁴⁵ that an incidental advantage of serving notice is that it automatically clarifies the issues, and may save time

¹³¹ S 111(2). Although it seems not to have been given in *R v Marsh* (n97), despite assuming admissibility under s 101(1)(a).

¹³² Thus necessitating the making, retention, and accessibility of such detail: *R v Bovell and Dowds* [2005] EWCA Crim 1091, [2005] 2 Cr App R 401, [2].

¹³³ *R v Hanson* (n79), [17]. Similar considerations apply to the co-accused in relation to gateway (e): see *R v Edwards and Rowlands* (n95), [1](ii).

¹³⁴ In *R v McNeill* (n122), [9] 'notice' and 'application' are used synonymously.

¹³⁵ So described in *R v Edwards and Rowlands* (n95) (*Smith*), [86]; see further, 406.

¹³⁶ Or co-accused: *R v Edwards* [2005] EWCA Crim 1813, [2006] 1 Cr App Rep 31, [1](ii); or defence, *R v Hanson* (n79), [17].

¹³⁷ *R v Hanson* (n79), [4].

¹³⁸ *R v Renda* (n101) (*Ball*), [38]. ¹³⁹ *R v Letts and Chung* [2007] EWCA Crim 3282, [21].

¹⁴⁰ As it did in *R v Culhane and Chin* [2006] EWCA Crim 1053. ¹⁴¹ CPR 35.4.

¹⁴² In the most common case. ¹⁴³ *Ibid* 35.8.

¹⁴⁴ *R (Robinson) v Sutton Coldfield Magistrates' Court* [2006] EWHC 307 (Admin), [16]–[17].

¹⁴⁵ *R v Tirnaveanu* (n111), [39].

and expense. Nevertheless, complete failure to give notice before the opening of the prosecution case has been allowed,¹⁴⁶ even when the evidence is sought to be adduced by the prosecution in retaliation for departure by the accused from his case as disclosed.¹⁴⁷ It has sometimes been commended,¹⁴⁸ and sometimes a late plea may so change the whole basis for the relevance of evidence of bad character as to require the notice to be reconsidered.¹⁴⁹ Because some of the 'gateways' depend upon events during the course of the trial, such as making an attack on another or conveying a false impression, it has been suggested that the time limits for such eventualities be examined,¹⁵⁰ although some robust opinions have categorized waiting for such triggers before service of the notice as 'absurd'.¹⁵¹

The availability of the power to vary the limits has lent support to the general inclination to sanction breach of the rules by the prosecution so long as no prejudice or injustice can be detected,¹⁵² which may well be the attitude when the court feels that the evidence would certainly have been admitted had proper notice been served.¹⁵³ Conversely, the Court may sometimes refrain from criticism when there is a different reason for excluding the evidence.¹⁵⁴ Perhaps the most far-reaching manipulation of the notice provisions was made in *R v Musone*, where the Court of Appeal conjured up a previously prohibited discretion to disallow the admission of evidence of the bad character of one co-accused by another, on the basis that failure to give notice had there amounted to deliberate ambush.

Proof of bad character

In the old law the fact of conviction was often used to discredit witnesses in cross-examination, but because of the enhanced relevance required for evidence in chief, underlying facts were then usually necessary. Assimilation of the rules for the use of evidence of the accused's bad character in cross-examination and in chief has thus created problems, immediately exposed in *R v Hanson*,¹⁵⁵ where it was accepted that sometimes under the new law a list of previous convictions would be sufficient, no doubt reflecting the abandonment of any enhanced standard of relevance.¹⁵⁶ On the other hand in relation to credit a more refined standard is required in the new law,¹⁵⁷ and this was reflected in *Hanson's* further discrimination of dishonesty from untruthfulness.¹⁵⁸ In cases where the underlying facts of a conviction, or any other example of bad character, were relied upon, the rules required the Crown in its notice to specify the circumstances and means of proof of the evidence. In *Hanson* it was hoped that this would generally be the subject of admission, and:¹⁵⁹

Even where the circumstances are genuinely in dispute, we would expect the minimum indisputable facts to be thus admitted. It will be very rare indeed for it to be necessary for the judge to hear evidence before ruling on admissibility under this Act.

¹⁴⁶ *R v Culhane* (n140); *R v Wallace* (n110), [40] (on account of confusion about the effect of s 98(a)).

¹⁴⁷ *R v Delay* [2006] EWCA Crim 1110 (where the notice was oral).

¹⁴⁸ *R v Wilson* [2008] EWCA Crim 134, [23].

¹⁴⁹ *R v Bullen* (n77), [27] (late plea of manslaughter at murder trial previously expected to turn on self-defence).

¹⁵⁰ *R v Letts and Chung* (n139), [21].

¹⁵¹ *R v Ullah* [2006] EWCA Crim 2003, [18].

¹⁵² As in *R v Culhane and Ching* (n140), [25].

¹⁵³ *R v Wallace* (n110), [40].

¹⁵⁴ As in *R v Urushadze* [2008] EWCA Crim 2498, [19], (very late oral notice). ¹⁵⁵ (n79), [17].

¹⁵⁶ See the distinction between similar fact evidence under the old law and propensity under the new drawn in *R v Hewlett* [2008] EWCA Crim 270, [24].

¹⁵⁷ As explained in *R v Lawson* [2006] EWCA Crim 2572, [2007] 1 Cr App R 11, [32].

¹⁵⁸ *R v Hanson* (n79), [13]. ¹⁵⁹ [17].

It immediately emerged that the apparently straightforward realm of convictions might sometimes lead to dispute; even as to whether those proffered really were those of the accused.¹⁶⁰ It has been stressed that even a conviction is not itself bad character, but merely evidence of it, a status unavailable to mere unproved charges.¹⁶¹ Similarly, the basis of the convictions might well be challenged.¹⁶² The position is still worse in the absence of the 'launch pad' of a conviction, most clearly summarized by Toulson LJ in *R v McKenzie*:¹⁶³

Without such a launch pad, proof of the previous alleged misconduct requires the trial of a collateral or satellite issue as part of the trial of the defendant for the offence with which he is charged. Trials of collateral issues have the dangers not only of adding to the length and cost of the trial, but of complicating the issues which the jury has to decide and taking the focus away from the most important issue or issues.

He also pointed out the paradox that proof of the relevant bad character is stronger the more previous incidents there are; but at the same time the more such incidents, the greater these dangers of distraction. Similarly, the further the previous misconduct from a formal charge, and the more ancient it is, the more difficult it is likely to be to prove.

Although many factual issues may arise in relation to the evidence of previous misconduct it is relatively rare for a voir dire to be thought necessary.¹⁶⁴ A number of other expedients have been followed or recommended, including ventilation at a preparatory hearing,¹⁶⁵ making a conditional decision to admit the evidence,¹⁶⁶ and deferring any decision until a triggering condition has occurred.¹⁶⁷ The advantage of considering the matter early is that it may help to precipitate a plea, and so avoid a trial at all; the disadvantage is that until all the evidence is in, it is difficult to assess its precise relevance and force. Nor should the amount of such evidence be underestimated. In one case¹⁶⁸ with two co-accused they had over a hundred previous convictions between them, of which just under half were admitted after the judge's ruling. The amount of time at trial and length in the judge's summing-up may be overwhelming,¹⁶⁹ and become a major reason for prolonging a trial.¹⁷⁰

The two basic methods of proving previous misconduct are oral evidence of witnesses, especially in sexual cases, of complainants, and documents either used in previous proceedings or summarizing such evidence.¹⁷¹ Attempts have sometimes been made to use material from the Police National Computer system, but then there is a danger that detail

¹⁶⁰ As in *R v Burns* [2006] EWCA Crim 617, [2006] 2 Cr App R 264, [17]; *R v Lewendon* [2006] EWCA Crim 648, [2006] 1 WLR 1278.

¹⁶¹ *R v Hussain* [2008] EWCA Crim 1117, [13].

¹⁶² As in *R v Humphris* [2005] EWCA Crim 2030, (2005) 169 JP 441, [18]; *R v Ainscough* [2006] EWCA Crim 694, (2006) 170 JP 517, [19].

¹⁶³ [2008] EWCA Crim 758, [23].

¹⁶⁴ *R v Hanson* (n79), [17] (convictions); *R v Maynard* [2006] EWCA Crim 1509, [10] (non-convictions). One was held in *R v Weir (Yaxley-Lennon)*, (n91) [64].

¹⁶⁵ *R v Steen* [2007] EWCA Crim 335, [2008] 2 Cr App R 380, [8]; although such issues are sometimes overlooked at that stage: see *R v O'Dowd* [2009] EWCA Crim 905, [71].

¹⁶⁶ *R v Lamaletie and Royce* [2008] EWCA Crim 314, [10].

¹⁶⁷ *R v Card* [2006] EWCA Crim 1079, [2006] 3 All ER 689, [23]; *R v Gyima and Adjei* [2007] EWCA Crim 429, [40]; *R v Hewlett* (n156), [23].

¹⁶⁸ *R v Culhane and Chin* (n140), [10] (48 out of 109).

¹⁶⁹ As in *R v O'Dowd* (n165), [74] (16 out of 42 trial days, and 148 pages out of 434).

¹⁷⁰ *Ibid*, [2] (the trial lasted over six months).

¹⁷¹ Including the use of reports of previous civil proceedings: *R v Hogart* [2007] EWCA Crim 338.

of criminal method often amounts to hearsay.¹⁷² In the case of convictions the relevant provisions of the Police and Criminal Evidence Act 1984 may be more appropriate.¹⁷³

Occasionally the use of the oral evidence of a complainant excites objection on account of the difficulty of assessing the credibility of such a witness, perhaps years after the commission of the relevant act, in the absence of further contemporary records and the disappearance of the sort of material usually apt for mounting cross-examination. In *R v Woodhouse*¹⁷⁴ the defence felt unable to admit the underlying facts of a caution some twelve years earlier for such reasons.

Attempts to prove the matters by oral evidence can also cause problems; for example, those witnesses may themselves be unsatisfactory. It may also happen that where the evidence is to be derived from some result of a previous trial other than a conviction, that second-order questions may arise about the quality of the evidence of the matters relied upon.¹⁷⁵ It may also be the case that to call the oral evidence only of a complainant may be unfair if there are other possible witnesses, whose testimony is equivocal and neither party is anxious to call.¹⁷⁶ In *R v Nguyen*¹⁷⁷ where some witnesses were unsatisfactory the Crown deliberately decided not to proceed to trial in respect of that alleged incident, but was then permitted to use it as bad character evidence in support of its case in respect of a later incident, and to prove the earlier incident by other more satisfactory witnesses.

It has been stressed that the court's function is to act as an arbiter only of the admissibility of evidence of bad character, and not as an assessor of its weight.¹⁷⁸ This is, however, liable to exception if the evidence is so weak as to be 'inherently incredible',¹⁷⁹ or if the rest of the evidence is so weak that the evidence of bad character constitutes virtually the whole of the prosecution case.¹⁸⁰

*Cross-admissibility*¹⁸¹

When an indictment contains more than one count against the accused, three different, but related, issues may arise. First, whether the indictment can be severed so that they are tried separately; secondly, if not, whether the evidence on one count is admissible on another; and thirdly, if it is, how it may be used. The first of these is governed by the old law, unaffected by the new legislation.¹⁸² The House of Lords took a strict view of the undesirability of severing an indictment, despite evidence on one count being under

¹⁷² As in *R v Humphris* (n162); it will rarely be the case that these can be overcome by the invocation of the inclusionary discretion in s 114(1)(d) of the Criminal Justice Act 2003, *R v Z* [2009] EWCA Crim 20, [24]; but see *R v Steen* (n165), [15] (not cited in *R v Z*).

¹⁷³ Ss 73, 74 as suggested in *Humphris*, (n162), [7]; *R v O'Dowd* (n165), [71].

¹⁷⁴ [2009] EWCA Crim 498, [16]; in *R v Steen* (n165), [12] similar considerations prevented agreement to the underlying facts of a previous conviction.

¹⁷⁵ Thus in *R v O'Dowd* (n165) one of the three trials had resulted in an acquittal, and another in a stay for abuse of process (on the basis of contamination of the very witness tendering evidence of it at the current trial).

¹⁷⁶ As in *R v Maynard* (n164) (defence prevented from calling witness); *R v Loughman* [2007] EWCA Crim 1912 (defence reluctant to call witness).

¹⁷⁸ *R v Highton* (n91), [10].

¹⁷⁹ *R v Edwards and Rowlands* (n95) (*Smith*), [82].

¹⁸⁰ *R v Highton* (n91), [10].

¹⁸¹ See further Fortson and Ornerod [2009] *Crim LR* 313.

¹⁸² See *R v Koc* [2008] EWCA Crim 77, [29] (severance of trials of different offenders).

the exclusionary rule inadmissible on the other. This matter is governed by Indictment Rules 1971, r 9,¹⁸³ which provides that:

Charges for any offences may be joined in the same indictment if those charges are founded on the same facts, or form or are part of a series of offences of the same or similar character.

It will be noted that this provision applies only to joinder of charges, and can thus extend only to part of the field, since often there is no more than one formal charge.¹⁸⁴ Nor can it be regarded simply as a subset of similar fact cases since it can apply to a series of offences even though evidence of some is inadmissible on others on such a basis.¹⁸⁵ The general provision is, however, qualified by a discretionary power to sever an indictment conferred by s 5(3) of the Indictments Act 1915:

Where before trial, or at any stage of a trial, the court is of opinion that a person charged may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same indictment, or that for any other reason it is desirable to direct that the person should be tried separately for any one or more offences charged in the indictment, the court may order a separate trial on any count or counts of such indictment.

It was authoritatively affirmed in *R v Christou*¹⁸⁶ that this discretion of the trial judge is unconstrained, and in particular that there is no rule¹⁸⁷ or presumption in favour of severance in sexual cases in which the evidence on one count is inadmissible on the other. Factors mentioned¹⁸⁸ as relevant for consideration were how discrete were the facts, the impact of ordering separate trials on the accused and on the victim, and, most importantly, whether the judge believed that fair joint trial could be achieved by suitable direction of the jury.¹⁸⁹

If separate counts remain, the second issue, of their admissibility under the new legislation, needs analysis, especially since the courts regard it as having become more difficult.¹⁹⁰ S 112(2) provides that:

Where a defendant is charged with two or more offences in the same criminal proceedings, this Chapter (except section 101(3)) has effect as if each offence were charged in separate proceedings: and references to the offence with which the defendant is charged are to be read accordingly.

It has been explained¹⁹¹ that the consequence is that the evidence of bad character as defined by the Act tendered to prove each charge must be considered separately,¹⁹² and

¹⁸³ See *Ludlow v Metropolitan Police Comr* [1971] AC 29, [1970] 1 All ER 567, and commentary from an Australian perspective by Weinberg in (eds) Campbell and Waller *Well and Truly Tried* (1982). For the view in the United States, see *Zafiro v United States* 506 US 534 (1993).

¹⁸⁴ It was pointed out in *R v Williams* [1993] Crim LR 533 that it is not necessary to include an incident as a charge in an indictment in order to secure the admission in evidence of the details relating to it, if they are relevant and otherwise admissible.

¹⁸⁵ See *R v Cannan* (1991) 92 Cr App Rep 16.

¹⁸⁶ [1997] AC 117, [1996] 2 All ER 927. Lord Hope, 130, 937 made it clear that the rule is the same in Scotland.

¹⁸⁷ In New Zealand, there appears to be a rule that cases in which there is little nexus beyond the identity of the victims, separate sexual offences by different offenders should be severed: *R v D and S* [1996] 2 NZLR 513.

¹⁸⁸ 129D, 937b.

¹⁸⁹ For problems still capable of occurring in this regard, see *R v Dye* [2003] EWCA Crim 2424, [2004] 1 Cr App Rep 206; *R v Carman* [2004] EWCA Crim 540.

¹⁹⁰ *R v Wallace* (n110), [3]; *R v Freeman and Crawford* [2008] EWCA Crim 1863, [2009] 1 Cr App R 137, [17].

¹⁹¹ *R v Chopra* (n81), [14].

¹⁹² Perhaps unless the charges constitute no more than 'a single book of many parts, but with a consistent theme', *R v Doncaster* [2008] EWCA Crim 5, [22].

admitted only on the basis of coming within one of the gateways. Difficulty has arisen on account of the diversity of forms of relevance, thus in some cases the evidence on each count, if believed, demonstrates the accused's propensity to commit the relevant crime;¹⁹³ in others it may do no more than establish the possibility of the accused's involvement, but in enough instances for it to be unlikely to have arisen by coincidence;¹⁹⁴ or contamination of the evidence of the complainants on the different counts, whether guilty by deliberate fabrication,¹⁹⁵ or innocent by unconscious influence as a result of pre-trial discussion.¹⁹⁶

If both hurdles have been surmounted, attention focuses on the use to be made of the evidence. An expansive view has been taken. Thus evidence on one count admitted under one gateway can be used for any purpose to which it is relevant, on the basis that once admitted there should be no restriction on use, in this respect taking over¹⁹⁷ the law first established in relation to the use of convictions.¹⁹⁸ The purport of the evidence must be established, however, as this will determine its relevance under different gateways,¹⁹⁹ and it was suggested in *R v Campbell* that it would rarely be useful to consider relevance to credit separately, despite the terms of the standard direction.²⁰⁰ Irrelevance under one gateway is not determinative of relevance under another, even when the conditions for the latter are more stringent.²⁰¹ Similarly, the definition of propensity in s 103 applies not only for the purposes of gateway (d), but also for the purposes of the other gateways, although it should be remembered that propensity is not the only form of relevance.²⁰²

PROTECTION OF THE ACCUSED

Because of the ever-present danger of prejudice in admitting evidence of the bad character of the accused, the Law Commission required such evidence to satisfy what it described as an 'interests of justice' test, according to which such evidence would be admitted only if there were no risk of prejudice, or that the interests of justice *required* the evidence nevertheless to be admissible depending on its probative value, the other evidence in the case, and its importance for the case as a whole.²⁰³ No such strong inclusionary conditions appear in the main provisions²⁰⁴ of the Act.²⁰⁵ Nevertheless, given the power of evidence of the bad character of the accused to create prejudice, in the sense of unduly increasing the likelihood of his being found guilty, it was thought desirable to build some protection into the legislation. This includes protection against the use of contaminated evidence, some

¹⁹³ As in *R v Chopra* (n81). ¹⁹⁴ As in *R v Wallace* (n110).

¹⁹⁵ As alleged in *R v Freeman and Crawford* (n190).

¹⁹⁶ Alleged as possible in *R v Lamb* [2007] EWCA Crim 1766, [38]. ¹⁹⁷ *R v Wallace* (n110), [42].

¹⁹⁸ *R v Highton* (n91), [22]; *R v Campbell* (n87), [25]. This also applies under s 100, despite the indication there in the wording of concentration on propensity alone: *Weir* (n91) (*Yaxley-Lennon*), [73].

¹⁹⁹ In *R v Leaver* [2006] EWCA Crim 2988, once it had been agreed between the parties and accepted by the judge that the purport of a previous conviction was propensity to degrade women, it could not be used to show violence or lack of credibility. ²⁰⁰ [30], [41].

²⁰¹ *R v Edwards and Rowlands* (n95) (*McLean*), [52]: irrelevant for (d), but relevant for (e).

²⁰² *R v McAllister* [2008] EWCA Crim 1544, [13] (not itself a multiple count case).

²⁰³ See e.g. LC 273 (Cm 5257, 2001) draft bill cl 8(3)(b).

²⁰⁴ But see s 108(2)(b), in which it plays some role in relation to the admission of convictions committed when the defendant was a child.

²⁰⁵ Not even in relation to the bad character of others than the accused.

protection against the use of evidence which may render the trial unfair, and a requirement to direct the jury carefully on the proper use of the evidence.

Contamination

Section 107 confers upon the trial judge a new supplementary²⁰⁶ statutory continuing power to stop a case on finding that the evidence of bad character is contaminated:

- (1) If on a defendant's trial before a judge and jury for an offence—
 - (a) evidence of his bad character has been admitted under any of paragraphs (c) to (g) of section 101(1), and
 - (b) the court is satisfied at any time after the close of the case for the prosecution that—
 - (i) the evidence is contaminated, and
 - (ii) the contamination is such that, considering the importance of the evidence to the case against the defendant, his conviction of the offence would be unsafe,

the court must either direct the jury to acquit the defendant of the offence or, if it considers that there ought to be a retrial, discharge the jury.

...
- (5) For the purposes of this section a person's evidence is contaminated where—
 - (a) as a result of an agreement or understanding between the person and one or more others, or
 - (b) as a result of the person being aware of anything alleged by one or more others whose evidence may be, or has been, given in the proceedings,

the evidence is false or misleading in any respect, or is different from what it would otherwise have been.

This provision appears to have been included to meet concern expressed by the House of Lords under the old law.²⁰⁷ It was there thought highly unlikely that such contamination would occur, and be apparent on the papers.²⁰⁸ The court is similarly concerned here to limit the range²⁰⁹ and application²¹⁰ of this form of protection, which explicitly excludes evidence admitted under gateways (a) and (b). It is, however, disturbing to find any countenance at all to the use of contaminated evidence. Such disturbance becomes more acute, the tighter the definition of contamination. There has so far been little guidance on that, but in *Renda*, it was held not to encompass evidence that had been wrongly admitted as a conviction, but only on the mistaken acquiescence of counsel that it should be so categorized.²¹¹

Because this provision does require the trial judge to make an assessment of fact, it has been held that the judge should, where possible, postpone a ruling until the close of the case when all the facts will be in, but must then give it very serious consideration, especially when there is internal evidence from the testimony that it has been suggested by someone else.²¹² Even if a firm finding that as a result of pre-trial discussion evidence is different as required by s 107(5) cannot be sustained, it was held in *R v Lamb* still to be

²⁰⁶ Section 107(4).

²⁰⁷ *R v H* [1995] 2 AC 596, [1995] 2 All ER 865.

²⁰⁸ See, 379.

²⁰⁹ *R v Bradley* (n78), [31] excluding its applications from Newton hearings and cases tried by magistrates.

²¹⁰ *Renda* (n101), [27] castigating its use as a means of reiterating rejected arguments for inadmissibility under one of the gateways.

²¹¹ *Ibid.*

²¹² *R v Card* (n167), [28].

necessary to direct the jury carefully where such discussion *might* have led to innocent contamination.²¹³ Paradoxically a more general jury direction seems to be all that is necessary if the allegation is of wrongful contamination.²¹⁴

If the trial judge orders a retrial in preference to directing an acquittal, such a retrial cannot, for that reason, be objected to as an abuse of process, since such an objection would be tantamount to an appeal against the original decision.²¹⁵

Unfairness

The principal provision is s 101(3), clearly modelled on s 78 of the Police and Criminal Evidence Act 1984:

The court must not admit evidence under subsection 1(d) or (g) if, on an application by the defendant to exclude it, it appears to the court that the admission of the evidence would have such an adverse effect upon the fairness of the proceedings that the court ought not to admit it.

In the case of convictions, this is supplemented by s 103(3) in relation to those of the same description or category under s 103(2):

Subsection (2) does not apply in the case of a particular defendant if the court is satisfied, by reason of the length of time since the conviction or for any other reason that it would be unjust for it to apply in his case.

It is worth noting at the outset that s 101(3) differs in form from s 78 in that it makes exclusion on satisfaction of the conditions mandatory,²¹⁶ but only in form, since it cannot be supposed that any judge, having determined for the purposes of s 78 that the admission of the evidence would make the trial so unfair that it ought not to be admitted, would go on to do so.²¹⁷ It has accordingly been held that, while s 101(3) involves a balancing exercise, it does not amount to the exercise of a discretion.²¹⁸ The exercise under s 103(3) was said in *Hanson* to be similar in determining whether the admission of a conviction was just. In both cases, the court was bound to take into account the degree of similarity²¹⁹ between the events showing the defendant's bad character and those with which he was now charged,²²⁰ the respective gravity of the past and present offences,²²¹ and the strength of the rest of the prosecution case.²²² Although, as noted above, the court is not primarily concerned with the weight of the evidence of bad character, it may exclude such evidence if it is 'inherently incredible'.²²³ There has also been some indication that collusion between witnesses to different events might lead to the exclusion of their evidence,²²⁴ although this seems to fall squarely within s 107, discussed above. On the other hand, the length of the

²¹³ (n196), [57]. ²¹⁴ *R v King* [2008] EWCA Crim 3177, [29]. ²¹⁵ *Ibid*, [22].

²¹⁶ As noted in *R v Hanson* (n79), [10].

²¹⁷ See *R v Chalkley* [1998] QB 848, [1998] 2 All ER 155; Auld LJ, 874D, 178d.

²¹⁸ *R v Weir* (n91) (*Somanathan*), [46]; the impropriety of so referring to it was not, however, alone enough to allow the appeal in *R v McMinn* [2007] EWCA Crim 3024, [5].

²¹⁹ Although it need not be so high as to be 'striking' as at one time required under the old law: see *R v Clements* [2009] All ER (D) 261 (different form of sexual offence inadmissible).

²²⁰ Whether or not within the same description or prescribed category.

²²¹ Although without any indication of what this entails, or even which way it inclines.

²²² Here on the basis that the weaker the rest of the case, and greater the reliance to be placed on the accused's bad character, the more likely it was to be excluded under this provision.

²²³ *R v Edwards and Rowlands* (n95) (*Smith*), [52]. ²²⁴ *R v Weir* (n91) (*Somanathan*), [39].

previous record,²²⁵ and the closer its similarity to the offences charged,²²⁶ the less likely it is to be excluded. Two matters relevant to exclusionary discretion under the old law have cropped up under the Act. Thus the intention of the accused in casting an imputation on his co-accused is, under the Act, to be disregarded,²²⁷ but springing an allegation on the accused without warning is relevant.²²⁸

As s 101(3) itself makes clear, it is to be taken into account only on the application of the²²⁹ defendant.²³⁰ It will also be seen that neither of these provisions applies to gateways other than (d) and (g), thus begging the question of whether there is any similar machinery for exclusion under other gateways. The most obviously eligible candidate is s 78 of the Police and Criminal Evidence Act 1984. A complication is the specification for the purposes of s 101(3) of only gateways (d) and (g), together with the conspicuous absence of any explicit saving of the operation of s 78 in this²³¹ chapter of Pt 11. The contrary argument would be that, since s 99(1) purports to abolish only common law rules of admissibility, and as s 78 has not been explicitly repealed for the purposes of c 1, it follows that a common law *discretion*²³² and a *statutory* provision have not been abolished, and continue in force. It can further be argued that the exclusion of evidence on the basis that its admission would be more prejudicial than probative, or would make the proceedings so unfair that it ought not to be admitted, does not amount to exclusion on the grounds that it is evidence of bad character, and is thus preserved by s 112(3)(c).²³³

Although no definitive decision has been made by the Court of Appeal, the Chief Justice stated that, in its provisional view,²³⁴ s 78 of the Police and Criminal Evidence Act 1984 does continue to apply to the other gateways, and recommended trial judges to act upon that basis.²³⁵ Here too part of the reason is to help preserve decisions from attack under Art 6 of the European Convention,²³⁶ although that article seems unable otherwise to generate discretionary exclusion.²³⁷ On the other hand, there seems little inclination to protect the accused by a process of bowdlerizing the evidence of bad character so as to leave out the most prejudicial and least probative detail.²³⁸

True discretionary control has, however, been applied where one co-accused deliberately ambushed another in omitting to give notice under the rules, by failure to apply the

²²⁵ *R v Hanson* (n79), [26], although it was held in *R v McMinn* (n218), [8] that a single three-year-old conviction was not 'demonstrably' unfair. ²²⁶ *R v Edwards* (n136) (*Chohan*), [76].

²²⁷ *R v Bovell* (n132) (*Dowds*), [32]. ²²⁸ *R v Weir* (n91) (*Somanathan*), [40].

²²⁹ Section 103(3) refers to 'a particular defendant', but the reason for the change of terminology is not apparent.

²³⁰ Although no such wording appears in s 103(3), with the apparent result that the court may there take the point of its own initiative.

²³¹ By contrast with the explicit saving in c 2 in relation to hearsay in s 126(2) of both s 78 and the exclusionary discretion at common law, fortified by the explicit limitation of that saving to c 2.

²³² It should be noted that an exclusionary discretion is needed only in the case of a rule of admissibility.

²³³ The government's spokeswoman in the House of Lords specifically affirmed its view that this provision did preserve the operation of s 78: see Official Report Vol 654, col 1988 (19 November 2003). In *R v Maitland* [2005] EWCA Crim 2145, [21], the Court of Appeal refused to express a view on what it described as so controversial an argument.

²³⁴ It had been left more open in *R v Amponsah* [2005] EWCA Crim 2993, [20].

²³⁵ *R v Highton* (n91), [13]; see also *R v Weir* (n91) (*Somanathan*), [44] in relation to gateway (f).

²³⁶ *Ibid*, [14]. ²³⁷ *R v Musone* [2007] EWCA Crim 1237, [2007] 1 WLR 2467, [52].

²³⁸ *Edwards* (n136) (*Chohan*), [74], [75].

discretion to dispense with such conduct,²³⁹ contrasting with its application to permit the prosecution to adduce bad character evidence despite not serving notice, and even intimating that it did not intend to adduce the evidence.²⁴⁰

Direction

Taken together, the matters mentioned above confer considerable importance on the trial judge's directions in relation to bad character.²⁴¹ It is not enough to tell the jury that it is entirely for them to decide what to do with the evidence.²⁴² The admissibility of evidence of bad character is capable of changing in the light of developments at the trial, and the judge must keep it constantly under review. If at a later stage, for this reason, or because of an earlier mistaken ruling, he feels at the end of the case that the evidence is inadmissible, he can direct the jury to disregard²⁴³ it.²⁴⁴ Given the comprehensive coverage of the new provisions, and the prejudice that evidence of the accused's bad character can create²⁴⁵ it has been held, even when adduced by the accused himself,²⁴⁶ that the trial judge must draw the threads together²⁴⁷ and direct the jury²⁴⁸ carefully, and moderately,²⁴⁹ on the way in which evidence of the bad character of the accused should be used.²⁵⁰

The important question that a court must consider, when deciding what help may need to be given to the jury in summing up, is the relevance of the evidence which was admitted. If the evidence has been admitted for a particular purpose, the jury may, depending on the circumstances, need to be told how they should use that evidence and the issue to which it goes.

The concept of relevance has not only been carried over from the old law, but is now of paramount importance.²⁵¹ It must be considered, not in the abstract by the mechanical and unthinking repetition of a standard direction,²⁵² but in the context of the precise issues that arise,²⁵³ which may be determined by the defence raised,²⁵⁴ or issues of fact conceded,²⁵⁵ by the accused. It may also be wise to direct the jury on the non-use of bad character derived otherwise than from evidence adduced by the parties.²⁵⁶

The relevance of the evidence of bad character should be explained in detail in the context of the case as a whole, and if it amounts to little more than background, that must be

²³⁹ *R v Musone* (n237) [50]. ²⁴⁰ *R v Moran* [2007] EWCA Crim 2947, [37].

²⁴¹ *R v Edwards and Rowlands* (n95), [1](iv). ²⁴² *R v Lafayette* [2008] EWCA Crim 3238, [25].

²⁴³ Or even if such disregard is merely implicit in his direction: see *Edwards and Rowlands* (n95), [28].

²⁴⁴ *R v Weir* (n91) (*Yaxley-Lennon*), [75], even though there only a majority verdict.

²⁴⁵ Described in *R v Clarke* [2008] EWCA Crim 651, [25] as 'obvious'.

²⁴⁶ As in *R v Harper* [2007] EWCA Crim 1746, [12]. ²⁴⁷ *R v O'Dowd* (n165), [82].

²⁴⁸ Magistrates need not, however, rehearse their full reasoning, *R (Wellington) v DPP* [2007] EWHC 1061 (Admin). ²⁴⁹ *R v Clarke* (n245), [27].

²⁵⁰ *R v Tirnaveanu* (n111), [32]. ²⁵¹ *R v Bullen* (n91), [29].

²⁵² *R v Campbell* (n87), esp [22], [36], [37].

²⁵³ In *R v Leaver* [2006] EWCA Crim 2988, once it had been agreed between the parties and accepted by the judge that the purport of a previous conviction was propensity to degrade women, it could not be used to show violence or lack of credibility; in *R v Clarke* (n245) the evidence did not go to the principal issue of the distinction between murder and manslaughter.

²⁵⁴ *R v Bullen* (n91), (late abandonment of defence of self-defence); but sometimes abandonment does not remove a possible defence, as in *R v Rees* [2007] EWCA Crim 1837 (of provocation).

²⁵⁵ *R v Whitehead* [2007] EWCA Crim 2078, [5] (driving speed).

²⁵⁶ *R v Wilson* [2008] EWCA Crim 134 (sight of court list on which the accused's name included in relation to a separate case); *R v Culhane and Chinn* (n140), [18] (concern that evidence admitted to issue might be used for credit).

made clear.²⁵⁷ The purport of the evidence must be established, as this will determine its relevance under different gateways.²⁵⁸ Although, indeed because, evidence once admitted under any gateway may be used for the purposes of another, it is not necessary to explain the gateways, but becomes still more important to explain their relevance,²⁵⁹ and to give an appropriate direction.²⁶⁰ Irrelevance under one gateway is not determinative of relevance under another, even when the conditions for the latter are more stringent.²⁶¹ More generally where the court has assured counsel that it will direct in a particular way, it should do so.²⁶² The judge should also normally direct the jury that the evidence of bad character should not be regarded as decisive in itself,²⁶³ and that its relevance be to an *important* matter in issue if admitted under the gateway of s 101(1)d.²⁶⁴ In cases where the relevance of the evidence to issue is circumstantial rather than via propensity, there seems to be some division as to whether it is necessary so to direct the jury.²⁶⁵

Most difficulty has arisen over the distinction between relevance to issue and to credit in the sense of propensity to untruthfulness. In the important case of *R v Campbell* the Lord Chief Justice explained that:²⁶⁶

Whether or not a defendant is telling the truth to the jury is likely to depend simply on whether or not he committed the offence charged. The jury should focus on the latter question rather than on whether or not he has a propensity for telling lies.

It may nevertheless sometimes occur that a distinction needs to be made, and in such cases the direction must ensure that where relevance is to untruthfulness,²⁶⁷ the jury be directed not to use it for issue, and perhaps more rarely where relevance is to issue,²⁶⁸ that there be no suggestion that it may also be regarded as going to untruthfulness.

Appeal and review

In the earliest detailed guidance to the application of the bad character provisions²⁶⁹ of the Criminal Justice Act 2003 in *R v Hanson* Rose LJ affirmed that:²⁷⁰

If a judge has directed himself or herself correctly, this Court will be very slow to interfere with a ruling either as to admissibility or as to the consequences of non compliance with the regula-

²⁵⁷ *R v Highton* (n177) (*Van Nguyen*), [43]; *R v Kumar* [2005] EWCA Crim 3549, [22].

²⁵⁸ In *R v Leaver* (n253), once it had been agreed between the parties and accepted by the judge that the purport of a previous conviction was propensity to degrade women, it could not be used to show violence or lack of credibility. ²⁵⁹ *R v Campbell* (n87), [38].

²⁶⁰ *R v Murphy* [2006] EWCA Crim 3408, 19].

²⁶¹ *Edwards and Rowlands* (n95) (*McLean*), [52]: irrelevant for (d), but relevant for (e).

²⁶² *R v Highton* (n91), [22].

²⁶³ *R v Edwards (Chohan)* (n136), [77] (commended by the Court of Appeal as a model direction).

²⁶⁴ *R v Garnham* [2008] EWCA Crim 266, [16].

²⁶⁵ Cp *R v Campbell* (n87), [40], *R v Tirnaveanu* (n111), [38]. ²⁶⁶ (n87), [30].

²⁶⁷ *R v Meyer* [2006] EWCA Crim 1126, [22] (convictions for violence after guilty plea irrelevant to credit); cf *R v Lafayette* (n242), [50] (where (d) and (g) appear to have been confusingly interchanged).

²⁶⁸ As tendered in *R v Culhane and Chinn* (n140), [18].

²⁶⁹ Subject to some doubt in the case where the bad character is adduced by a co-accused under s 101(1)(e): *R v Reed and Williams* [2007] EWCA Crim 3083, [37], although much the same considerations seem to apply to the categorization of the issue as 'substantial'.

²⁷⁰ [2005] EWCA Crim 824, [2005] 1 WLR 3169, [15]. See also *R v Awaritefe* [2007] EWCA Crim 706, [33]–[35]. The same approach is taken when the prosecution appeals against a decision of the magistrates by way of case stated: *DPP v Chand* [2007] EWHC 90 (Admin), [9].

tions for the giving of notice of intention to rely on bad character evidence. It will not interfere unless the judge's view as to the capacity of prior events to establish propensity is plainly wrong, or discretion has been exercised unreasonably in the *Wednesbury*... sense....

Judge LJ forcefully re-emphasised this view in *R v Renda* by assimilating fact-specific judgments to discretion, and assigning their determination to the trial judge, by way of his 'feel' for the case, deploring the creation of 'authority' from such rulings, and devolving at least primary responsibility to trial courts.²⁷¹ It is difficult to reconcile such an approach with the obligation to provide reasons for any ruling on issues of admissibility and reasons for exclusion imposed by s 110 of the Criminal Justice Act 2003,²⁷² with the general rule laid down in *Renda* itself on the effect of a concession in cross-examination on whether a false impression had been given,²⁷³ and more generally with the later proposition 'that the Court of Appeal Criminal Division is the appropriate court in which the correctness of the judge's decision should be questioned.'²⁷⁴

So light an appellate rein is worth some further exploration, distinguishing situations in which the application of discretion by the trial judge has been reversed; those in which the appellate court has applied its own view in the absence of any exercise of discretion by the trial judge; and those in which it has eschewed the language of review, and apparently exercised its own discretion, but then arrived at a conclusion agreeing with the result achieved by the trial judge.

The first case to overturn a trial judge's ruling on such an issue appears to have been *R v Murphy*,²⁷⁵ where the Court of Appeal, while recognizing the limitations on its powers in these respects expressed in previous authorities,²⁷⁶ nevertheless held the trial judge's determination of the relevance of an old conviction to the issues at trial to have been 'plainly wrong',²⁷⁷ and allowed the appeal. In *R v McKenzie* the Court of Appeal was also prepared simply to disagree in one instance while agreeing in another with the trial judge's assessment of admissibility, without in either invoking dyslogistical adverbial support.²⁷⁸ More recently, in *R v McAllister* the Court of Appeal felt free to overrule the trial judge on the application of the discretion under s 101(3), partly because the trial judge failed to explain the reasons for her decision.²⁷⁹ In effect in these cases the Court of Appeal simply substituted its own 'feel' for the case, and exercised its own discretion or judgment on a matter of fact for that of the trial judge.

Notwithstanding the justification for limited control on the basis of lack of appellate opportunity for direct observation of the trial, such lack has on occasion failed to deter

²⁷¹ (n101), [3]. See also *R v Rossi* (n109), [22 referring to the judge's 'very wide discretion' to admit evidence of bad character.]

²⁷² Itself explicitly endorsed elsewhere in *R v Renda*, (n101), [60], at least in relation to a determination in favour of the defence. It is, however, sometimes ignored; see e.g. *R v Clarke* [2006] EWCA Crim 3427, [23]; *R v Awaritefe* [2007] EWCA Crim 706, [25].

²⁷³ [27].

²⁷⁴ (n260), see [14]. In *R v Griffiths* [2007] EWCA Crim 2468 (where there is no explicit reference to any limitation of powers) the Court of Appeal, [12] seems to have thought it enough that the evidence excluded by the trial judge *might well have been considered relevant by the jury* and that its exclusion made the verdict *unsafe*.

²⁷⁵ [17]. See also *R v Williams* [2007] EWCA Crim 211, [48]; *R v Smith* [2007] EWCA Crim 2105, [25], in both of which the Court of Appeal found the exercise of discretion at the trial to have been clearly wrong.

²⁷⁶ [2008] EWCA Crim 758, (2008) 172 JP 377.

²⁷⁷ (n202), [34]. Other factors included reliance on matters found 'not proven' and the need to minimize satellite litigation.

²⁷⁸ Citing *R v Hanson* and *R v Renda*.

the Court from exercising its own discretionary and judgmental control when the trial court has failed even to attempt to exercise any at all. In *R v Gyima and Adjei* the Court of Appeal was quite specific in asserting: first, that the relevant condition was 'a question of fact for the trial judge'; second, that the trial judge made 'no express finding of fact'; and third that it 'found no difficulty in making such a finding itself'.²⁸⁰ While in *R v Lamaletie and Royce*²⁸¹ the Court of Appeal took the view that although the application of s 101(1)(g) had been argued at trial to be inapplicable as a matter of rule, and not as one of discretion under s 101(3), it was nevertheless able to agree with what it predicted the trial judge's ruling would have been, had the defence instead been rested on that basis.

In a number of cases the Court of Appeal has agreed with the trial judge about the admission of the evidence, by the exercise of discretion or some fact-specific judgment, but in upholding his decision has failed to advert to the limited basis for its review, and instead appeared merely to record its own similar view of the relevant factors, which is somewhat confusing, and quite unnecessary, if it really is exercising only a limited power of review. In *R v Watson* the Court went out of its way to assert that the trial judge's decision in relation to the common law²⁸² had to be made 'by the exercise of his judgment in the light of all the information he had about the trial', but then went on to record that 'from all the information we have, we are of the view that the trial judge was quite right in reaching the conclusion he did'.²⁸³ That certainly sounds more like positive agreement on appeal than reluctance to overturn on review.

In many cases the determination of the trial judge has been upheld by the appellate court on the basis that any mistake has not rendered the conviction unsafe.²⁸⁴ While the vagueness of this condition has caused considerable difficulty,²⁸⁵ its significance is indirect. It does not itself render the rules of admissibility more vague, but rather reduces any pressure to sharpen their accuracy.

A similar approach has also been made in a number of cases to the assessment of credibility of a witness, which might well be thought still more clearly to be the prerogative of the trial judge. In *R v Musone* the Court of Appeal was unable to accept the principal reasons for rejecting the defence hearsay advanced by the judge, but upheld his fall-back provision finding a new discretion to reject such evidence in the Criminal Procedure Rules, and then went beyond review to express its agreement with the substance of the trial judge's decision to exclude.²⁸⁶ It is somewhat paradoxical that while elsewhere matters of law seem to be assigned to the exclusive control of the trial Court, these matters of fact should be determined against the defence by an appellate tribunal without seeing the witnesses at all.

It has further been held that no appeal is likely to succeed after a plea of guilty, even though precipitated by a finding of admissibility of evidence of the accused's bad

²⁸⁰ (n167), [24]–[25].

²⁸¹ [2007] EWCA Crim 314, [9]. See also *R v Reid and Rowe* [2006] EWCA Crim 2900, [23], where, after accepting that no discretion arose either under s 101(3) or s 78 of the Police and Criminal Evidence Act 1984 (because the evidence was not adduced by the prosecution), the Court of Appeal still thought it appropriate to indicate its view that the evidence should not have been excluded on a discretionary basis.

²⁸² Discretion to depart from the normal rule against investigation of collateral matters.

²⁸³ [2006] EWCA Crim 2308, [31].

²⁸⁴ The new criterion for the exercise of the old proviso as introduced by the Criminal Appeal Act 1995.

²⁸⁵ And led to a now postponed proposal for further statutory amendment. ²⁸⁶ (n237), [64].

character.²⁸⁷ So also the Court of Appeal has generally been reluctant to allow appeals for mere breach of the rules in the absence of a showing of real prejudice²⁸⁸ incapable of cure by procedural steps,²⁸⁹ or remedial directions.²⁹⁰ Nor is it prepared to intervene to exercise any exclusionary discretion in the absence of explicit application by the defence.²⁹¹

SECTION 3. GATEWAYS

This section will mention all of the gateways specified for the admission of evidence of the bad character of the accused in CJA 2003, s 101(1), although only cursorily in the case of those discussed in the previous chapter.

AGREEMENT OF THE PARTIES

It is likely to be rare²⁹² for all of the parties to agree to the admission of evidence of the defendant's bad character, except perhaps for evidence falling within the next gateway. Within the Law Commission's scheme, these two gateways were treated simply as two situations in which it was not appropriate to require leave to be sought. It is perhaps just conceivable that a defendant might prefer the evidence to be led in chief by agreement with the prosecution through this gateway, rather than himself to do so either by leading the evidence, or by raising the matter in cross-examination of a prosecution witness.

A feature of the empirical research on juries carried out by Professor Lloyd Bostock for the Law Commission was that it not only confirmed the expectation that evidence of the convictions for similar crimes by the accused was likely to lead to a greater chance of his being found guilty, but that it also demonstrated the unexpected result that evidence of a dissimilar conviction was more likely to have the opposite result,²⁹³ so perhaps on that basis the defendant would be happy to acquiesce in such evidence being led.²⁹⁴

CHOICE OF THE DEFENDANT

It might also be thought rather rare for the defendant to wish to adduce evidence of his own bad character, but sometimes the exigencies of the situation are such that the defendant sees some advantage in it. In *Jones v DPP*, the accused needed to establish an alibi, and first gave one that could be proved to be false, which he explained as having been given because he had been in trouble with the police. Subsequently, still needing to rely upon an alibi, he claimed to have been with a prostitute at the relevant time.

Another result shown by Professor Lloyd Bostock was that, if the previous conviction were for indecent assault of a child, the prejudicial effect was especially strong. But even

²⁸⁷ *R v Hanson* (n79), [29]. ²⁸⁸ *R v Edwards* (n136) (*Duggan*), [42].

²⁸⁹ *R v Edwards* (n136) (*Fysh*), [32].

²⁹⁰ *R v Hanson* (n79) (*Gilmore*), [37] (possible extension of time). ²⁹¹ *R v Highton* (n91) [23].

²⁹² But see *R v Hussain* (n161), [7] (all agreed on admissibility of convictions of co-accused running cut-throat defences); *R v Marsh* (n97) (inferred from lack of objection).

²⁹³ LC 141, App D.22.
²⁹⁴ Although, since this result seems most likely to be explained on the basis that the use of convictions in a different area is unfair, such acquiescence might well be counterproductive.

in this situation the accused may want to adduce the evidence, as in *B v R*,²⁹⁵ where the accused, most ill-advisedly, thought it would assist his defence on a charge of sexual abuse of his daughter to refer to his previous conviction for just such an offence as an explanation of why she might be making up a false charge this time.

It was also pointed out by some respondents to the Law Commission that, where the accused's bad character is relatively innocuous in the context of the trial, he might prefer to put it in rather than leave the jury to speculate about it.²⁹⁶ He might also choose to do so where he considers that his own character, while bad, is less likely to indicate guilt than that of a person he alleges was the true criminal.²⁹⁷

IMPORTANT EXPLANATORY EVIDENCE

As noted above,²⁹⁸ the old law had elaborated a rather ill-defined category of the admissibility of background evidence that evaded the normal criteria of admissibility for evidence of bad character. The Law Commission was particularly concerned to restrain abuse in this area. It is indicative of the tenor of much of this part of the legislation that none of the Law Commission's proposed safeguards in terms of detailed criteria, enhanced relevance, and strong discretionary control are reflected in gateway (c), or its vestigial elaboration in s 102:

For the purposes of section 101(1)(c) evidence is important explanatory evidence if—

- (a) without it, the court or jury would find it impossible or difficult properly to understand other evidence in the case, and
- (b) its value for understanding the case as a whole is substantial.

It was said in *R v Davis* that this gateway should be applied with great care, and that it should not be used as an easier route for letting in evidence properly to be admitted under one of the other 'gateways',²⁹⁹ most often as propensity evidence under 'gateway' (d), or to correct a false impression under 'gateway' (f). It should also be borne in mind that it operates only when it does not 'have to do with the facts of the offence',³⁰⁰ which many of the cases under the old law clearly did. This leaves a narrow ambit for 'gateway' (c). It is also tightly drawn in making its conditions cumulative,³⁰¹ and in the statement of its conditions, so that it might well be hard³⁰² to point to pieces of particular evidence to which they apply.

IMPORTANT ISSUE BETWEEN DEFENDANT AND PROSECUTION

This is the core gateway, designed to replace the major part of both the similar fact rule and the Criminal Evidence Act 1898 so far as issues between the prosecution and the defence are concerned.³⁰³ It is proposed to start with the overall pattern of the provision, comparing it, in this respect, with the recommendations of the Law Commission; then to discuss

²⁹⁵ (1992) 175 CLR 599. ²⁹⁶ LC 273, [6.25].

²⁹⁷ As under the old law in *R v Bracewell* (1978) 68 Cr App Rep 44. ²⁹⁸ 377.

²⁹⁹ [2008] EWCA Crim 1156, [2009] 2 Cr App R 306, [36].

³⁰⁰ Noted in *R v Edwards and Rowlands* (n95), [1](i).

³⁰¹ Noted in *R v Beverley* [2006] EWCA Crim 1287, [7].

³⁰² Although accomplished in *R v Edwards (Chohan)* [2005] EWCA Crim 1813, [2006] 1 Cr App R 31, [75].

³⁰³ Said in *R v Bradley* (n78), [12] to represent the most radical departure from the old law.

its substance distinguishing between bad character as going to propensity, or otherwise to issue, and as going to credibility, so far as these matters can be distinguished.

In defining the gateway, section 101(1)(d) specifies that the matter in issue should be important, although this qualification is not repeated in the heading³⁰⁴ of s 103, which adds a little elaboration. In this dual provision, it differs from the pattern adopted by the Law Commission under which evidence of bad character going to issue, and such evidence going to credibility, were governed by separate clauses. The justification for such separation was that the issues will usually arise at different times and in a different state of the evidence, and given the concern of the Law Commission to ensure that detailed factors were set out to assist the determination of the balance of probative value and prejudicial effect, different factors needed to be set out.³⁰⁵ The difference between the care and stringency of the conditions set out by the Law Commission, and the vestigial elaboration to be found in the provisions of the Act, is indicative of a very different spirit.

Where the evidence of bad character went to issue, the Law Commission required enhanced relevance by reference to *substantial* probative value,³⁰⁶ and the satisfaction of a second stringent condition that the court be satisfied:

- (a) that, in all the circumstances of the case, the evidence carries no risk of prejudice to the defendant, or
- (b) that, taking into account the risk of prejudice, the interests of justice nevertheless require the evidence to be admissible in view of—
 - (i) how much probative value it has in relation to the matter in issue,
 - (ii) what other evidence has been, or can be, given on that matter, and
 - (iii) how important the matter is in the context of the case as a whole.

The Law Commission further required regard to the various factors it had listed as governing the general probative value of evidence of bad character in this context.³⁰⁷

In stark contrast, s 103 provides that:³⁰⁸

- (1) For the purposes of section 101(1)(d) the matters in issue between the defendant and the prosecution include—
 - (a) the question whether the defendant has a propensity to commit offences of the kind with which he is charged, except where his having such a propensity makes it no more likely that he is guilty of the offence;
 - (b) the question whether the defendant has a propensity to be untruthful, except where it is not suggested that the defendant's case is untruthful in any respect.
- (2) Where subsection (1)(a) applies, a defendant's propensity to commit offences of the kind with which he is charged may (without prejudice to any other way of doing so) be established by evidence that he has been convicted of—
 - (a) an offence of the same description as the one with which he is charged, or
 - (b) an offence of the same category as the one with which he is charged.

³⁰⁴ Which coheres with the pattern for issues between co-defendants, but not with that for explanatory evidence, where 'important' does appear in the heading of s 102, the elaborating provision.

³⁰⁵ It should, however, be noted that the substance of cl 8 of the Law Commission's draft bill relating to credibility does reappear in s 106 in the guise of an attack upon the character of another.

³⁰⁶ Clause 8(2). ³⁰⁷ Clause 5(2).

³⁰⁸ For doubts about the usefulness of the official explanatory notes as a guide to the interpretation of this provision, see Munday [2005] *Crim LR* 337.

- (3) Subsection (2) does not apply in the case of a particular defendant if the court is satisfied, by reason of the length of time since the conviction or for any other reason, that it would be unjust for it to apply in his case.
- (4) For the purposes of subsection (2)—
 - (a) two offences are of the same description as each other if the statement of the offence in a written charge or indictment would, in each case, be in the same terms;
 - (b) two offences are of the same category as each other if they belong to the same category of offences prescribed for the purposes of this section by an order made by the Secretary of State.
- (5) A category prescribed by an order under subsection (4)(b) must consist of offences of the same type.
- (6) Only prosecution evidence is admissible under section 101(1)(d).

One of the most significant features of this provision is its severity by contrast to s 100 in relation to evidence of the bad character of others than the accused, and especially the terseness of s 103(1), explaining that this formula covers propensity to commit offences of the kind charged, ‘except where his having such a propensity makes it no more likely that he is guilty of the offence’. This qualification, so far from being a safeguard, is so stringent in its exemption that it will hardly ever be capable of establishment,³⁰⁹ given minimal ingenuity by the prosecution. It might be thought that such a rejection shows no more than distaste for the complexity of the elaboration proposed by the Law Commission, but this cannot be the explanation, since that very complexity *is* required in s 100(3) in relation to the bad character of a non-defendant. The result is not only to turn the existing law on its head, by making the conditions to be satisfied for the prosecution to adduce bad character evidence less, rather than more, rigorous than those to be applied to its use against other persons who are not being tried; but by its deliberate substitution of the vestigial and severe elaboration in s 103(1)(a) for the extended and careful elaboration in cl 5(2), it seems to have weakened still further the standard of relevance under the existing law. The court was thus, in *R v Randall*, inclined to accept that a witness’s identification of a man as a burglar was supported, not only by one conviction in similar circumstances, but by others of far less statistical significance.³¹⁰ Such a difference between the rules applying to the bad character of the accused and of all other witnesses also contradicts the policy of the Law Commission to achieve a measure of simplicity, and fairness, and far from having adopted the uniform approach it proposed, has reinstated different, but converse, tests for the admission of bad character in the two different situations.³¹¹

The Criminal Justice Bill had included evidence of convictions as a separate gateway,³¹² but in the course of passage, they lost that distinct and direct route, and were instead accommodated here. It will, however, be seen that the enormous width of the definition of

³⁰⁹ But see *Beverley* (n301), (n[8] doubting the relevance even of a conviction in the same category, also for possession of drugs with intention to supply, but in very different circumstances.

³¹⁰ [2006] EWCA Crim 1413, [11].

³¹¹ See e.g. [9.14].

³¹² It is significant that most of the public attention to the issue before and during the passage of the legislation was dominated by reference to the admissibility of convictions: see e.g. the government’s White Paper *Justice for All*, Home Office 2002.

relevance to both issue³¹³ and credibility in subs (1) means that little has been altered by that change.

These provisions have generated a deluge of case law, which it will be convenient to discuss separately in relation to issue and credibility.

Issue

It has become clear that the provision covers not only cases where the reasoning is via propensity, but also where it is circumstantial. In the latter case its relevance may be to establish the accused's commission of the actus reus on the basis that all of the crimes were likely to have been committed by the same person, and the accused was connected with all of them;³¹⁴ or his mens rea where the act is established but issues arise as to intent;³¹⁵ or sometimes both.³¹⁶ An important difference between these two routes is that if the evidence is relevant only via propensity, then the prior misconduct, and its *capacity*³¹⁷ to show the relevant propensity, must be established by the prosecution to the ordinary criminal standard.³¹⁸ However, if the route is circumstantial it would defeat the whole basis of the reasoning if that standard were required of any individual example of misconduct standing alone.³¹⁹ A difficulty is that if the misconduct is sufficiently similar to ground propensity reasoning, then even though its initial admissibility were determined by the circumstantial route, it can if believed to the requisite standard, theoretically be used to show propensity, so potentially complicating jury directions.³²⁰

The parentheses in ss 103(2) make it clear that propensity to commit crimes of the relevant sort can be established, as under the old law, by much more than evidence of previous convictions, or the commission of criminal offences,³²¹ and the same applies in relation to the circumstantial route. This is capable of raising a very serious risk of satellite litigation³²² when the misconduct is disputed even if derived from convictions or cautions, and still more when derived from the facts underlying acquittals, stays, 'not proven' or other foreign verdicts, or allegations.³²³ Similarly, it has been held that the facts of offences alleged, but not proved because of the accused's unfitness to plead at the time of trial, are admissible under gateway (g),³²⁴ on the basis of reasoning equally applicable to (d). It has been definitively decided that the mere fact that the evidence consists of unproved allegations is immaterial to admissibility,³²⁵ and relevant only to use by the jury.³²⁶

³¹³ Where they may postdate the matters in issue: *R v Adenusi* [2006] EWCA Crim 1059.

³¹⁴ As in *R v Wallace* (n110), [37]; *R v McAllister* (n202), [25]; *R v Freeman and Crawford* (Crawford) (n190), [25].

³¹⁵ As in *R v Saleem* (n80), [37] (rebutting innocent presence).

³¹⁶ As in *R v Chopra* (n81) (both touching patient, and intent in so touching).

³¹⁷ *R v Brima* [2006] EWCA Crim 408, [39].

³¹⁸ See *R v O'Dowd* (n165), [65].

³¹⁹ Clearly explained in *R v McAllister* (n202), [18].

³²⁰ *Ibid*, [27].

³²¹ Affirmed in *R v Weir* (n91) [7]. In *R v S* [2006] EWCA Crim 756, [2006] 2 Cr App R 341, [12], cautions were held to come within s 98.

³²² Resulting in appeals being allowed in *R v McAllister* (above n202), and still more spectacularly in *R v O'Dowd* (n165).

³²³ Although these origins may affect the operation of discretion, *R v Edwards and Rowlands* (n95), [1](vii).

³²⁴ *R v Renda* (n101), [24].

³²⁵ Although also perhaps relevant to the exercise of discretion: *R v Edwards and Rowlands* (n95) [1](vii).

³²⁶ *R v Edwards and Rowlands* (95) (*Smith*), [81].

Much of the law has, however, concerned the use of convictions,³²⁷ and in that respect, the statute has been supplemented, pursuant to ss 4(b), by order³²⁸ establishing categories of offences of theft and sexual offences against persons under the age of 16. The Act thus specifies relevant convictions as those for an offence of the same description, or of the same category, as the one charged.³²⁹ This is then amplified³³⁰ by defining offences as being of the same description if the statement on a charge sheet or indictment would be in identical terms, or as being in the same category by reference to such categorization in an order to be made by the Secretary of State. It is far from clear exactly how easy such categorization will prove to be. The matter is made a little more mysterious by s 103(5), which provides that such a category must consist of offences of the same type. Needless to say, 'same type' is not defined. Presumably, this is intended to provide some check upon the discretion of the Secretary of State, but if a court can, and must for the purposes of such a check, determine whether offences are of the 'same type', it is not quite clear why the intervention of the Secretary of State in performing such categorization is necessary at all. The whole area was first considered extensively by the Court of Appeal in *R v Hanson*.³³¹ Perhaps the most significant guidance was denial, even when offences were categorized as being of the same description, that this was either necessary, or sufficient, to justify admission.³³² It still depended upon the convictions establishing propensity, and that propensity being relevant to the accused's guilt. Thus the allegation of no more than a propensity to acquire the property of others for gain,³³³ or to commit sexual offences,³³⁴ are far too broad, and a propensity to know what theft is, and to perceive its occurrence is incomprehensible.³³⁵ It was suggested that no minimum number of events was appropriate.³³⁶ So far as age is concerned,³³⁷ this relates to the time of those events.³³⁸ Considerations of relevance and age interact, so older and more relevant convictions³³⁹ may be preferred to newer but less relevant ones.³⁴⁰ In one case, however, the trial judge seems to have imposed an upper limit of twenty years, however relevant the convictions were.³⁴¹ If the perpetrator were young at the relevant time, it seems that should be taken into account, although it will have less impact when there are subsequent occurrences of the same type.³⁴² It may also be necessary to bear in mind that the accused may have spent considerable periods of time in

³²⁷ Which include foreign convictions: *R v Kordasinski* [2006] EWCA Crim 2984, [2007] 1 Cr App R 238 [65]. ³²⁸ SI 2004/3346.

³²⁹ CJA 2003, s 103(2). Arson of dwellings and vehicles were treated as sufficiently similar in *R v Jan* [2006] EWCA Crim 2314, [30]. ³³⁰ CJA 2003, s 103(3)–(5).

³³¹ (n79). ³³² [8]. See also *R v Johnson* [2009] EWCA Crim 649, [20].

³³³ *R v Tully and Wood* [2006] EWCA Crim 2270, [26]. ³³⁴ *R v Clements* (n219).

³³⁵ *R v Urushadze* (n154), [23].

³³⁶ Although one would rarely be sufficient: see also *R v Murphy* (n260), [17] (single conviction for possession of firearms not enough to establish propensity to use firearms twenty years later).

³³⁷ Specifically mentioned as a factor relevant to the exercise of exclusionary discretion in subs (3).

³³⁸ Applied by analogy to the events where matters other than conviction were relied upon: see *R v Edwards and Rowlands* (95) (*Smith*), [74].

³³⁹ In *R v Hanson* (n79) (*P*), [50] it was immaterial that a relevant conviction was spent under the Rehabilitation of Offenders Act 1974. See also *R v Amponsah* (n234), [19].

³⁴⁰ *R v Edwards* (n136) [16] (the reasoning applies to this gateway as much as to (g)); in *R v Tangang* [2007] EWCA Crim 469, [17] a two-week gap between offences of the same type of fraud strengthened the evidence of propensity. ³⁴¹ *R v Edwards* (n136) (*Fysh*), [24].

³⁴² *R v Edwards* (n136) (*Chohan*), [72]; and cf *R v Renda* (n101) (*Razaq*), [76] (although there the bad character of a complainant, and a caution rather than a conviction).

prison, so diminishing the mitigation to be attached to mere passage of time.³⁴³ Because of the stress on relevance, the facts underlying the conviction are more important than its formal title, or the sentence imposed,³⁴⁴ so also the closer the factual circumstances, the more relevant the conviction is likely to be.³⁴⁵ If an offence contains distinguishable elements, a propensity showing only one of them remains admissible.³⁴⁶ It should further be noted that convictions for events occurring subsequent to those the subject matter of the trial may still be relevant, and admissible.³⁴⁷

Where the facts, as opposed to the fact, of a conviction are vital, there may well be difficulty in establishing them by admissible evidence, especially if they are old. For this reason, an appropriate amendment was made³⁴⁸ to s 74 of the Police and Criminal Evidence Act 1984, which then, by operation of s 75, permits reference to 'the contents of the information, complaint, indictment or charge-sheet on which the person in question was convicted'.³⁴⁹ This was designed to meet the criticism that evidence of a bare conviction would be unhelpful, and might be unduly prejudicial. Foreign convictions may be proved under the provisions of s 7 of the Evidence Act 1851.³⁵⁰

Credibility³⁵¹

Under the old law, virtually any conviction was regarded as relevant to credibility.³⁵² In *Hanson*, however, the Court of Appeal construed the modern provisions differently, and refused to regard even offences involving dishonesty as automatically establishing a propensity to be untruthful. It required reference to such matters as whether there had been a denial of the commission of the earlier offence, a plea of not guilty, or some element of untruthfulness inherent in the matters there charged.³⁵³ This view was endorsed in subsequent cases, and in some regarded as beyond argument,³⁵⁴ although distinguishing propensity to untruthfulness from credibility.³⁵⁵ A still more radical approach was adopted by the Lord Chief Justice in *R v Campbell*.³⁵⁶

The question of whether a defendant has a propensity for being untruthful will not normally^[357] be capable of being described as an *important* matter in issue between the defendant and the prosecution. A propensity for untruthfulness will not, of itself, go very far in establishing the

³⁴³ In *R v O'Dowd* (n165) the accused had spent many years in prison between the earliest misconduct relied upon and the date of the offence, during which period his opportunities to commit heterosexual rape were limited.

³⁴⁴ *Hanson* (n79), [12]. Although in cases of doubt, the sentence may indicate the facts underlying the conviction, as in *Atkinson* (n259). ³⁴⁵ *Edwards* (n136) (*Chohan*), [76].

³⁴⁶ *R v Harris* [2009] EWCA Crim 434, [25] (stabbing to secure sex, convictions for use of knife, but none for sexual offences). ³⁴⁷ *Edwards* (n136) (*Duggan*), [44]; *R v Adenusi* [2006] EWCA Crim 1059, [13].

³⁴⁸ Schedule 37 Pt 5.

³⁴⁹ Suggested in *R v O'Dowd*, (n165), [71] as a means of avoiding resort to excessive satellite litigation.

³⁵⁰ *R v Kordasinski* (n327), [66].

³⁵¹ For full and perceptive analysis see Mirfield [2009] *Crim LR* 135.

³⁵² So construing s 6 of the Criminal Procedure Act 1865.

³⁵³ [13]. Affirmed in *Edwards* (n136), [33]; see also *Edwards and Rowlands* (n95) (*Enright and Gray*), [104]. This approach finds some support in the official explanatory notes. Such a view has been rejected in New Zealand: *R v Wood* [2006] 3 NZLR 743.

³⁵⁴ *R v Meyer* (n267), [22]; a position there accepted by the prosecution, [1]; see also *R v Awaritefe* (n270), [24].

³⁵⁵ [22], in the sense of going to issue despite resolution depending upon the comparative reliability of the accounts given by complainant and accused. ³⁵⁶ [30], original emphasis.

³⁵⁷ Even in cases where it may, it will be because it goes to issue; see *R v Blake* [2006] EWCA Crim 871, [25].

commission of a criminal offence. To suggest that a propensity for untruthfulness makes it more likely that a defendant has lied to the jury is not likely to help them.

This seem to emasculate s 103(1)(b) to virtual³⁵⁸ impotence, a result which should be recognized in directing the jury about use of convictions admitted as going to issue.³⁵⁹ This approach fails to cohere with that adopted in relation to the untruthfulness of prosecution witnesses under the provisions of s 100,³⁶⁰ or in the event of such an attack, of the attacking accused under 'gateway' (g).³⁶¹

In relation to convictions especially, the balance of research,³⁶² and even anecdote³⁶³ recounted by the Law Commission, suggests that the danger of prejudice is extremely high. Nor should the degree to which such further use of convictions in respect of which the defendant has served his sentence might discredit, and distort, the fairness of the whole system of criminal justice be lightly dismissed.

There has so far been little indication of matters other than conviction that might affect credibility, except the rejection in *R v Purcell and Christopher*³⁶⁴ of an outrageous suggestion that a plea of not guilty might indicate a propensity to lie.

Important issue between co-defendants

This was discussed in Chapter VII.³⁶⁵

False impression

This was also discussed in Chapter VII.³⁶⁶

*Attack on another*³⁶⁷

The final gateway for admission of evidence of the bad character of the defendant is when he has attacked the character of someone else. Under the old law, this constituted the second limb of s 1(3)(ii) of the Criminal Evidence Act 1898, sometimes characterized as a case of 'tit for tat'.³⁶⁸ It was thought unfair if the accused attacked a prosecution witness for being of bad character in a particular respect, while having exactly the same character defect himself, and that it was misleading to allow the jury to decide between the two

³⁵⁸ In *R v Belogun* [2008] EWCA Crim 2006, [23] *R v Campbell* was distinguished in order to allow in a previous conviction for fabricating a defence when here it was alleged the defence was also fabricated.

³⁵⁹ *R v McDonald* [2007] EWCA Crim 1194, [25]; although such misdirection is not necessarily fatal: *R v Foster* [2009] EWCA Crim 353, [18].

³⁶⁰ *R v Renda (Osbourne)* (n101), [59]; *R v Stephenson* [2006] EWCA Crim 2325, [27]; but see *R v S* [2006] EWCA Crim 1303, [2007] 1 WLR 63, [11]–[12]; see further 354.

³⁶¹ *R v Lamaletie and Royce* (n166), [15]–[17]; cp *R v Renda (Osbourne) (Razaq)* (n101), [73], in which emphasis was placed upon not guilty pleas having been made at the previous trials resulting in conviction. See further 348.

³⁶² LC 141, [9.14] mentions Dutch research in which 100 per cent of judges who had heard the accused's convictions in advance went on to convict him, when only 27 per cent of those who had no prior knowledge convicted, the rest of the evidence being identical.

³⁶³ Thus para 14.33 recounts a judge's account of a case involving two co-defendants, which found it proved against the one whose previous convictions had been disclosed, despite the fact that the evidence against the other who was acquitted was much stronger.

³⁶⁵ 349.

³⁶⁶ 345.

³⁶⁴ [2006] EWCA Crim 1264, [24].

³⁶⁷ For more detailed analysis, see Munday [2006] *Crim LR* 300. For a novel approach to one aspect of this topic in Scotland, see *DS v HM Adv* [2007] UKPC 36.

³⁶⁸ See e.g. LC 273, [1.9]; [12.10]. See also *R v McLeod* (n25), 264g.

without knowing that this was the case. It was defective in a number of respects. It hindered the accused with a bad record from advancing true defences denying or mitigating the commission of the crime, or attributing commission to a third party. To the extent that the rationale depended upon a fair comparison between accuser and accused, it inhibited attack on prosecution witnesses,³⁶⁹ while leaving defence witnesses open to exactly similar attack.³⁷⁰ It was all the more damaging since the definition of what amounted to an attack was vague, and the retaliatory use of the accused's bad record extended to all convictions, however close to the subject matter of the case, irrespective of their not having been admitted, often being inadmissible, in chief, and theoretically going only to credit. There were two mitigating factors in the old law. First, the accused could evade the exposure of his record, by not testifying; and second, if he did, the courts developed a practice of discretionary refusal of allowing the accused's bad character to be adduced if they thought it unfair.

The Law Commission was aware of these defects, and sought to alleviate them; but once again the Act departed from the Law Commission's proposals. The Law Commission distinguished sharply between incriminatory and credibility gateways to admissibility, but the CJA 2003 did not. It would have been possible to regard the comparative credibility of the prosecution witnesses and those for the defence as merely one type of important issue between them. Despite the credibility of the defendant being covered by that gateway,³⁷¹ a further gateway was felt necessary to cater for attacks of this sort.

The Law Commission adopted the same position for attacks on credibility as for issue, namely that enhanced probative value should be required, that in order to make that assessment a detailed list of factors must be considered, and that there should be an overriding requirement, in all cases of possible prejudice, that the interests of justice should require admission, with the relevant factors to be taken into account for this purpose being set out in detail.³⁷² Once again, the whole of that detail was omitted from s 101(1)(g), and the supplementary s 106, which provides:

- (1) For the purposes of section 101(1)(g) a defendant makes an attack on another person's character if—
 - (a) he adduces evidence attacking the other person's character,
 - (b) he (or any legal representative appointed under section 38(4) of the Youth Justice and Criminal Evidence Act 1999 (c 23) to cross-examine a witness in his interests) asks questions in cross-examination that are intended to elicit such evidence, or are likely to do so, or
 - (c) evidence is given of an imputation about the other person made by the defendant—
 - (i) on being questioned under caution, before charge, about the offence with which he is charged, or
 - (ii) on being charged with the offence or officially informed that he might be prosecuted for it.

³⁶⁹ Because this would expose the accused's bad character.

³⁷⁰ Because this would not expose the accuser's bad character.

³⁷¹ Abundantly clear from the reference in CJA 2003, s 103(1)(b), to the propensity of the defendant to be untruthful.

³⁷² Law Commission's bill cl 9.

- (2) In subsection (1) “evidence attacking the other person’s character” means evidence to the effect that the other person—
- (a) has committed an offence (whether a different offence from the one with which the defendant is charged or the same one), or
 - (b) has behaved, or is disposed to behave, in a reprehensible way; and “imputation about the other person” means an assertion to that effect.
- (3) Only prosecution evidence is admissible under section 101(1)(g).

It is unfortunate that this provision³⁷³ of the new legislation has been construed much more in line with the provisions of the old law.³⁷⁴ Despite some weak recognition of formal change,³⁷⁵ the old law has been overwhelmingly endorsed.³⁷⁶ It might have been thought that an attack on a prosecution witness need not have been made a separate ‘gateway’ from that for an important issue between prosecution and defence described above,³⁷⁷ but the need to avoid such redundancy has been regarded as justifying a more expansive interpretation of this gateway.³⁷⁸ Thus it remains the case that the admissibility of the accused’s bad character is still triggered, despite the attacking element being an integral element of the defence,³⁷⁹ despite the attack being inadvertent,³⁸⁰ despite its not being false in any way,³⁸¹ and despite its having been determined by the Court to be in the interests of justice for it to have been made, since leave is required under s 100 to launch such an attack,³⁸² although this requirement seems often to have been ignored.³⁸³ As under the old law, however, mere allegation of consent as a defence to rape seems still not by itself to amount to such an attack,³⁸⁴ but will if it is alleged that witnesses for the prosecution have colluded to present a false story.³⁸⁵ The range of attack has also been extended under the new provisions to take in attacks upon non-complainants and non-witnesses, although it has been said that discretion may provide some protection.³⁸⁶

Not only have the new provisions reinforced the defects of the old law, they have also diminished its alleviations. The most notable respect is that the gateway applies even when the accused chooses not to testify, but has made his attack in an earlier statement.³⁸⁷ It is true that the statement must ‘be in evidence’, but this may include its being put in evidence not by the accused but by the prosecution against the wishes of the defence, at least if such a procedure were more than a ruse for getting evidence of the accused’s bad

³⁷³ But not for (f) (false impression). ³⁷⁴ *R v Hanson* (n79), [14].

³⁷⁵ *R v Bahanda* [2007] EWCA Crim 2929, [16].

³⁷⁶ *R v Singh* [2007] EWCA Crim 2140 [8]; *R v Lamaletie and Royce* (n166), [8], [15]; *R v Hearne* [2009] EWCA Crim 103 [10].

³⁷⁷ Overlap was recognized in *R v Lamaletie and Royce* (n166), [13], [14]. There is no overlap with ‘gateway’ (e) on account of the limitation to prosecution evidence, although this seems often overlooked, as in *R v Bovell (Dowds)* (n132), [30]; see also *R v Lewis* (n110), [13] (limitation also ignored in relation to ‘gateway’ (f) so as to create overlap with (e)). ³⁷⁸ *R v Singh* (n376), [9].

³⁷⁹ *Ibid*, [8]. ³⁸⁰ *R v Bovell (Dowds)* (n132), [32].

³⁸¹ *R v Renda (Osbourne and Razaq)* (n101).

³⁸² Invocation rendered the admission of the accused’s bad character in *R v Bovell* (n132), [23] and *R v Edwards (Fysh)* (n136), [34] (‘inevitable’), and in *R v Highton (Carp)* (n91), [51] (‘irresistible’).

³⁸³ It was not referred to in *R v Hanson (P)*, (n79) or *R v Renda (Ball)*, (n101), and only obliquely in *R v Singh* (n376), [6] (‘properly put’ to the complainant’). ³⁸⁴ *R v Renda* (n101) (*Ball*), [34].

³⁸⁵ *R v Hanson* (n79) (*P*), [49]; *R v Edwards* (n136) (*Fysh*), [34].

³⁸⁶ *R v Nelson* [2006] EWCA Crim 3412, [14]–[16].

³⁸⁷ Section 106(1)(c) applied in *R v Renda* (n101) (*Ball*), [35].

character admitted.³⁸⁸ The gateway is not, however, appropriate for a case where the attack appears in the witness statement of a prosecution witness, but is not relied upon in chief, but adduced only in cross-examination by a co-accused.³⁸⁹ Nor is there now any vestige of the old limitation of effect to credibility, since once admitted the evidence of the accused's bad character can be used for any purpose for which it is relevant.³⁹⁰ It is true that there is here a discretion to exclude such evidence under s 101(3), although it seems not yet to have been exercised decisively in this context.

SECTION 4. OTHER STATUTORY PROVISION

As noted above, CJA 2003, s 99(1) purported to abolish only the common law rules relating to the admissibility of evidence of bad character, several provisions explicitly preserve other statutory provisions in the area, and Sch 37, Pt 5 is selective in its specification of statutory provisions to be repealed.³⁹¹

Nevertheless, by far the most important previous statutory provision, s 1(3) of the Criminal Evidence Act 1898, has been repealed, and the provisions that remain are of little general importance.

Two³⁹² statutes abrogate the rules discussed in this section in the particular circumstances to which they apply: namely, s 1(2) of the Official Secrets Act 1911, and s 27(3) of the Theft Act 1968.

Section 1(1) of the Official Secrets Act 1911 (as amended by the Official Secrets Act 1920) punishes various forms of spying prejudicial to the state. Section 1(2) provides that it shall not be necessary to show that the accused person was guilty of any particular act tending to show a purpose prejudicial to the safety or interests of the state and, notwithstanding that no such act is proved against him, he may be convicted if, from the circumstances of the case, or his conduct, or his known character as proved, it appears that his purpose was a purpose prejudicial to the safety or interests of the state. The wording of this subsection shows that evidence of the accused's misconduct may be given, although relevant only because it shows that he is the kind of man whose purpose in doing certain acts might be of the type proscribed by the statute.

The Law Commission recommended that, so far as OSA 1911, s 1(2) dealt with the means rather than the object of proof, it should be dealt with under the rules it recommended to govern bad character. Since the section has not been repealed by the Criminal Justice Act 2003, it must remain in force, and will be subject to the new rules, although, as noted above, they are considerably more stringent than those recommended by the Law Commission, which the Commission had assumed in abstaining from recommending repeal of this provision.

Section 27(3) of the Theft Act 1968, reads as follows:

Where a person is being proceeded against for handling stolen goods (but not for any offence other than handling stolen goods), then at any stage of the proceedings, if evidence has been

³⁸⁸ *R v Nelson* (n386), [19].

³⁸⁹ *R v Assani* [2008] EWCA Crim 2563, [18].

³⁹⁰ *R v Highton* (n91), [10].

³⁹¹ Some are repealed only in part.

³⁹² For an Australian example, see Crimes Act (Victoria) 1958, s 47A, considered by the High Court in *KRM v R* [2001] HCA 11, 206 CLR 221. There are other statutes that exceptionally allow proof of other convictions for limited purposes: see e.g. Social Security Administration Act 1992, s 120.

given of his having or arranging to have in his possession the goods the subject of the charge, or of his undertaking or assisting in, or arranging to undertake or assist in, their retention, removal, disposal or realisation, the following evidence shall be admissible for the purpose of proving that he knew or believed the goods to be stolen goods:

- (a) evidence that he has had in his possession, or has undertaken or assisted in the retention, removal, disposal or realisation of, stolen goods from any theft taking place not earlier than twelve months before the offence charged; and
- (b) (provided that seven days' notice in writing has been given to him of the intention to prove the conviction) evidence that he has within the five years preceding the date of the offence charged been convicted of theft or handling stolen goods.

The subsection re-enacts, with some significant differences,³⁹³ s 43(1) of the Larceny Act 1916, which, in its turn, re-enacted s 19 of the Prevention of Crimes Act 1871.

It has proved so unpopular with English judges as to be given a highly restricted interpretation.³⁹⁴ In particular, there has been concern to restrict its application to proof of guilty knowledge,³⁹⁵ and, despite the apparently mandatory language, the court has invested itself with, and applied, discretion to exclude evidence should there be any danger of this restriction being undermined.³⁹⁶ Similar motives have led to the application of a strictly literal construction being placed upon the ambit of the evidence admitted under the provision. Thus, in the case of s 27(3)(a), it has been determined that no surrounding detail of the previous possession can be adduced beyond the barest description of the relevant goods.³⁹⁷ Similarly, in relation to s 27(3)(b), no more than the formal details of the relevant conviction may be adduced, corresponding to those certified under the provisions of s 73(2) of the Police and Criminal Evidence Act 1984. This permits little more than a brief description of the goods,³⁹⁸ and the result of the case. Here, too, there is a discretion to exclude the evidence if it seems likely to be unfairly prejudicial. It has been argued³⁹⁹ that this effort has been counterproductive, since the elimination of detail makes it very difficult for the jury to evaluate the true significance of the evidence, and gives rise to the possibility of exacerbating the very prejudice that it is designed to eliminate. The prosecution is in no way hampered, since it can adduce any detail that is sufficiently relevant under the ordinary similar facts rules that the provision supplements, while the accused has no

³⁹³ On which, see the Eighth Report of the Criminal Law Revision Committee (Cmnd 2977, 1966), paras 157–9.

³⁹⁴ It is no more popular in its local form in Australia: see *R v Cresswell* (1987) 8 NSWLR 56, in which faint ambiguity in the drafting of the starting point for time beginning to run was resolved in favour of inadmissibility.

³⁹⁵ *R v Wilkins* (1975) 60 Cr App Rep 300; *R v Bradley* (1979) 70 Cr App Rep 200. It cannot be used to undermine the accused's general credibility: see e.g. *R v Duffas* (1993) *The Times*, 19 October.

³⁹⁶ *R v Herron* [1967] 1 QB 107, [1966] 2 All ER 26; see above 199.

³⁹⁷ *R v Wood* (1987) 85 Cr App Rep 287, preferring *R v Bradley* (1979) 70 Cr App Rep 200 to *R v Smith* [1918] 2 KB 415.

³⁹⁸ Until the decision of the House of Lords in *R v Hacker* [1995] 1 All ER 45, [1994] 1 WLR 1659, no detail at all of the stolen goods had been permitted: see, in New Zealand, *R v Brosnan* [1951] NZLR 1030, 1039.

³⁹⁹ By Smith, in his note in the *Criminal Law Review* on *R v Bradley* [1980] Crim LR 173, and Munday [1988] *Crim LR* 345.

ready means to avoid the prejudice, since it would hardly help his cause to draw attention to the variety and versatility of his previous criminal conduct.⁴⁰⁰

The Law Commission recommended repeal of this provision, partly because its retention would be otiose in the light of its other recommendations.⁴⁰¹ It would appear to be still more otiose under the enacted provisions of the Criminal Justice Act 2003, but, perhaps surprisingly, has been omitted from the provisions listed for repeal under the Schedule.

SECTION 5. APPRAISAL⁴⁰²

Reform of this area of the law sought to consolidate its sources, to clarify its rules, to simplify its procedures, and to improve its operation. How far has it succeeded in so doing?

CONSOLIDATION

The aim was to substitute one single set of statutory provisions for the combination of statutory and common law rules, discretions, and practices which had previously prevailed. To that end the common law rules were to be abolished, and evidence of bad character governed only by these statutory provisions. Unfortunately, the terminology for abolishing the common law was flawed,⁴⁰³ and in particular it has been accepted that basic concepts like relevance remain,⁴⁰⁴ although whether unchanged is somewhat less clear. Similarly, although the principal general statute, the Criminal Evidence Act 1898, has been repealed, other statutory provisions remain unrepealed, or repealed only in part.⁴⁰⁵ Even in the case of repealed provisions some parts of the common law interpretation of those provisions seems to have been retained, while other parts have not. Thus the common law interpretation of what was once s 1(f)(i) of the Criminal Evidence Act has been retained so far as it related to attack on the character of others,⁴⁰⁶ but rejected so far as it related to response to evidence of good character.⁴⁰⁷ It was also left unclear how far some important statutory provisions operative in this area applied despite neither explicit retention nor repeal. S 78 of the Police and Criminal Evidence Act 1984 thus seems to have survived, although its relationship to explicit discretions and similarly worded provisions in the new provisions remains mysterious.⁴⁰⁸ Reference to Codes extraneous to the legislative provisions remains necessary for some purposes, such as procedural rules governed by the Criminal Procedure Rules and guidance as to direction of juries by the forms promoted by the Judicial Standards Board.⁴⁰⁹ Perhaps most significant of all, s 98 of the Act defines

⁴⁰⁰ The Law Commission in Law Com No 273, [11.55], rec 15, recommended its repeal, as did the Criminal Law Revision Committee, and as occurred in 1973 in the State of Victoria. Such a course would have left this situation to the operation of the ordinary rules.

⁴⁰¹ Law Com 273 [11.55], rec 15, draft bill cl 20(3)(b).

⁴⁰² Based upon consideration only of reported cases. Most of the points summarized below have appeared earlier in this chapter, or its predecessor. A rather limited empirical study by the Ministry of Justice *Research into the impact of bad character provisions on the courts* MoJ Res Ser 5/09 (March 2009) came to a very different conclusion, although it had no data on the operation of the old law with which to compare the impact of the new. ⁴⁰³ S 99, 383.

⁴⁰⁴ *R v Bullen* (n77), [29]. ⁴⁰⁵ 410. ⁴⁰⁶ *R v Lamelitie* (n166), [8].

⁴⁰⁷ *R v Renda* (n101), [19]. ⁴⁰⁸ *R v Highton* (n91), [13]; *R v Moran* (n240), [36].

⁴⁰⁹ *Cp R v Hanson* (n79), [18]; *R v Campbell* (n87), [37]–[43].

its area of operation to exclude from its operation in the very vaguest of terms evidence otherwise satisfying the Act's criterion of misconduct, but 'having to do with the facts of the case', or 'connected with' their investigation or trial. This has left it quite uncertain what is excluded, whether it is wholly excluded, and what rules apply to it, to the extent that it is excluded.⁴¹⁰

CLARIFICATION

The aim was to make the law more comprehensible, for lawyer and juror alike. It sought to accomplish this by the use of less technical terms, by the dissection of admissibility into discrete sub-rules, each with its own expository clause, and by the casting of rules in forms closer to that of the terminology of their underlying policies. Unfortunately, the use of a new terminology, or re-use of an old,⁴¹¹ requires elucidation, and it was ominous that in the very first case to arise in relation to the new provisions, it was complained that there had been insufficient time to train the judiciary,⁴¹² and that it was felt necessary to deliver sometimes as many as five composite judgments at a time⁴¹³ to illustrate the operation of the Act. The combination of non-technical language and the multiplication of sub-rules has also led to potential overlapping,⁴¹⁴ and there has been a number of examples of appellate courts differing from trial courts as to the correct rule to apply,⁴¹⁵ or sometimes simply getting it wrong themselves.⁴¹⁶ While it is possible to use terms in common use in legislative provisions, this is often at the expense of clarity in their connotation. At the most general level, terms such as fairness can be understood, but this may well be at the expense of dispute as to just what fairness requires in a given situation, say in a three-cornered case involving prosecution, and two mutually hostile co-accused.⁴¹⁷ Similarly, instead of a provision allowing bad character to be admitted in response to the adduction or elicitation of evidence of good character, the new provisions refer to evidence apt to convey a false impression. The difficulty and ambiguity inherent in the latter notion is patent. Where new terms have been coined, such as 'reprehensible' behaviour, interpretation has proved difficult and inconsistent. It is hard to believe that practitioners now have confidence in their ability to predict admissibility.

SIMPLICITY

It was hoped that the new law would be simple to operate, by providing for admissibility without needing leave of the court, and by avoiding the need for voir dire or appeal, so giving trial judges a freer hand. The decision on leave was, however, taken between receipt of the Law Commission's recommendations and the passage of the Act, and applied only to evidence of the bad character of the accused, thus exacerbating difference from the rules applying to the admissibility of evidence of others. Since simplicity of operation was also

⁴¹⁰ *R v Watson* (n96), [19]. ⁴¹¹ *R v McAllister* (n202), [22].

⁴¹² *R v Bradley* (n78), [38]–[39], the provisions were said to be 'conspicuously unclear', the language 'obfuscatory' and the legislation 'perplexing'.

⁴¹³ *R v Weir* (n91); *R v Renda* (n101).

⁴¹⁴ *R v Bovell and Dows* (n132), [32] ('gateways' (f) and (g)). ⁴¹⁵ *R v Lamelitie* (n166), [14].

⁴¹⁶ *R v Lewis* (n110), (assuming 'gateway' (g) to enable one co-accused to adduce evidence of the other's bad character); *R v Z* (n21), [27] (assuming s 116(4) to apply to evidence admitted under s 116(2)(a)).

⁴¹⁷ Such as *R v Musone* (n237).

designed to avoid delay and adjournment it was necessary also to provide for notice to the accused of an intention to adduce or elicit evidence of bad character, and for the accused to be able to apply to exclude the evidence. This is in practice regarded, and described, as a system of application and counter-application.⁴¹⁸ Many of the changes in the legislation have introduced new factual conditions for admissibility, some of them capable of being very close to the issues ultimately to be decided by the jury, for example in the area of false impression. It has not been possible to avoid the resolution of such preliminary issues by securing agreement in a number of high-profile cases, and it has proved difficult to establish the underlying facts even of convictions,⁴¹⁹ and still less of acquittals, stayed proceedings, or mere allegations. This has, of necessity, led to proliferation of satellite litigation, one feature of which has been doubt about the interaction of the means of establishing such facts and those of the issues crucial to the offences being tried.⁴²⁰ If it was hoped to avoid recourse to appellate tribunals by restricting their intervention to one of review, this seems not to have succeeded either in terms of the number of cases being reported at the appellate level, or in the abstention of such courts from reversing decisions in some cases, even though all of the matters relevant to the exercise of a discretion⁴²¹ or making a fact-sensitive judgement⁴²² had been rehearsed at trial. In effect this attempt to substitute admission for admissibility seems to have led to greater pressure upon the direction of juries, and some inconsistency in the appellate courts towards the use of standard directions to secure uniformity of approach. Any failure of clarity in the rules of admissibility is likely to inhibit agreement between the parties, and restriction of appeal to prolong argument at trial.

IMPROVEMENT

Few doubt that the result of the introduction of the new provisions has increased rather than reduced complexity,⁴²³ and that it has spawned more satellite litigation.⁴²⁴ It seems⁴²⁵ to have led to the increased use of evidence of the accused's bad character as the government intended, but since the criterion under the old law was that such evidence was admissible unless more prejudicial than probative, it is not self-evident that the result has been an improvement in justice.

⁴¹⁸ *R v McNeill* (n122), [9]. ⁴¹⁹ *R v Burns, R v Lewendon* (n160).

⁴²⁰ *R v Freeman and Crawford* (n190), [20]. ⁴²¹ *R v O'Dowd* (n165), [61] (s101(3)).

⁴²² *R v Murphy* (n260); in *R v McKenzie* (n163) the Court of Appeal upheld the decision of the trial judge on the evidence of one event, and rejected it on another.

⁴²³ *R v Isichei* [2006] EWCA Crim 1815, [32]. ⁴²⁴ *R v O'Dowd* (n165), [2].

⁴²⁵ *R v Chopra* (n81), [12]; *R v Campbell* (n87), [1].