CHAPTER 3

Documents

A party wishing to rely on the contents of a document must first prove it, i.e. adduce it in evidence. In general, the proof of documents does not create difficulties in criminal trials. Their admissibility is not usually disputed. 3–01

For this reason, the provisions for proving documents may be considered concisely. The general rule is that primary evidence of the document must be given. This rule is subject to a number of exceptions, in particular in the case of public and judicial documents. The meaning and classification of documents is first considered.

1. MEANING AND CLASSIFICATION

In general speech, a document is taken to mean something written which furnishes information.[1] The writing is usually thought of as being on a piece of paper. However, it is the writing which is of significance, not the object on which it is written. Darling J said that any written thing capable of being evidence is properly described as a document, no matter what material it was written on.[2] (As Darling J pointed out, it was once common to write on parchment and, before that, on stone, marble or clay.) Accordingly, the definition of "document" is not confined to writing on paper. It is, also, not restricted to things written. The essential feature of a document is that it should convey information.[3] Accordingly, photographs of tombstones and houses have been accepted as documents for the purposes of discovery,[4] a tape recording has been held to be a document for the same purposes[5] and a film has been held to be a document for the purposes of a *subpoena duces tecum*.[6] Information stored on a hard disk has been held to come within the meaning of "documentary".[7] 3–02

A similar broad definition is given in the Police and Criminal Evidence Act 1984. "Document" is defined for the purposes of that Act by s.118(1) (the general interpretation section) as having the same meaning as in Pt I of the Civil Evidence Act 1968. "Document" is defined for the purposes of Pt I of that Act to

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[1] See *Shorter Oxford English Dictionary*.
[2] *Daye* [1908] 2 K.B. 333 at 340.
[3] *Grant v Southwestern Properties* [1975] Ch. 185 at 193, per Walton J.
[4] *Lyell v Kennedy (No.3)* (1884) 50 L.T. 730, CA.
[5] *Grant* [1975] Ch. 185.
[6] *Senior v Holdsworth Ex p. ITN* [1976] Q.B. 23.
[7] *Derby & Co Ltd v Weldon* [1991] 1 W.L.R. 652, per Vinelott J; *Alliance & Leicester Building Society v Ghahremani*, *The Times*, 19 March 1992, per Hoffmann J.

include, inter alia, any photograph, tape or film. For the purposes of the law relating to hearsay, "document" is defined as being "anything in which information of any description is recorded".[8]

3–03 Electronic communications and data stored electronically are documents and admissible in criminal proceedings. The Electronic Communications Act 2000 makes provision for the admissibility of electronic signatures and related certificates in legal proceedings in relation to any question as to the authenticity of such communications or data.[9] This includes communications and data which have been encrypted.[10] It will be for the court to decide whether the electronic signature has been correctly used and what weight it should be given.[11] "Document" is defined by the Act to include, inter alia, any plan, design or other image[12]; "communication" to include a communication comprising sounds or images or both[13]; "electronic communication" means a communication transmitted either by means of a telecommunications system or by other means but while in an electronic form.[14]

The increased use of social media, such as Facebook, Twitter and YouTube, has inevitably resulted in courts being presented with ever-increasing quantities of such media as evidence. Social media is widely used by police forces in the detection of crime and, in turn, used as evidence in criminal proceedings. For example, during the riots of August 2011 social media was extensively used as a medium of organisation by the rioters and its impact was considered by the Court of Appeal in *Blackshaw*.[15] In order to rely effectively on such media it is sometimes necessary to establish the identity of the person behind the particular social media communication.[16] Provided this is properly done, social media can often prove a very effective form of evidence.

If a document is written in a foreign language, it must be translated into English before it is admitted in evidence. The translator must himself swear to the accuracy of the translation.[17]

Documents are usually classified as follows:

(i) *private*, i.e. documents emanating from a private person[18];
(ii) *public*, i.e. documents made by a public officer for the purpose of the public making use of them;

[8] Criminal Justice Act 2003 s.134.
[9] Electronic Communications Act 2000 s.7(1). For the definition of "electronic signature" see s.7(2). The signature is required to be certified by a person who has made a statement confirming it: s.7(3).
[10] Encryption is the process of turning normal text into a series of letters or numbers which can only be deciphered by someone with the correct password or key: Explanatory Notes to the Act, para.5. Such communications and data may be put into intelligible form, for instance, restored to the condition in which it was before any encryption or similar process was applied to it: Electronic Communications Act 2000 s.15(3).
[11] Explanatory Notes to the Act, the Stationery Office, 2000, para.43.
[12] Electronic Communications Act 2000 s.15(1).
[13] Electronic Communications Act 2000 s.15(1).
[14] Electronic Communications Act 2000 s.15(1).
[15] *Blackshaw* [2011] EWCA Crim 2312.
[16] *Applause Store Productions Ltd v Raphael* [2008] EWHC 1781 (QB).
[17] *Nkambule v King* [1940] A.C. 760 at 771.
[18] See Nokes, *An Introduction to Evidence* (4th edn), pp.353–354. For these purposes a corporate body is a private person. Thus documents produced by the police are private.

(iii) *judicial*, i.e. documents recording the proceedings and judgments of courts of law.

2. PRIVATE DOCUMENTS

A. Primary evidence

3–04 The general rule is that private documents must be proved by primary evidence.[19] The Divisional Court, however, has said that this rule is limited to written documents and in the strict sense of the term is not relevant to tapes and films.[20] The reason for the distinction would appear to be that originally copies of documents could only be made by hand: with the attendant risks of error through transcription. As a result, strict rules were necessary to limit the use of copies, save in particular circumstances. Such rules are not necessary in the case of copies made by mechanical devices.

Primary evidence in this context usually means the production of the original document.[21] The operation of the rule may be illustrated as follows. Suppose a defendant to have made a written confession to the police. The confession was written as a statement by a police officer at the defendant's dictation. In order to adduce the confession in evidence, the prosecution must call the officer to produce the original handwritten statement. If the original is not produced, the prosecution cannot normally rely on a typewritten copy and the confession will not be admitted in evidence.

3–05 Two points should be made about original documents.

(a) Normally there is only one original document; but, in some cases, there may be more than one, for example the counterparts of a lease or the second set of printouts from an intoximeter.[22]
(b) In some cases the question as to which document is the original will depend on the circumstances. Thus, in the case of a telegram, the original (as against the sender) was the message handed in at the Post Office.[23]

[19] A person wishing to rely on a private document must prove that it has been duly executed, i.e. that it was signed by the person who purported to have signed it and (where attestation is necessary) that it was attested. (Evidence of attestation is only necessary in the case of wills and other testamentary documents.) Execution is usually proved by calling a person to identify his own signature on the document. In his absence it may be proved by calling somebody who saw him sign the document or can identify his handwriting (see para.6–10, below, for evidence as to handwriting).
[20] *Kajala v Noble* (1982) 75 Cr.App.R. 149 at 152; discussed at para.3–06, below.
[21] In certain unusual instances, primary evidence may be given by other means, e.g. (i) in a few cases copies of private documents made under public authority are receivable as primary evidence; (ii) an admission of the truth of the contents of an inadmissible document may be evidence of the contents against the party making the admission: *Slatterie v Pooley* (1840) 6 M. & W. 664.
[22] *DPP v Hutchings* [1991] R.T.R. 380. In that case the first set of printouts had been lost and a police officer took a second set. This amounted to a second "reading" of the same material, resulting from the further operation of the device. The Divisional Court commented that the second set was as much an original as the first. Presumably the same test could be applied to any printouts taken from a machine operating in the same way as the Intoximeter.
[23] *Regan* [1887] 16 Cox C.C. 203.

Sometimes a carbon copy may be the relevant original, for example if the offence alleged is that a carbon copy has been falsified.

The rule has a long history. It is now seen as the last surviving aspect of the best evidence rule, i.e. that a party must produce the best evidence of which the nature of the case permits.

3–06 The best evidence rule was considered by the Divisional Court in *Kajala v Noble*.[24] The defendant in that case was charged with using threatening behaviour during the course of a disturbance in which a group of youths threw missiles at the police. The defendant was identified as one of those participating in the missile-throwing by a witness who had recognised him on a BBC television news bulletin concerning the disturbance. At the trial before the magistrates, the prosecution relied on a cassette recording of the film. The defendant appealed on the ground that since the original film existed, the prosecution should not have been allowed to rely on a copy. The Divisional Court did not agree. Ackner LJ giving the judgment of the court said:

> "The old rule, that a party must produce the best evidence that the nature of the case will allow, and that any less good evidence is to be excluded, has gone by the board long ago. The only remaining instance of it is that, if an original document is available in one's hands, one must produce it; that one cannot give secondary evidence by producing a copy. Nowadays we do not confine ourselves to the best evidence. We admit all relevant evidence. The goodness or badness of it goes only to weight, and not to admissibility."[25]

The general rule does not affect the admissibility of documents as real evidence (discussed at para.2–05, above) or for the purposes of identification. Thus, a document may be identified by looking at its contents.[26] For instance, a cheque book or a driving licence may be identified by the name upon it.

B. Secondary evidence

3–07 Secondary evidence usually takes the form of a copy. At one time (when the best evidence rule prevailed) there were degrees of secondary evidence. Thus, if the original document could not be produced, the next best evidence had to be adduced. However, there are now no degrees of secondary evidence.[27] Accordingly, oral evidence of the contents of a document may be given. Thus, a witness may give evidence of the contents of a document which he has himself

[24] *Kajala* (1982) 75 Cr.App.R. 149.
[25] *Kajala* (1982) 75 Cr.App.R. 149 at 152. The same point was also made by Lloyd LJ in *R. v Governor of Pentonville Prison Ex p. Osman* [1990] 1 W.L.R. 277 at 308, when he said that all remains of the best evidence rule is that if a party has an original document and does not produce it without reasonable explanation the court will infer the worst.
[26] *Boyle v Wiseman* (1855) 11 Exch. 306 at 367, per Martin B.
[27] *Brown v Woodman* (1834) 6 C. & P. 206, per Parke B; *Doe d. Gilbert v Ross* (1840) 7 M. & W. 102 at 106–107; *Garton v Hunter* [1969] 2 Q.B. 37 at 44, per Lord Denning MR; *Wayte* (1983) 76 Cr.App.R. 110 at 116.

read.[28] A statement which has been read to him may be admissible under the hearsay legislation: see s.114 of the Criminal Justice Act 2003.[29]

In *Nazeer*[30] three employees of the Record Department of the DSS checked the computer records in the Department for payable orders from lost or stolen pension or allowance books which had passed through the defendant's sub Post Office during a particular period. The orders were individually examined and compared with the entries on the computer screen and a schedule setting out more than 7,000 such entries was produced. It was argued that the evidence of the employees relating to the comparison between the orders and the entries on the screen was inadmissible as secondary evidence. The Court of Appeal held that secondary evidence was itself admissible because it was impracticable to produce the computers in court and (there being no degrees of secondary evidence) such evidence might be given in a number of ways which meant that this evidence was admissible: questions of accuracy were only relevant to the weight of the evidence.[31]

(1) Copies

Copies may take a number of forms such as (i) the certified copy which has been certified as true by an officer to whose custody the original document has been entrusted[32]; (ii) the examined copy which has been proved to have been examined and checked with the original. 3–08

Today, since most copies are produced by photocopiers, disputes rarely arise. In *Wayte*,[33] the Court of Appeal laid down guidelines on the procedure to be adopted if there is a dispute about the admissibility of photocopies. The guidelines may be summarised as follows:

(a) As a general rule, documents should not be handed to nor seen by the jury until questions of admissibility have been determined.
(b) Warning should be given before such documents are produced to counsel for the parties likely to be affected by admission of the document so that they may have a fair chance of considering their admissibility.
(c) If the defendant is unrepresented, the guidance of the court should be sought before the document is put before the jury.

The Court said that on very rare occasions there would have to be a trial-within-a-trial on the question of admissibility; but in the end the issue of the genuineness of the document will have to be left to the jury. Whether copies are first or second hand goes only to the weight of the evidence.[34]

[28] *Brown* (1834) 6 C. & P. 206.
[29] Considered in Ch.8, below.
[30] *Nazeer* [1998] Crim.L.R. 750.
[31] See now s.117 of the Criminal Justice Act 2003 (discussed at paras 8-52 et seq., below).
[32] For instance, under s.120 of the Terrorism Act 2000, a document bearing a certificate signed by the Secretary of State, or on his behalf, and stating that the document is a true copy of a notice or direction under the Act and signed by him is evidence of the document.
[33] *Wayte* (1983) 76 Cr.App.R. 110 at 118.
[34] *Nazeer* [1998] Crim.L.R. 750.

(2) Copies of copies

3–09 A copy of a copy is admissible in a case where secondary evidence may be given. Usually a witness is called who can verify that the copy is not only a true copy of the original copy but is also in the same terms as the original document.[35] Even if such evidence cannot be given, the copy of the copy may still be admitted. The fact that a false document can be constructed by photocopying techniques does not render a photocopy inadmissible: that is a matter of weight, not admissibility.[36] Where a statement in a document is hearsay but is also admissible it may be proved by production of a copy.[37]

(3) Microfilm copies

3–10 The contents of a document may be proved by production of a microfilm copy of it or of a material part of it which must be authenticated in such matter as the court approve.[38]

Thus, once a document has been microfilmed, a copy may be produced in any proceedings, provided that it is authenticated in such manner as the court may approve. This provision applies whether or not the document is in existence. No indication is given of the manner in which the document should be authenticated. However, in many cases the authenticity of a document is proved by a witness who has had custody or control of it.

(4) Hearsay statements

3–11 Section 133 of the Criminal Justice Act 2003 provides that where a hearsay statement in a document is admissible as evidence it may be proved by producing either the document or a copy of it (or the material part) authenticated in whatever way the court may approve. This section replaces s.27 of the Criminal Justice Act 1988 and is in very similar terms. Its purpose is to cover all forms of copying, including the use of imaging technology.[39]

C. Admissibility of secondary evidence

3–12 Secondary evidence of documents may be admissible in the following circumstances. (This is not an exhaustive list of all the circumstances in which secondary evidence may be given but outlines the main exceptions to the general rule.)

(1) Where the original has been destroyed, for example by fire,[40] or lost, so long as there is evidence that a search has been made for it.[41]

[35] *Collins* (1960) 44 Cr.App.R. 170.
[36] *Wayte* (1983) 76 Cr.App.R. 110.
[37] Criminal Justice Act 2003 s.133; see below.
[38] Police and Criminal Evidence Act 1984 s.71.
[39] Explanatory Notes to the Criminal Justice Bill, para.366.
[40] *Leyfield's Case* (1611) 10 Co.Rep. 88a, 92b.
[41] *Brewster v Sewell* (1820) 3 B. & Ald. 296.

(2) Where it is impossible or inconvenient to produce the original.[42] Examples would be a placard on a wall[43] or a notice in a factory.[44]

Where a party wishes the original of a document to be produced, but it is in the hands of the opposite side, he must serve a notice to produce on the opposing party or his solicitors.

The rule in criminal cases is the same as in civil cases,[45] save that civil rules as to discovery do not apply in criminal proceedings.[46] Failure to serve a notice may make secondary evidence inadmissible (unless the evidence is admissible by reason of the hearsay provisions of the Criminal Justice Act 2003).[47] In 1925, a conviction was quashed because copies of letters had been produced without notice to produce having been served.[48] However, copies of documents are produced today without notice and without objection. Thus, if a defendant is charged with a hire purchase fraud, the prosecution will produce copies of the relevant hire purchase agreement without giving notice to produce the original. Objection will usually not be taken to this course. If the original document is relevant, the defendant may be in a position to produce it or procure its production.

3–13 Indeed, it may be that, in the above example, no objection could properly be taken because there is no need for the prosecution to serve a notice when the document is the subject matter of the proceedings, for example where the defendant was charged with theft of a bill of exchange, it was held that there was no need for the prosecution to serve a notice in relation to the bill.[49] This is because "[by] the form of the indictment the prisoner has notice that he is charged with possession of the very document and will be required to produce it".[50] Thus, in cases where the defendant was charged with driving a motor vehicle without insurance, it was held that notice to produce the certificate was not necessary and secondary evidence of it was admitted.[51] "The summons itself is a notice to the defendant to have his policy in court."[52]

The defence often request the prosecution without notice during the trial to produce records made during a defendant's detention in the police station. Such requests are usually complied with. However, in *Hackney*[53] the Court of Appeal appeared to deprecate this practice and said that such records did not prove themselves. "The prosecution do not have to produce them without some notice which allows proper opportunity of proving and explaining their contents by the

[42] The principle was laid down in *Mortimer v M'Callan* (1840) 6 M. & W. 58 at 72 which concerned the books of the Bank of England but which suggested inscriptions on tombstones or on a wall as examples. Graffiti on a wall inciting to racial hatred would be a modern example.
[43] *Fursey* (1833) C. & P. 81.
[44] *Owner v Beehive Spinning Co Ltd* [1914] 1 K.B. 105.
[45] *Attorney-General v Le Merchant* (1772) 2 T.R. 201.
[46] *Spokes v Grosvenor Hotel* [1897] 2 Q.B. 124. For rules as to disclosure in criminal proceedings, see Ch.20, below.
[47] See Ch.8, below.
[48] *Morgan* [1925] 1 K.B. 752.
[49] *Aickles* (1784) 1 Leach 294.
[50] *Elworthy* (1867) L.R. 1 C.C.R. 103 at 106, per Kelly CB.
[51] *Machin v Ash* (1950) 49 L.G.R. 87; *Bracegirdle v Apter* (1951) 49 L.G.R. 790.
[52] *Machin* (1950) 49 L.G.R. 87 at 89, per Lord Goddard CJ.
[53] *Hackney* (1982) 74 Cr.App.R. 194 at 198.

evidence of officers who actually made the records." (However, it should be noted that custody records are also admissible under s.117 of the Criminal Justice Act 2003: para.8–55, below.[54])

3–14 If a notice to produce a document has been served, the court has no power to compel an accused to comply with it[55]: to do so would be to require the defendant to produce evidence against himself. On the other hand, failure to comply with a notice to produce will allow secondary evidence of the documents to be given.[56]

If a document is in the hands of a stranger to the proceedings, a witness summons may be issued requiring the stranger to attend before the court and to produce the document.[57]

However, the document in question must be material to the proceedings. The Divisional Court has accordingly held that summonses should not have been issued in a disguised attempt to obtain discovery[58] or to obtain material for use in cross-examination.[59] Where a summons is issued requiring a third party (for instance a local authority) to disclose a large number of documents and the party applies to set the summons aside, it is proper for the judge to accept the assurance of the party (for instance the local authority, based on the opinion of independent counsel instructed by the authority) that certain documents are irrelevant.[60]

Secondary evidence will be admissible if the document is in the possession of somebody who (a) is outside the jurisdiction[61]; or (b) has successfully claimed privilege in respect of the document[62]; or (c) has diplomatic immunity.[63] If, on the other hand, no summons has been served or the summons is disobeyed, secondary evidence may not be admissible[64] unless a copy which has been authenticated in whatever way the court may approve is admitted under the Criminal Justice Act 2003 s.133.

D. Bankers' books

3–15 Special provisions have been enacted to protect banks from the disruption caused by the removal of ledgers and accounts. Accordingly, s.3 of the Bankers' Books Evidence Act 1879 provides that a copy of any entry in a banker's book shall be received as prima facie evidence of such entry and the matters, transactions and accounts therein recorded. The word "book" is not used in its normal sense but is given a wide definition in the Act which has been amended to include modern

[54] *Hogan* [1997] Crim.L.R. 349.
[55] *Trust Houses Ltd v Postlethwaite* (1944) 109 J.P. 12, DC.
[56] *Watson* (1788) 2 T.R. 199.
[57] For proceedings in the Crown Court the procedure is governed by the Criminal Procedure (Attendance of Witnesses) Act 1965 s.2 (as amended by the Criminal Procedure and Investigations Act 1996 s.66); and for the magistrates' court: Magistrates' Courts Act 1980 s.97.
[58] *Skegness Magistrates' Court Ex p. Cardy* [1985] R.T.R. 49; *Manchester Crown Court Ex p. Williams* [1985] R.T.R. 49.
[59] *Cheltenham Justices Ex p. Secretary of State for Trade* [1977] 1 W.L.R. 95.
[60] *W(G) and W(E)* [1997] 1 Cr.App.R. 166.
[61] *Kilgour v Owen* (1889) 88 L.T. 7.
[62] *Mills v Oddy* (1834) 6 C. & P. 728.
[63] *Nowaz* (1976) 63 Cr.App.R. 178.
[64] *Inhabitants of Llanfaethly* (1853) 2 E. & B. 940.

methods of recording transactions.[65] However, it does not extend to letters in a file of bank correspondence[66] nor to records of conversations between bank employees and customers.[67]

For a copy to be admissible under the Act, it must be proved that:

(a) the book was at the time of the making of the entry one of the ordinary books of the bank;
(b) the entry was made in the ordinary course of business;
(c) the book is in the custody or control of the bank[68]; and
(d) the copy has been examined with the original entry and is correct.[69]

3–16 Section 7 of the Bankers' Books Evidence Act 1879 provides that on the application of any party to a legal proceeding, a court may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings. Accordingly, once legal proceedings are in being against a particular defendant, the police may apply for an order under this section to inspect the defendant's bank account if it is relevant to the proceedings to do so.

The person affected by an order cannot object on the ground that he may incriminate himself.[70] However, care should be taken before such an order is made because it is an interference with the liberty of the subject. In *Williams v Summerfield*,[71] Lord Widgery CJ, laying down guidelines for magistrates, said that they should limit the period of disclosure of the account to a period strictly relevant to the charge; and consider whether the prosecution has other evidence to support the charge before making the order.

The latter consideration is to prevent the prosecution from going on a "fishing expedition" in order to try to find material for a case. An order should only be made where there is evidence of the commission of an offence and the purpose of the application is to add to that evidence.[72] The reason for these restrictions is to prevent the oppression of the person affected. Thus the Divisional Court has quashed orders which were not limited in time[73] or covered a longer period than was relevant to the charge.[74]

An order may not be necessary where the customer has waived his right to confidentiality and the bank agreed to the inspection and copying of its books.[75]

[65] The Bankers' Books Evidence Act 1879 s.9 (as substituted by paras 1 and 13 of Sch.6 to the Banking Act 1979) provides that the expression includes ledgers, day-books, cashbooks, account books and other records used in the ordinary business of the bank, whether those records are in written form or are kept on microfilm, magnetic tape or any other form of mechanical or electronic data retrieval mechanism.
[66] *Dadson* (1983) 77 Cr.App.R. 91.
[67] *Re Howglen* [2001] 1 All E.R. 376.
[68] Bankers' Books Evidence Act 1879 s.4.
[69] Bankers' Books Evidence Act 1879 s.5.
[70] *Williams v Summerfield* [1972] 2 Q.B. 512.
[71] *Williams* [1972] 2 Q.B. 512 at 518–519.
[72] *Nottingham City Justices Ex p. Lynn* (1984) 79 Cr.App.R. 238 at 243.
[73] *Marlborough Street Stipendiary Magistrate Ex p. Simpson* (1980) 70 Cr.App.R. 291.
[74] *Lynn* (1984) 79 Cr.App.R. 238; *Owen v Sambrook* [1981] Crim.L.R. 329.
[75] *Wheatley v Commissioner of Police for the British Virgin Islands* [2006] 1 W.L.R. 1683 (Privy Council). A case concerning the British Virgin Islands' Banker's Books (Evidence) Act 1881, identical to the Bankers' Books Evidence Act 1879 s.7.

3–17 The following points should also be noted:

(a) An order may be made to inspect a person's bank account although the person is not a party to the proceedings. Thus, in *Andover Justices Ex p. Rhodes*,[76] Mrs R was charged with the theft of some money. She told the police that the money was in her husband's bank account. Magistrates made an order allowing the police to inspect the account. The Divisional Court held that the order was proper, despite the fact that the husband was not a party to the proceedings. In this case the order was necessary because inspection of the husband's account was relevant to the charge and he could not be compelled to give evidence and produce the account. In *Grossman*,[77] the Court of Appeal said that such an order should be made only in exceptional circumstances in criminal cases; and only where the public interest in assisting a prosecution outweighed the private interest in keeping a bank account confidential.

(b) There must be legal proceedings in being before an order is made. The order itself cannot constitute the proceedings. *Nottingham City Justices Ex p. Lynn*[78] is an example of a case where it was held that proceedings were in being. In that case a person was charged with an offence connected with the importation of drugs. He was subsequently twice remanded in custody by the magistrates. An order under s.7 was then made. It was argued that there were no proceedings in being. The Divisional Court commented that this was an idle suggestion.

(c) There is no requirement that notice of an application should be given to the party affected. However, Lord Widgery observed that there was much to be said for giving notice.[79] Shaw LJ made similar observations in the case of persons not party to the proceedings unless considerations of urgency or secrecy make it imperative that the application should be dealt with ex parte.[80] It is submitted that if the considerations mentioned by Shaw LJ do not exist, it is better practice to give notice, if only so that any objection may be canvassed at the earliest stage.

3. PUBLIC DOCUMENTS

3–18 A public document is a document made by a public officer for the purpose of the public making use of it and being able to refer to it.[81] In general, the originals of such documents do not have to be produced. The reason for the rule is that the production of the originals would cause public inconvenience.[82] Public documents do not require evidence of execution. For admissibility, see paras 8–64 et seq., below.

[76] *Andover Justices Ex p. Rhodes* [1980] Crim.L.R. 644.
[77] *Grossman* (1981) 73 Cr.App.R. 302 at 307.
[78] *Lynn* (1984) 79 Cr.App.R. 238.
[79] *Simpson* (1980) 70 Cr.App.R. 291 at 294.
[80] *Grossman* (1981) 73 Cr.App.R. 302 at 308.
[81] *Sturla v Freccia* (1880) 5 App. Cas. 623 at 643, per Lord Blackburn.
[82] *Mortimer v M'Callan* (1840) 6 M. & W. 58 at 63, per Alderson B.

3–19 The production of many public documents is governed by statute. The following may be cited by way of example.

(a) Private Acts of Parliament and entries in the journals of both Houses of Parliament may be proved by copies printed by the Queen's Printers or under the authority of Her Majesty's Stationery Office ("HMSO").[83] All statutes of the UK are public Acts and to be judicially noticed as such, unless the contrary is provided in the Act: Interpretation Act 1978 s.3.

(b) Royal proclamations and orders or regulations issued by the Government may be proved by copies printed by the Queen's Printer or under the authority of HMSO.[84] In *Clarke*[85] the Court of Appeal said that the word "order" in the 1868 Act should be given a wide meaning covering "any executive act of Government performed by the bringing into existence of a public document for the purpose of giving effect to an Act of Parliament". The Court, therefore, held that an order printed by HMSO stating that the Home Secretary had approved a breath test device was an order within s.2 of the Documentary Evidence Act 1868. This has been held to include a prison licence issued by a prison governor on behalf of the Secretary of State.[86]

(c) Statutory instruments may be proved by a copy printed by HMSO.[87] In *Koon Cheung Tang*[88] the defendant was charged with offences under the Food Hygiene General Regulations 1970. At the trial the Regulations were proved by the production in the form of a photocopy from a commercial publication rather than the Queen's Printer's copy. It was argued on appeal that this procedure failed to comply with s.2 of the Documentary Evidence Act 1868. The Court of Appeal held that technically the judge was probably wrong to hold that the provisions of s.2 had been satisfied. (The Court said that this was only "probably" so because some Regulations have attained such notoriety that judicial notice may be taken of them: *Jones*[89]). However, it was not suggested that there was any inaccuracy in the text before the court, and the Court dismissed the appeal on the ground that no miscarriage of justice had actually occurred.

(d) Byelaws may be proved by a printed copy purporting to be made by the local authority making the bye-law and endorsed with a certificate signed by the proper office of the authority.[90]

(e) Public records may be proved by a certified copy of a public record in the Public Records Office.[91]

[83] Evidence Act 1845 s.3; Documentary Evidence Act 1882 s.2.
[84] Documentary Evidence Act 1868 s.2; Documentary Evidence Act 1882 s.2.
[85] *Clarke* [1969] 2 Q.B. 91 at 97.
[86] *West Midlands Probation Board v French* [2009] 1 W.L.R. 1715.
[87] Documentary Evidence Act 1868 s.2; Documentary Evidence Act 1882. See also Statutory Instruments Act 1946 ss.2–4; *Palastanga v Solman* (1962) 106 S.J. 176.
[88] *Koon Cheung Tang* [1995] Crim.L.R. 813.
[89] *Jones* [1970] 1 W.L.R. 16, see para.5–09, below.
[90] Local Government Act 1972 s.238.
[91] Public Records Act 1958 s.9(2).

(f) Births and deaths may be proved by a certified copy of an entry purporting to be sealed or stamped with the Seal of the General Register Office.[92] Marriages may be proved by similar means.[93]

(g) The records of the Driver and Vehicle Licensing Authority (DVLA) may be proved under s.52 of the Vehicle and Excise Registration Act 1952.[94]

3–20 If there is no statute providing for the admissibility of a particular document, it may be admissible under s.14 of the Evidence Act 1851. This section provides that whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody and no statute exists which renders its contents provable by means of a copy, an examined or certified copy is admissible.

4. JUDICIAL DOCUMENTS

3–21 Convictions, acquittals, judgments and connected documents are usually proved by certified copies. For proof of convictions and acquittals, see below.

A. Civil proceedings

3–22 The following provisions relating to civil proceedings should first be noted.

(a) All writs, records, pleadings and documents filed in the High Court are proved by office copies.[95]

(b) Proceedings in the County Court may be proved by a certified copy of an entry in the district judge's book.[96]

(c) Proceedings in the magistrates' court may be proved by a certified extract from the court register.[97]

(d) Orders of the court required to be gazetted under the Insolvency Act 1986 or the Insolvency Rules 1986 may be proved by the production of a copy of the *London Gazette* containing the relevant notice.[98]

Despite these provisions it is submitted that in cases relating to the forgery of a court record or perjury in an affidavit, the original document should be produced. Indeed, it is difficult to see how the prosecution could proceed without production of the original.

[92] Births and Deaths Registration Act 1953 s.34(6).
[93] Marriage Act 1949 s.65(3).
[94] *McCarthy* [1998] R.T.R. 374.
[95] RSC Ord.38, r.10(11). An office copy is one made by an officer of the court.
[96] County Courts Act 1984 s.12(2). In *Stoke*, *The Times*, 6 August 1987, the Court of Appeal held that an oral admission by the defendant that County Court judgments had been entered against him was evidence of the entry of the judgment. The court described s.12(2) as a piece of machinery providing a means of proof and said that proof by some other method was perfectly acceptable.
[97] Magistrates' Courts Rules 1981 r.68. For convictions and acquittals in the magistrates' court, see below.
[98] Insolvency Rules 1986 r.12.20.

B. Proof of convictions and acquittals

Proof of convictions and acquittals in all proceedings is now governed by s.73(1) and (2) of the Police and Criminal Evidence Act 1984[99] which provides: **3–23**

> "(1) Where in any proceedings the fact that a person has in the United Kingdom or any other member State[100] been convicted or acquitted of an offence otherwise than by a Service court is admissible in evidence, it may be proved by producing a certificate of conviction or, as the case may be, of acquittal relating to that offence, and proving that the person named in the certificate as having been convicted or acquitted of the offence is the person whose conviction or acquittal of the offence is to be proved.
>
> (2) For the purposes of this section a certificate of conviction or of acquittal—
>
> (a) shall, as regards a conviction or acquittal on indictment, consist of a certificate, signed by the proper officer of the court where the conviction or acquittal took place, giving the substance and effect (omitting the formal parts) of the indictment and of the conviction or acquittal; and
>
> (b) shall, as regards a conviction or acquittal on a summary trial, consist of a copy of the conviction or of the dismissal of the information, signed by the proper officer of the court where the conviction or acquittal took place or by the proper officer of the court, if any, to which a memorandum of the conviction or acquittal was sent; and
>
> (c) shall, as regards a conviction or acquittal by a court in a member State (other than the United Kingdom), consist of a certificate, signed by the proper officer of the court where the conviction or acquittal took place, giving details of the offence, of the conviction or acquittal, and of any sentence;
>
> and a document purporting to be a duly signed certificate of conviction or acquittal under this section shall be taken to be such a certificate unless the contrary is proved."

The section thus provides for proof of convictions or acquittals in both trials on indictment and summary trials by: **3–24**

(a) production of a certificate duly signed by the proper officer of the appropriate court; and

(b) proof that the person named in the certificate is the person whose conviction or acquittal is to be proved.

In *Derwentside Justices Ex p. Heaviside*[101] the Divisional Court emphasised that strict proof that the accused was the person named in the certificate was required in order to avoid mistakes. The Court held that it was insufficient to produce the court register showing that person of the same name, date of birth and address had been disqualified and that the identity of the person convicted must be proved by an admission, fingerprints or the evidence of a person in court **3–25**

[99] As amended by the Access to Justice Act 1999 and the Coroners and Justice Act 2009 and superseding a number of nineteenth-century provisions.
[100] It was held in *M (E)* [2014] 2 Cr.App.R. 484 (29) that a certificate of conviction in a member State was admissible under s.73(1) despite the fact that the conviction preceded the accession of the member state concerned to the European Union.
[101] *Derwentside Justices Ex p. Heaviside* [1996] R.T.R. 384.

on that occasion. The Court listed these three methods as providing the necessary proof. However, in subsequent cases the Court made it clear that it is an error of law to consider that these three methods are exhaustive: it is for the justices to determine in the individual case whether other means are sufficient.[102] These methods may include proof of an admission to a witness in the case or proof by means of a written statement under s.9 of the Criminal Justice Act 1967.[103] Similarly, justices were held to have been wrong in ignoring evidence of admissions to a police officer on the ground that it did not fall into one of the three above categories.[104] The position was summarised by Simon Brown LJ in *Bailey v DPP*[105]:

(a) the link between the certificate and the defendant must be proved beyond reasonable doubt;
(b) this link can be proved by any admissible means;
(c) the list in *Heaviside* is not exhaustive and other methods can be envisaged; but
(d) there must be "some evidence which plainly demonstrates that a previous conviction in the defendant's name is not possibly explicable . . . by some other person having given the defendant's details both to the police and to the Court . . .".[106]

3–26 A conviction may be proved by admission even in the absence of a certificate. This is illustrated by *DPP v Moran*[107] where the Divisional Court upheld a conviction in circumstances where no certificate of disqualification was produced to the Court, but the accused had admitted to the police that he was disqualified and gave details; and, at trial, accepted that his admission was correct. These cases were reviewed in *Pattison*[108] in which the Divisional Court held that a prima facie case may be established where the certificate of conviction shows consistent details with those of the defendant. In the absence of any evidence to the contrary, identity is proved to the criminal standard. In *Burns*,[109] however, the Court of Appeal held that similarity between a memorandum and a defendant's name and date of birth alone may not be sufficient. Each case depends on its own facts and upon all the available material.[110]

The following should also be noted:

(a) References in s.73 to the clerk of a court include references to his deputy and to any other person having the custody of the court records (s.73(3)).

[102] *Derwentside Justices Ex p. Swift* [1997] R.T.R. 89; *DPP v Mansfield* [1997] R.T.R. 96; *DPP v Mooney* [1997] R.T.R. 434.
[103] *Swift* [1997] R.T.R. 89.
[104] *Mooney* [1997] R.T.R. 434.
[105] *Bailey v DPP* (1999) 163 J.P. 518 at 523.
[106] *Bailey* (1999) 163 J.P. 518, 523.
[107] *DPP v Moran* (2000) 164 J.P. 562.
[108] *Pattison* [2006] All E.R. 317.
[109] *Burns* [2006] 1 W.L.R. 1273.
[110] *Burns* [2006] 1 W.L.R. 1273 at [17].

(b) If a defendant denies a conviction lawfully put to him in cross-examination, the prosecution may prove the conviction in the manner provided for in this section.
(c) For proof of the *facts* upon which a conviction is based (as applied to the conviction itself) see the Police and Criminal Evidence Act 1984 s.74, discussed at paras 5–27 et seq., below.

Section 73 of the 1984 Act and *Heaviside*, above, apply only to convictions in **3–27** the UK. Foreign convictions must be proved under s.7 of the Evidence Act 1851. This was established in *Mancini*[111] in which the Court of Appeal accepted, as "examined copies" under the Act, certificates of convictions in the Netherlands produced by a Dutch liaison officer called to give evidence by the Crown. The Court said that it was open to the Crown to prove that the "examined copies" related to the defendant in the ordinary way, in the instant case, by means of admissible fingerprint evidence.[112] Similarly, in *Kordasinski*[113] it was held that convictions in Poland, provable under s.7 of the Evidence Act 1851, were admissible as bad character pursuant to ss.101 and 103 of the Criminal Justice Act 2003.[114]

The following should also be noted: **3–28**

(a) A person disputing the correctness of a conviction bears the burden of proving that it is incorrect.
(b) The method of proving a conviction or acquittal authorised by the section is in addition to and not to the exclusion of any other authorised manner of proving a conviction or acquittal (s.73(4)), i.e. evidence by a person in court; proof by means of fingerprints under s.39 of the Criminal Justice Act 1967; written statements under s.9 of the same Act or admissions under s.10 of that Act.
(c) References in the section to the clerk of a court include references to his deputy and to any other person having the custody of the court record (s.73(3)).
(d) If a defendant denies a conviction lawfully put to him in cross-examination (e.g. under the Criminal Evidence Act 1898 s.1(f)), the prosecution may prove the conviction in the manner provided for in this section.

[111] *Mancini* [2002] 2 Cr.App.R. 377.
[112] The method of proof of convictions by fingerprints under s.39 of the 1948 Act applies only to convictions in Great Britain.
[113] *Kordasinski* [2007] 1 Cr.App.R. 238 (17).
[114] *Kordasinski* [2007] 1 Cr.App.R. 238 (17) at [72]–[73].

CHAPTER 7

Character

1. INTRODUCTION

"Character" may bear two meanings in law. According to common law rules, it meant general reputation,[1] i.e. the general reputation which a man or woman bears. However, under s.1 of the Criminal Evidence Act 1898 the word was said to combine both the concept of reputation and the concept of disposition, i.e. a disposition to act or think in a particular way.[2] They are similarly combined in s.98 of the Criminal Justice Act (CJA) 2003, below, para.7–30. **7–01**

"Character" may be good or bad. Both are discussed in this chapter, good character at paras 7–06 et seq., below and bad character at paras 7–28 et seq., below. Within the context of criminal proceedings, saying someone is of "good" character normally means that they have no previous convictions. Conversely, saying someone has "bad" character means that they have previous convictions. Thus reputation is measured by whether a person has previous convictions or not, rather than their actual moral rectitude. It is, however, not always true to say that a person of good character has no previous convictions. There are occasions when previous convictions may be disregarded. Similarly, a person of bad character is not always a person who has previous convictions; misconduct of which someone has not been convicted can constitute bad character. This chapter is concerned with the admissibility of evidence relating to the character of both defendants and witnesses.

The former general rule was that evidence of a person's disposition or reputation was generally inadmissible. In particular, evidence that the accused had been guilty of misconduct other than that charged or had a disposition to commit the kind of offence charged (or crimes in general) was inadmissible for the purpose of showing that he committed the offence charged. Two reasons were usually given for this exclusionary rule: (a) evidence of previous misconduct was considered to be generally irrelevant; and (b) such evidence was considered so prejudicial that a fair trial would be impossible. **7–02**

This rule was considered to be fundamental to all criminal trials. It was described by Lord Sankey LC as "one of the most deeply rooted and jealously guarded principles of our common law"[3] and Lord Hailsham said that its force should not be reduced or diminished.[4] This was because it was thought that if this were to happen the evidence of propensity on the part of the defendant to commit

[1] *Rowton* [1865] Le. & Ca. 520.
[2] *Stirland v DPP* [1944] A.C. 315 at 325, per Lord Simon LC.
[3] *Maxwell v DPP* [1935] A.C. 309 at 317.
[4] *Boardman v DPP* [1975] A.C. 421 at 456.

offences might so influence the minds of the jury that all other considerations would be set aside and the jury might reason that simply because the defendant had committed one or more offences in the past, he must have committed the offence which they were trying.

7–03 The effect of the exclusionary rule was that evidence of a defendant's disposition was normally inadmissible and the prosecution was not permitted to adduce evidence of the bad character of the defendant, i.e. evidence of his bad reputation, disposition and previous misconduct. However, there were numerous exceptions to this rule. The common law, for instance, developed a rule known as the "similar fact" rule which permitted evidence of the disposition and previous misconduct of an accused to be given if sufficiently relevant to an issue in the case to outweigh its prejudicial effect. This antithesis received its most famous expression in *Makin v Attorney-General*[5] where the importance of relevance to the admission was emphasised. The evidence thus admitted was known as "similar fact" evidence. Likewise the Criminal Evidence Act 1898 s.1, permitted the accused to be cross-examined as to his character in certain prescribed circumstances. Both of these exceptions created a great deal of case law which became increasingly complex and convoluted.[6] However, in *Boardman*[7] the House of Lords held that it was the degree of relevance which made similar fact evidence admissible. The question in each case was whether the evidence was sufficiently relevant and had the necessary probative force to outweigh its prejudicial effect.[8]

7–04 The complications and seeming illogicality of the law led to calls for reform. There followed a number of reports concentrating on the admissibility of previous convictions. Those reports were: (1) the Law Commission Report on Evidence of Bad Character[9]; (2) Lord Justice Auld's Review of Criminal Courts in England and Wales[10]; (3) a Home Office White Paper, *Criminal Justice: The Way Ahead*[11]; and (4) the Government White Paper, *Justice for All*.

7–05 The CJA 2003 made changes to the law relating to bad character, see paras 7–28 et seq, below. The rules relating to good character remain unchanged by the 2003 Act and are discussed in paras 7–06 to 7–26, below. Establishing the defendant's propensity to commit crimes will go towards establishing his guilt; establishing his credibility will go towards establishing his innocence. However, "propensity", now under ss.98 and 103(1)(a)(b) of the Act has a wider meaning than before; it includes both the propensity to commit the crime charged and a propensity as to untruthfulness, i.e. credibility: see paras 7–48 to 7–57, below. In addition, the common law rules relating to the evidence as to reputation are also retained: CJA 2003, s.118(2), para.2. As to the relevance or probative value of

[5] *Makin v Attorney-General* [1894] A.C. 57 at 65, per Lord Herschell.
[6] For discussion of these exceptions, see the 4th edition of this work, Chs 6 and 7.
[7] *Boardman* [1975] A.C. 421.
[8] In *DPP v P* (1991) 93 Cr.App.R. 267 at 279 Lord Mackay LC said that the essential feature of similar fact evidence was that it was sufficiently probative to be justly admitted notwithstanding the prejudice to the accused.
[9] Law Commission Report (No.273) on Evidence of Bad Character in Criminal Proceedings (2001) Cm.5257.
[10] 2001, HMSO, paras 563–568.
[11] T50, Com.5074 (2001).

evidence as regards, inter alia, character evidence, see s.109, on the assumption of truth in such matters, para.7–71, below.

2. GOOD CHARACTER

7–06 The common law has for many years allowed the defendant to call evidence of his good character. Such a character may be established by:

(a) the defendant's own evidence; or
(b) witnesses called on his behalf; or
(c) cross-examination of prosecution witnesses such as, for instance, a police officer.

7–07 It is the duty of the defendant and his counsel to ensure that the judge is aware that he is relying on his good character. Given that a lack of previous convictions does not necessarily mean that the defendant is of good character, the judge, where there is doubt, should raise the matter with counsel.[12] But failure to raise the defence is not necessarily fatal to the fairness of a trial or the safety of a conviction.[13] It will depend on a close examination of the case against the defendant in a particular case as to whether or not a good character direction would have affected the outcome.

A. What evidence may be given?

7–08 When evidence of character is given it should be directed to that part of the man's character which is relevant.[14] Thus, if the charge is theft, the relevant part is his character for honesty; and if the charge is assault, his character for violence. If the defendant gives evidence of his own character, however, he is usually given a fairly wide latitude.

7–09 **Reputation** Evidence as to reputation is the oldest established rule of the exceptions to the rules restricting the admissibility of character evidence. Such evidence is confined to evidence of general reputation. Evidence of (a) opinion, or (b) particular acts or examples of conduct should, as a matter of law, be excluded. The rule was established in *Rowton*[15] where defence witnesses had testified that Rowton was a man of good character and the evidence to the contrary of a prosecution witness was rejected because it was the opinion of only one person not of general reputation. The decision has been criticised on two

[12] *Gilbert v The Queen* [2006] 1 W.L.R. 2108, PC.
[13] *Brown (Nigel) v The State of Trinidad and Tobago* [2012] 1 W.L.R. 1577.
[14] *Plato Films Ltd v Speidel* [1961] A.C. 1090 at 1140, per Lord Denning. And see CJA 2003 s.109, as to the assumption of relevance, para.7–71, below.
[15] *Rowton* (1865) Le. & Ca. 520.

grounds: (a) a general reputation may well be inaccurate[16]; (b) evidence of general reputation may lack cogency compared with the opinion of a witness who knows the defendant well.[17]

7–10 However, in practice, the rule is persistently ignored.[18] Evidence is often given by a witness who says that he knows the defendant well and holds a high opinion of him. An employer, for example, may give evidence that he has employed the defendant for a number of years and during that time no money has gone missing while the defendant had charge of the cash. Such evidence will usually be given without objection. It is, however, admitted as an indulgence to the defendant for it is technically inadmissible.

A more recent instance is *Redgrave*[19] where the defendant sought to produce evidence (letters, photographs etc) of his heterosexual relationships to rebut a charge of importuning men for immoral purposes. The defence wished to produce letters, cards and photographs in order to establish his heterosexuality. It was held that this was evidence of particular facts, i.e. conduct, not of reputation, and so inadmissible. As regarded his character all he could do was call witnesses to testify about his general reputation as a heterosexual, although he would have been able to testify as to his heterosexual relationship with his wife or girlfriend.

The law, therefore, remains as decided in *Rowton*, tempered in practice by an indulgence to defendants. There would appear to be five reasons for limiting evidence as to reputation, namely that such evidence: (a) is easy to fabricate; (b) is often irrelevant[20]; (c) may lead to the investigation of side issues of little relevance to the case; (d) amounts frequently to evidence of opinion which is generally excluded; and (e) may create a risk that the function of the jury will be usurped.[21] On the other hand, the interests of justice have often required a more liberal attitude.

B. Evidence in rebuttal

7–11 At common law where the defendant put his character in issue by giving or calling evidence of his good character or cross-examining witnesses to that effect, the prosecution were entitled to call evidence of his bad character in rebuttal.[22] If

[16] Sir James Fitzjames Stephen, *Digest of Law of Evidence*(12th edn, 1948), p.201.
[17] "To my mind personal experience gives cogency to the evidence; whereas such a statement as, 'I have heard some persons speak well of him', or, 'I have heard general report in favour of the prisoner' has a very slight effect in comparison", *Rowton* (1865) Le. & Ca. 520 at 534, per Erle CJ, dissenting.
[18] As noted by the Criminal Law Revision Committee in 1972 in their 11th Report: Cmnd. 4991, para.134.
[19] *Redgrave* (1982) 74 Cr.App.R. 10; see also *Butterwasser* [1948] 1 K.B. 4, 6, per Lord Goddard CJ.
[20] For example, the fact that a man is capable of acts of personal generosity is usually irrelevant when he is charged with armed robbery.
[21] That is, by a witness who, in saying that the accused is not of such a character as to commit the offence charged, says in effect that he is not guilty: the opinion of the witness may then become a substitute for the verdict of the jury.
[22] *Rowton* [1865] Le. & Ca. 520, cited at para.7–09 above.

he called witnesses as to his good character, they might be cross-examined as to his bad character.[23] These rules are retained by the CJA 2003 ss.101(1)(f) and 105(1), see paras 7–61 et seq., below.[24]

It should also be noted that the prosecution may rely on attested copies of a conviction by a foreign court in order to rebut a claim of good character by an accused.[25]

C. Directions to the jury

Evidence of good character is relevant to two issues in a criminal trial, namely: (a) whether it is likely that a person with such a character committed the offence charged, i.e. propensity; and (b) whether the defendant's evidence should be believed, i.e. his credibility. 7–12

Development of the law The relevance of good character to the first of these issues was recognised at a time before the defendant was permitted to give evidence on the grounds that good character was capable of being evidence for the jury to consider since the accused, in effect, invited the jury to infer that by reason of his good character he was unlikely to have committed the offence charged.[26] Later, when the accused was permitted to give evidence, the courts emphasised the relevance to the second issue relating primarily to the credibility of the defendant.[27] Judges normally directed juries in these terms, i.e. that when considering whether the defendant had told the truth the scales should be weighted in his favour. In *Berrada*[28] the Court of Appeal confirmed that, as issues of credibility had been at the heart of the trial and no proper "conventional" direction had been given, that this was so and said that the judge should give a clear direction (described by the judge as "conventional") as to the relevance of the defendant's good character: failure to do so amounted to a major defect in the summing-up. Directions as to credibility became known as "first limb directions", those as to propensity as "second limb directions" 7–13

The present-day position In *Vye; Wise; Stephenson*,[29] three separate appeals dealt with together, the Court of Appeal, following *Berrada*[30] and setting out clear guidelines, said that where a defendant of good character had given evidence it is no longer sufficient for the judge to comment in general terms; he is required to make a "first limb" direction regarding the relevance the defendant's good character as to his credibility. This applied even where the defendant had lied to the police.[31] The Court also said that the judge is entitled, but not obliged, 7–14

[23] *Waldeman* (1934) 24 Cr.App.R. 204.
[24] But the old rule that, where the defendant attacked prosecution witnesses but did not himself give evidence the prosecution could not adduce evidence of his bad character has been abolished: *Waldeman* (1934) 24 Cr.App.R. 204.
[25] *Kordasinski* [2007] 1 Cr.App.R. 238(17); [2007] Crim.L.R. 794, and *M(E)* [2014] 2 Cr.App.R. 484(29).
[26] *Stannard* (1837) 7 C.& P. 673.
[27] *Bellis* (1966) 50 Cr.App.R 88; *Falconer-Attlee* (1974) 58 Cr.App.R. 348 at 358.
[28] *Berrada* (1990) 91 Cr.App.R. 131 (Note).
[29] *Vye; Wise; Stephenson* [1993] 37 Cr.App.R. 131.
[30] *Berrada* (1990) 91 Cr.App.R. 131.
[31] *Kabariti* (1991) 92 Cr.App.R. 362.

to make a "second limb" direction as to propensity. In *Vye*, V was a man aged 50 of previous good character who was convicted of rape. The judge had omitted to give a good character direction in the summing up, had then recalled the jury to do so but had given only a vague and insufficient direction. W was charged with handling stolen goods and with deception. The judge in his summing up had referred to W's good character but had not related it specifically to his propensity on the grounds that that was "optional". S, who was of bad character, had been convicted of conspiracy to supply drugs. One co-defendant, H, of good character was acquitted; another pleaded guilty. Neither S nor H gave evidence. The judge referred only to H's good character and omitted any reference to S's character. S's appeal was on the ground that this highlighted S's character. The Court, allowing the appeals of V and W but not that of S, stated that:

> "the following principles should be applied: (1) A direction as to the relevance of his good character to a defendant's credibility is to be given where he has testified or has made pre-trial answers or statements. (2) A direction as the relevance of his good character to the likelihood of his having committed the offence charged is to be given, whether or not he has testified, or made pre-trial answers or statements. (3) Where defendant A of good character is jointly tried with defendant B of bad character,[32] (1) and (2) still apply . . . it is for the trial judge to decide how he tailors his direction to the particular circumstances."[33]

The court gave as extreme examples, on the one hand, the long-serving and exemplary employee charged with stealing from the till, and on the other, the defendant who, charged with murder, admits to a previous manslaughter although in that case intent might be relevant.

> "Provided the judge indicates to the jury the two respects in which good character may be relevant, ie credibility and propensity, this court will be slow to criticise any qualifying remarks he may make based on the facts of the individual case."[34]

As regards the "second limb" propensity direction, the Court said that "it must be for the judge in each case to decide in each case how he 'tailors' his direction to the particular circumstances".[35]

7–15 In *Aziz, Tosun and Yorganci*,[36] the House of Lords approved the decision in *Vye*[37] and supplied guidance as to other issues. All three defendants had been convicted of tax evasion involving fake invoices. A did not give evidence but made "mixed statements", inculpatory and exculpatory (blaming another person) to the Customs and Excise officers. T and Y did give evidence, denying dishonesty regarding the invoices but admitting other dishonest actions. None of the three had previous convictions. In his summing-up the judge gave a propensity direction as to A, and credibility directions as to T and Y. The Court of Appeal quashed the convictions on the grounds that good character directions as

[32] As to directions regarding defendants of bad character, see para.7–20, below.
[33] *Vye* [1993] 37 Cr.App.R. 131 at 141.
[34] *Vye* [1993] 37 Cr.App.R. 131 at 139.
[35] *Vye* [1993] 37 Cr.App.R. 131 at 139. But see also *McCarthy* [2015] R.T.R. 92(10) in which it was said that direction could have been couched in different terms, albeit that it did not affect the safety of the conviction.
[36] *Aziz, Tosun and Yorganci* [1996] A.C. 41; [1995] 2 Cr.App.R. 478; [1995] Crim.L.R. 897.
[37] *Vye* [1993] 37 Cr.App.R. 131.

to credibility and propensity should have been given regarding all three defendants and the House of Lords, dismissing an appeal by the Crown from the Court of Appeal, confirming that both directions should have been given. As regards A, the House said, per curiam, that where a "mixed statement" is concerned, both inculpatory and exculpatory elements are admissible as evidence of their truth, and a judge may comment adversely on the exculpatory elements not tested by cross-examination.[38]

What is good character? This question, which was not relevant in *Vye*, was discussed in *Azizin* the context of other criminal misconduct. There is a wide spectrum of cases to be kept in mind. Prima facie a good character direction must be given but there is discretion to qualify it if the circumstances require. **7–16**

Lord Steyn described the discretion as limited: "Prima facie the directions must be given". However, he also said[39]:

> "A good starting point is that a judge should never be compelled to give meaningless or absurd directions. And cases occur from time to time where a defendant, who has no previous convictions, is shown *beyond doubt* to have been guilty of *serious criminal behaviour similar to the offence charged*. A sensible criminal justice system should not compel a judge to go through the charade of giving good character directions in a case where the defendant's claim to good behaviour is spurious. [A] trial judge has a *residual*[40] discretion to decline to give any character directions in the case of the defendant without previous convictions . . . [T]he judge will often be able to place a fair and balanced picture before the jury by giving [good character] directions and then adding words of qualification concerning other *proved or possible*criminal conduct of the defendant which emerged during the course of the trial. On the other hand, if it would make no sense to give [good] character directions, the judge may in his discretion dispense with them."

Lord Steyn went on to say that it was not desirable to generalise about this essentially practical subject which should be left to the good sense of trial judges. But he did suggest that if a trial judge proposed to give a direction which was not likely to be anticipated by counsel, he should initiate submissions on his directions.

Post-*Aziz* there have been a number of cases relating to directions as to good character. In *Butler (Diana)*[41] the defendant was convicted of murdering her cohabitee. The judge allowed evidence as to acts of violence by her against the victim some years previously and in directions to the jury said that the defendant's character was "seriously tarnished". The Court of Appeal said that the evidence as to the earlier violence should not have been admitted and consequently the character direction should not have been qualified. In *Martin (David)*[42] it was held that where the defendant had been previously cautioned for another offence but the jury had not been informed of this and the judge had correctly given the credibility direction, a propensity direction would have been **7–17**

[38] *Aziz* [1995] 2 Cr.App.R. 478 at 484–486, confirming *Sharp* (1988) 86 Cr.App.R. 274.
[39] *Aziz* [1995] 2 Cr.App.R. 478 at 488–489. Italics and words in square brackets supplied.
[40] Lord Steyn referred to two earlier cases where the Court of Appeal had ruled that there was such a residual discretion: *H* [1994] Crim.L.R. 205 and *Zoppola-Barraza* [1994] Crim.L.R. 833.
[41] *Butler (Diana)* [1994] Crim L.R 834.
[42] *Martin (David)* [2002] 2 Cr.App.R. 42.

absurd and misleading.[43] In *Gray (John)*[44] it was held that the defendant's previous conviction for drink driving offences was not relevant to a charge of murder and the judge should have given a *Vye* direction as to his credibility and a modified *Vye* direction as to his propensity. Certainly under the CJA 2003, a modified good character direction may be required even if the defendant is not wholly of good character.[45]

All of those decisions should now be considered against the recent ruling in *Hunter (Nigel)*; *Saruwu (Joseph)*; *Johnstone (Ian)*; *Walker (Alan)*; *Lonsdale (Paul)*,[46] in which it was held that the binding principles are those to be derived from *Vye* and *Aziz*, and that, in future, there should be no need to rely on anything other than those two decisions and this judgment.[47] The court set out the principles that it derived from *Vye*and *Aziz* and to which it considered itself bound:

(a) the general rule is that a direction as to the relevance of good character to a defendant's credibility is to be given where a defendant has a good character and has testified or made pre-trial statements;
(b) the general rule is that a direction as to the relevance of a good character to the likelihood of a defendant's having committed the offence charged is to be given where a defendant has a good character whether or not he has testified or made pre-trial answers or statements;
(c) where defendant A, of good character, is tried jointly with B who does not have a good character, (a) and (b) still apply;
(d) there are exceptions to the general rule for example where a defendant has no previous convictions but has admitted other reprehensible conduct and the judge considers it would be an insult to common sense to give directions in accordance with Vye. The judge then has a residual discretion to decline to give a good character direction;
(e) a jury must not be misled; and
(f) a judge is not obliged to give absurd or meaningless directions;

The court then emphasised that *Vye*and *Aziz* did *not* decide first, that a defendant with no previous convictions is always entitled to a full good character direction whatever his character, secondly, that a defendant with previous convictions is entitled to good character directions, thirdly, that a defendant with previous convictions is entitled to the propensity limb of the good character directions on the basis he has no convictions similar or relevant to those charged, fourthly, that a defendant with previous convictions is entitled to a good character direction where the prosecution do not seek to rely upon the previous convictions as probative of guilt, and fifthly that the failure to give a good character direction will almost invariably lead to a quashing of the conviction.

The court then made the following additional points:

[43] The Court referred to the article, "The Legal Effect of a Police Caution", May [1997] Crim.L.R. 491.
[44] *Gray (John)* [2004] 2 Cr.App.R. 4989(30).
[45] *G* [2013] Crim.L.R. 152.
[46] *Hunter (Nigel)*; *Saruwu (Joseph)*; *Johnstone (Ian)*; *Walker (Alan)*; *Lonsdale (Paul)* [2015] 2 Cr.App.R. 9.
[47] See the "postscript" (at [103]).

(i) a defendant of "absolute good character" (i.e. no previous convictions or cautions and no other represensible conduct alleged, admitted or proven) is entitled to both limbs of the good character direction and does not have to adduce evidence of positive good character;
(ii) where a defendant who is of "effective good character" (i.e. old, minor or irrelevant previous convictions or cautions), the judge must make a judgment as to whether or not to treat the defendant as a person of effective good character; a judge was not obliged to treat him as such and should be vigilant to ensure that only those defendants who merit an "effective good character" are afforded one; this should not be left to the jury; if the judge does decide to give a good character direction, both limbs must be given albeit with modifications as necessary so as to not mislead the jury;
(iii) where defendants adduce previous convictions or cuations which are not in the same category as the offence alleged, the judge has a broad discretion as to whether or not to give any part of the good character direction, and if so on what terms; the judge will decide what fairness dictates;
(iv) where a defendant has no previous convictions or cautions, but evidence is admitted and relied upon by the Crown of other misconduct, the judge is obliged to give a bad character direction; however, the judge has a broad discretion whether to weave into his remarks a modified good character direction;
(v) where a defendant has no previous convictions or cautions, but admits reprehensible conduct that is not relied upon by the Crown as probative of guilt, the decision as to what directions to give should be left to the good sense of the trial judge.

The decision has, therefore, provided comprehensive guidance as to how courts should approach good character directions.

Obligation to give directions on good character In *Aziz*Lord Steyn held that **7–18**

> "in modern practice a judge almost invariably reminds the jury of the principal points of a prosecution case. At the same time he must put the defence case in a fair and balanced way. Fairness requires that the judge should direct the jury about good character because it is evidence of probative significance."[48]

There is no need for the direction on either limb to be given in a particular form of words, although "you must take into account" is a better expression than "you are entitled to".[49] However, it should be given in the form of an affirmative statement, rather than rhetorical questions.[50] It was emphasised in *Berrada* that such directions must be given with clarity, impartiality and without exaggeration or sarcasm.[51]

The need for fairness and balance must be taken into account. In *Hickmet*[52] the **7–19** defendant was charged with rape and with supplying a Class A drug. The judge

[48] *Aziz* [1995] 2 Cr.App.R. 478 at 486.
[49] *Miah and Akbar* [1997] 2 Cr.App.R. 12 at 22.
[50] *Lloyd* [2000] 2 Cr.App.R. 355.
[51] *Berrada* (1990) 91 Cr.App.R. 131.
[52] *Hickmet* [1996] Crim.L.R. 588.

referred to Hickmet's previous spent convictions, but also to the fact that the complainant and another witness had consumed drugs: he was endeavouring to treat the complainant and the defendant on a basis of complete equality. The Court of Appeal commented that had he given the standard direction that H's lack of previous relevant convictions made it less likely that he would have committed a rape, "the intelligent jury asking themselves the question 'Why?' might find that question difficult to answer, and consequently a dangerous question to ask on the facts of the case".

These cases must now be considered in the light of the decision in *Hunter*, para.7–18, above.

7–20 **Directions where defendant of good character charged with other defendant of bad character** In *Vye*[53] the Court of Appeal held that in such circumstances the defendant of good character is entitled to a direction as to the relevance of good character. In that case, what should the judge say about the defendant of bad character? Lord Taylor CJ said that any comment about the defendant of bad character will depend upon the circumstances of the individual case: for instance, how great an issue has been made of character during the evidence and speeches.

> "In some cases the judge may think it best to . . . tell the jury they must try the case on the evidence, where there has been no evidence about [that defendant's] character, they must not speculate and must not take the absence of information as to [the defendant's] character as any evidence against [him]. In other cases the judge may . . . think it best to say nothing about the absence of evidence as to [that defendant's] character."[54]

The latter may not infrequently be the better course. Any other direction, no matter how carefully worded, may have the effect of encouraging speculation.

On the other hand, if there is evidence that the defendant *has* previous convictions, a direction will be necessary. In these circumstances the judge must direct the jury as to the limited relevance of previous convictions, i.e. they are relevant to the defendant's credibility, but irrelevant to his guilt.[55]

If an issue arises whether defendants in these circumstances should have separate trials, it is a matter for the judge to decide on a case-by-case basis according to the usual principles, i.e. by weighing the prejudice to the accused against the interest of the Crown in having persons charged with the same offence tried together.[56] Lord Taylor said that that there is no rule in favour of separate trials in the circumstances and that, generally, those jointly indicted should be jointly tried.[57]

These points must now be considered in the light of the decision in *Hunter*, para.7–18, above.

[53] *Vye* (1993) 97 Cr.App.R. 134.
[54] *Vye* (1993) 97 Cr.App.R. 134 at 140.
[55] *Cain* (1994) 99 Cr.App.R. 208.
[56] *Vye* (1993) 97 Cr.App.R. 134.
[57] *Vye* (1993) 97 Cr.App.R. 134 at 141.

Witnesses It is impermissible to call witnesses to bolster the credibility of a prosecution witness[58] but the standard practice of asking his occupation is normally unobjectionable but the jury should be directed not to accept the evidence merely because of the witness's occupation.[59] 7–21

D. Spent convictions

(1) *The practice*

The effect of s.4(1) of the Rehabilitation of Offenders Act 1974 is that once a conviction is spent the rehabilitated person shall be treated in law as a person who has not been convicted or charged with the offence. A conviction becomes spent after a period specified in the Act. Some convictions are excluded from the Act altogether, i.e. those resulting in sentences of life imprisonment or custody for life or sentences of more than 30 months' imprisonment or detention.[60] The rehabilitation period is 10 years for a conviction resulting in a sentence of more than six but not exceeding 30 months' imprisonment or detention; seven years when the sentence is six months' or less imprisonment or detention; five years for a fine, probation, or community service, one year in the case of a conditional discharge,[61] six months for an absolute discharge. 7–22

Section 4(1) does not apply to evidence given in criminal proceedings; but in 1975 the Lord Chief Justice made a Practice Direction, now consolidated in the Criminal Practice Direction (Evidence), 35A, which provides that: "'. . .No one should refer in open court to a spent conviction without the authority of the judge, which authority should not be given unless the interests of justice so require".'[62] The Practice Direction provides that the most common way for spent convictions to be referred to is obviously when a bad character application is made under the CJA 2003. Although the Practice Direction is for the guidance of Crown Courts, magistrates will no doubt follow it. 7–23

In *Smallman*,[63] prosecuting counsel, without leave, revealed the spent conviction of a defence witness when cross-examining him. The judge directed the jury to leave out of account the prejudice resulting from the disclosure. The defendant appealed on the ground that the prejudicial effect of the disclosure had made a fair trial impossible. The Court of Appeal held that although there had been a breach of the Practice Direction, that could not be a ground for upsetting a conviction which was otherwise perfectly proper. 7–24

In *Lawrence (Irvin)*[64] the Court of Appeal said that the effect of the Practice Direction was to give the judge a wide discretion as to when, and in what manner, it is appropriate for reference to be made to spent convictions: any discretion had to be exercised with the intent and spirit of the Act in mind, and it was undesirable to go further than was necessary for the justice of the case. In *Lawrence* the defendant was charged with unlawfully wounding W. The trial 7–25

[58] *Hamilton* (1998) 162 J.P.N. 534; *Beard* [1998] Crim.L.R. 585.
[59] *S(D)* [1999] Crim.L.R. 911.
[60] In a young offender institution.
[61] Or the period of the order or discharge, whichever is longer.
[62] Criminal Practice Direction (Evidence), 35A [2013] 1 W.L.R. 3164.
[63] *Smallman* [1982] Crim.L.R. 175.
[64] *Lawrence (Irvin)* [1995] Crim.L.R. 815.

judge refused to allow the defence to question W about 20 spent convictions (mainly for dishonesty) and only allowed questions on four more recent convictions (also for dishonesty). The Court of Appeal said that the judge had not erred in principle and was right not to have allowed the defence to cross-examine W about matters going back to 1966: on the other hand he had ensured that the defence were given sufficient opportunity to elicit information about W so that the jury could decide how much of his evidence to believe. The Court said that the judge should not give the same latitude to counsel as would be afforded if the convictions were live.

On the other hand, a refusal to allow disclosure of spent convictions may also lead to unfairness. In *Evans*[65] credibility was at the heart of the issue in the trial. However, the judge refused to allow defence counsel to cross-examine a witness about her spent convictions. The Court of Appeal held that the judge's refusal amounted to a material irregularity because it was relevant for the jury to know that the witness had been dishonest in the past.

In any case a defendant has the right to cross-examine a co-defendant as to his or her spent convictions where the co-defendant has given evidence against him: this right was not taken away by the Practice Direction of 1975.[66]

(2) Spent convictions and good character

7–26 The Rehabilitation of Offenders Act 1974 does not confer on a rehabilitated person the right to be called a man of good character. If the defence wants to put such a person forward as being of good character, it must first apply to the judge. It is then a matter of the judge's discretion to decide whether such a course is to be followed or not.[67] The judge should be asked for his ruling at the outset of the trial.[68]

No rules can be laid down as to the exercise of the discretion. If the defendant is adult and has been convicted long ago of a trivial offence, no doubt the judge will allow the defendant to be treated as a man of good character. But if, on the other hand, the defendant has been convicted of some more serious offence and the conviction has only recently been spent the judge is not likely to take such a lenient view. It will depend on the circumstances of the case. Thus, in *Nye*[69] the defendant's two previous convictions for criminal damage, although spent, were still held to be sufficiently relevant to his character for the judge to be justified in not exercising his discretion not to refer to his character. However, the discretion should be exercised as favourably as possible to the accused person.[70] In *Hanson; Gilmore; Pickering*,[71] where the defendant P had previously been convicted of an indecent assault on a child, that conviction, although spent, was still relevant regarding a similar offence.

[65] *Evans* (1992) 156 J.P. 539.
[66] *Corelli* [2001] Crim.L.R. 913.
[67] *Nye* (1982) 75 Cr.App.R. 247; *Bailey* [1989] Crim.L.R. 723.
[68] *Nye* (1982) 75 Cr.App.R. 247.
[69] *Nye* (1982) 75 Cr.App.R. 247. See also *Bailey* [1989] Crim L.R. 723.
[70] *Nye* (1982) 75 Cr.App.R. 247 at 250–251.
[71] *Hanson; Gilmore; Pickering* [2005] 2 Cr.App.R. 299(2); [2005] Crim.L.R. 787.

7–27 While the jury must not be told that the defendant has no convictions (when he has), for that would be to mislead them,[72] a formula sometimes used is to say that the defendant is "a man of good character with no relevant convictions". On the other hand, where a defendant's spent convictions are so immaterial that the court decides that he should be treated as a man of good character, a full good character direction should be given[73]: paras 7–13 et seq., above.

3. BAD CHARACTER—GENERAL

7–28 The law relating to the admissibility of the bad character of defendants and witnesses is now contained in Pt 11 of the CJA 2003.[74]

A. Abolition of the previous law

7–29 By s.99(1) of the CJA 2003, the common law rules governing the admissibility of bad character are abolished.[75] But this is subject to s.118(1) in so far as it preserves the rule under which in criminal proceedings[76] a person's reputation is admissible for the purpose of proving his bad character.[77] In *Somanathan*[78] the Court of Appeal refused to follow the obiter dictum of the House of Lords in the civil case of *O'Brien v Chief Constable of South Wales* that the Act had not significantly altered the admissibility of similar fact evidence; the Court said that "[t]he 2003 Act completely reverses the pre-existing rule" and said, furthermore, "the pre-existing one stage test which balanced probative value against prejudicial effect is obsolete". In *Chopra*,[79] where virtually all the argument had, it appeared, proceeded on the basis of the law before the Act, the Court of Appeal said that such an approach carried with it inherent dangers. The Act had effected a "sea-change" in the law's starting point and the right way to deal with the new law was not to ask what would have been the starting point under the old, although many of the familiar considerations of relevance and fairness which had confronted courts in cases where there were multiple allegations would continue to similarly confront courts and that some of the answers might be the same. In *Renda*,[80] the Court of Appeal said that, the Act having been in force for nearly a year and its principles having been considered by the Court on a number of occasions, the creation and subsequent citation from a vast body of so-called

[72] *O'Shea, The Times*, 8 June 1993.
[73] *Heath, The Times*, 10 February 1994.
[74] For a description of the law previous to the coming into force of this Part of the Act in December 2004, the relevant provisions of the Act, and a degree of criticism, see Murphy, "Character Evidence: The Search for Logic and Policy Continues" (1998) 2(2) E.&P. 71–108 and Tapper, "Evidence of Bad Character" [2004] Crim.L.R 533.
[75] For instance, the former common law immunity for a defendant who alleges consent in a rape case no longer exists: see the 4th edition of this work for the former rule.
[76] Criminal proceedings are those "to which the strict rules of evidence apply": CJA 2003 s.112(1).
[77] See Chapter 8 at paras 8–61, 8–68.
[78] *Weir; Somanathan; Yaxley-Lennon; Manister; He and He* [2006] 1 Cr App R 303(19).
[79] *Chopra* [2007] 1 Cr.App.R. 225(16). That case involved "two or more offences in the same proceedings", CJA 2003 s.103(4)), see further para.7–49 below.
[80] *Renda; Ball; Akram; Osbourne; Razaq (Ajaz) and Razaq (Abdul)* [2006] 1 Cr.App.R. 380(24), [2006] Crim.L.R. 534.

"authority", in reality representing no more than observations on a fact-specific decisions of the judge in the Crown Court, is unnecessary and may be counter-productive. In cases where the judge had ruled as to the specific factual context of the individual case, or in the exercise of his judicial discretion, the Court would be reluctant to intervene. Subsequently, however, as will be seen from the rest of this chapter, this has not proved to be so.

B. Bad character defined

7–30 Section 98 of the CJA 2003 provides that:

> "References in this Chapter to evidence of a person's 'bad character' are to *evidence of, or of a disposition towards, misconduct* on his 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*."

7–31 **Note that the section applies to defendants and non-defendants alike** The separate provisions applying to defendants (ss.101 to 108) and to non-defendants (s.100) are dealt with at paras 7–41 to 7–65 and paras 7–66 to 7–71 respectively, below. The words in italics in section 98 are supplied and are discussed in the following paragraphs.

7–32 **Statutory definitions** Certain definitions are set out in s.112(1): (i) "misconduct" means "the commission of an offence or other reprehensible behaviour"; (ii) "defendant", in relation to criminal proceedings, means a person charged with an offence in those proceedings; (iii) "criminal proceedings" means "criminal proceedings to which the strict rules of evidence apply"; (iv) "prosecution evidence" means evidence which is to be (or has been) adduced by the prosecution is to be invited to give (or has given) in cross-examination by the prosecution.

7–33 **Where the Act does not apply** Section 112(3) provides that nothing in the Act affects the exclusion of evidence: (a) against a party impeaching the credit of his own witness by general evidence of bad character (Criminal Procedure Act 1865 s.3) or (b) the restriction on evidence or questions about the complainant's sexual history (Youth Justice and Criminal Evidence Act 1999, paras 7–74 et seq., below) or (c) on grounds other than the fact that it is evidence of a person's bad character.

Certain phrases in s.98 have been considered by the courts.

Misconduct[81]

7–34 *1. Previous convictions as evidence of a disposition towards misconduct.* This is the first issue for the court to determine. Evidence that a person has committed an offence other than the offence for which he has been charged may take a number of forms. The first and most common way is by proof of a previous

[81] See also "propensity" below; CJA 2003 ss.101, 103; paras 7–48 et seq., below.

conviction. If the person has a conviction for an offence it plainly shows that he committed that offence and is evidence of bad character under the Act. In practice, the vast majority of instances of bad character have been proved in the past in this way and will no doubt continue to be so. Previous convictions should be proved by certificates of conviction: Police and Criminal Evidence Act 1984 ss.73, 74, not by computerised police records[82] or from details from the Police National Computer.[83] However, convictions adduced as evidence of bad character must be capable of admission via the various gateways in the Act (defendants: s.101, below, paras 7–41 et seq.) or as required by s.100 (non-defendants, below, paras 7–66 et seq.)

In *Hanson; Gilmore; Pickering*[84] the Court of Appeal set out its conclusions (not to be taken as a treatise) as to the approach where the prosecution wished to introduce evidence of bad character in the form of a previous conviction. It must state whether it wished to rely simply upon the fact of the conviction or also upon the circumstances of it. It must do so in the appropriate application forms prescribed by the Criminal Procedure Rules 2013.[85] In *Bovell; Dowds*[86] the Court of Appeal said that all parties must have the appropriate information in relation to convictions and other evidence of bad character in good time, whether in relation to the defendant or some other person. Where the circumstances of the offence are sufficiently apparent from the description of the conviction that will suffice, but where the prosecution needs and proposes to rely upon the circumstances of the previous convictions then those circumstances and the manner of proof must be set out in the application. There is a similar requirement as regards the defence which is obliged by the Criminal Procedure Rules 2014[87] to actively assist the court in its case management.

7–35 *Foreign convictions.* In *Kordasinski*[88] the Court of Appeal held that a foreign conviction was admissible as a prior conviction so long as it was otherwise admissible through one of the gateways and it was properly proved under s.7 of the Evidence Act 1851. In *M(E)*[89] the Court held that a certificate of conviction in a Member State of the European Union was admissible unless either the proof of the conviction constituted a merely rebuttable presumption that the offence was committed by the defendant,[90] or that there was evidence that the conviction was the result of a trial that failed to reach the appropriate standard of fairness when it would be open to the court to decline to admit the evidence.[91] It had been

[82] *Humphries* (2005) 169 J.P. 441.
[83] *Ainscough* [2006] Crim.L.R. 635.
[84] *Hanson; Gilmore; Pickering* [2005] 2 Cr.App.R. 299(2), [2005] Crim.L.R. 787.
[85] SI 2013/1554.
[86] *Bovell; Dowds* [2005] Crim.L.R. 790, see the commentary for criticism of the vagueness and ambiguity of the statutory provisions necessitating detailed exposition of the general principles.
[87] Criminal Procedure Rules 2014 r.3.3.
[88] *Kordasinski* [2007] 1 Cr.App.R. 238(17); [2007] Crim.L.R. 794.
[89] *M(E)* [2014] 2 Cr.App.R. 484(29).
[90] Police and Criminal Evidence Act ss.73(1), 74(2).
[91] Under either s.101(3) of the CJA 2003 or s.78 of PACE. On the problems that can arise regarding the standard of fairness of foreign proceedings, see *Brooks* [2014] EWCA Crim 562.

misconceived to argue that the appellants' convictions in Bulgaria could not be proved by a certificate produced pursuant to s.73 of the Police and Criminal Evidence Act 1984.[92]

7–36 *Children.* It should be noted that the previous convictions of a person for offences committed while a child under 14 are admissible under s.108(1) of the CJA 2003.[93] This is the rule except in the case of an offence committed by a defendant, aged 21 or over, when evidence of conviction for an offence when under the age of 14 is not admissible unless both offences are triable on indictment and the court is satisfied that it is in the interests of justice to require the evidence to be admitted: s.108(2). Thus, in the case of an offence committed by an accused under 21 the evidence of a previous conviction will normally be admissible provided that it is also otherwise admissible. However, limitations apply in proceedings for an offence committed by a defendant aged over 21. For the evidence to be admissible, both offences, the one being tried and the earlier conviction, must be offences triable only on indictment: s.108(2)(a); and the court must be satisfied that the interests of justice require the evidence to be admissible: s.108(2)(b). There is thus a discretion for the court to restrict the giving of such evidence when it is unnecessary and unduly prejudicial. This should prevent the giving of evidence such as that for convictions which have little to do with the case, but which would simply lower the defendant in the eyes of the jury. This should allow relevant convictions to be given but, as noted by the Court of Appeal *Clark*,[94] judges must be "sensitive to an attempt to rely on previous convictions for offences which occurred when the offender was a child and in particular when the offender was a young child", but that there could not be a "near miss" approach allowing s.108 to be invoked by a defendant who was 20 at the time of the alleged offences.[95]

7–37 *2. Other reprehensible behaviour as misconduct.* The Law Commission had recommended that "bad character" should not be defined solely in terms of committing an offence. Evidence of conduct can also be demonstrative of a person's bad character, even if that conduct is not a crime. "Reprehensible" is defined as "deserving of reprehension, censure or rebuke".[96] This is much wider than the previous law by which, under the Criminal Evidence Act 1898, evidence of bad character had almost invariably been limited to evidence of previous convictions. The previous edition of this work echoed the concern of House of Lords and House of Commons Joint Committee on Human Rights about the breadth of the provision.[97]

[92] As amended by the Coroners and Justice Act 2009.

[93] Repealing s.16(2) of the Children and Young Persons Act 1963 which prohibited the asking of questions of a person aged over 21 relating to any offence while he was under 14.

[94] *Clark* 178 JP 534, CA. In *Clark*the Court of Appeal stated that the rationale behind s.108(2) was "not entirely clear".

[95] *Clark* 178 JP 534 at [20].

[96] *Shorter Oxford English Dictionary*, 1993.

[97] House of Lords and House of Commons Joint Committee on Human Rights, 11th Report of Session 2012-03, HL Paper 118, HC 724, paras 10 and 11. And see the trenchant criticism of the phrase in Munday, "What Constitutes 'other reprehensible behaviour' under the Bad Character Provisions of the Criminal Justice Act 2003?" [2005] Crim.L.R. 24.

Such a disposition may be evidenced even where there has been no charge or conviction. It includes cases where a person has been acquitted (thus retaining the rule in *Z*[98]), provided that the evidence is otherwise admissible. Thus evidence that the accused had been implicated in a series of rapes would not necessarily be inadmissible in a subsequent rape charge so long as the earlier rapes were relevant to the subsequent charge as in *Smith (David)*,[99] where in previous proceedings allegations of rape had been dropped on grounds of abuse of process, those allegations were held to be admissible as evidence of misconduct. Similarly, where witnesses to violent incidents involving the defendant had refused to make statements to the police so that there were no prosecutions, evidence as to those incidents was admissible in a later trial for a similar incident.[100] Even where there was no police investigation of an incident, evidence of that incident was admissible as regards a later incident.[101] Such behaviour could fairly be described as "reprehensible" but not so, for instance, where a witness had taken an overdose[102] or failed to take medication.[103]

In *Manister*[104] where the defendant was charged with several sexual offences involving a girl of 13, a sexual relationship between him (aged 34) and a girl of 16 was not "reprehensible behaviour" and therefore was not evidence of a disposition towards the commission of the offence but could be admitted at common law. In *Mullings*[105] the Court of Appeal held that letters from members of a criminal gang to the defendant who was in custody and retained by him could constitute evidence of his disposition: it was not uncommon for the conduct of a defendant on a date well after the commission of the particular offence to be admitted as relevant to disposition or propensity but it would have required a careful direction to the jury.

Bad character The description of bad character in the section is widely drawn and refers to evidence of, or to a disposition towards, misconduct by either a defendant[106] or a non-defendant, although in the latter case it is necessary to satisfy the requirements of s.100.[107] However, it is then necessary for the evidence to pass through one of the "gateways" enumerated in s.101(1). Where there are two or more counts, evidence on one count may be admissible as bad character evidence on another (cross-admissibility).[108] Not all "reprehensible behaviour" is sufficient to establish "bad character": thus, where a paranoid schizophrenic, charged with killing his close friend, who, when he did not take 7–38

[98] *Z* [2002] 2 A.C. 483; [2002] 2 Cr.App.R. 281, cited at para.5–15, above.

[99] *Smith (David), sub nom Edwards and Rowlands; Mclean; Smith (David); Enright and Gray* [2006] 2 Cr.App.R. 62(4).

[100] *Weir; Somanathan; Yaxley-Lennon; Manister; He and He* [2006] 1 Cr.App.R. 303(19).

[101] *Nguyen* [2008] 2 Cr.App.R. 99(4), [2008] Crim.L.R. 547.

[102] *Hall-Chung* (2007) 151 S.J. 1020.

[103] *Osbourne* [2007] Crim.L.R. 710 where the accused had failed to take medication for his schizophrenia and had unexpectedly killed his friend. The Court considered *Dolan* [2003] Crim.L.R. where the defendant had previously lost his temper and damaged objects but had never shown violence towards a human being until he shook his baby to death.

[104] *Weir; Somanathan; Yaxley-Lennon; Manister; He and He* [2006] 1 Cr.App.R. 303(19).

[105] *Mullings* [2011] 2 Cr.App.R. 303(19).

[106] *Smith (David)* in *Edwards and Rowlands; McLean; Smith (David); Enright and Gray* [2006] Crim.L.R. 531.

[107] See "Bad Character of Others", at para.7–66, below.

[108] *Chopra* [2007] 1 Cr.App.R. 225(16).

his medication, shouted at his partner, this was not "bad character".[109] Nor is taking an overdose[110] or attempting to commit suicide: *contra* drinking to excess and taking illegal drugs.[111]

The mere fact that a defendant has been "charged" with an offence does not, of itself, amount to misconduct.[112] In *Hussain* the Court of Appeal stated that "the fact that a prosecuting authority considers there is sufficient evidence to prefer a charge is no evidence of the conduct that allegedly constitutes guilt of that charge". The misconduct is not the fact of the charge but the *facts* which support the decision to charge. On the same reasoning, neither a "Fixed Penalty Notice"[113] nor a "Child Abduction Warning Notice"[114] is, by itself, evidence of bad character against the person to whom it is issued. Thus, a defendant will still be entitled to a good character direction.[115]

7–39 **Alleged facts of the offence** The effect of s.98 is that evidence may be admitted about the facts of the offence charged (e.g. forensic evidence or closely related facts) together with any evidence connected with the investigation, for example intimidating witnesses or striking a police officer when faced with an awkward question in an interview.[116] Such evidence is admissible outside the scheme in this Act and, as the Court of Appeal stressed in *Edwards*,[117] s.98 should not be "overlooked" as where the exclusions in the section are applicable "the evidence will be admissible without more ado".[118]

There have been a number of decisions as to what sort of evidence comes within this exception and so should be considered for admission at common law. In *Machado*,[119] where the defendant was charged with street robbery and said that the victim had offered him drugs and had then fallen over rather than being pushed over by the defendant as part of the robbery as the prosecution alleged, the Court of Appeal said that this was part of the very circumstances of the offence and so came within the exception in s.98(1)(a). *Machado* was followed in *McNeill*[120] where the defendant had made threatening remarks to a neighbour and evidence had been admitted as to similar remarks about the neighbour to a

[109] *Osbourne* [2007] Crim.L.R. 710; *Tine* [2006] EWCA Crim 1788.
[110] *Hall-Chung* (2007) 151 S.J. 1020.
[111] *M* [2014] Crim.L.R. 823.
[112] *Mohammed Yousaf* [2009] EWCA Crim 435 and *Hussain* [2013] Crim 2053.
[113] *Harmer* [2010] EWCA Crim 2053. It should be noted, however, that the Crown may, in some cases, be able to adduce evidence of the alleged misconduct that has resulted in the Fixed Penalty Notice.
[114] *Mortimore* [2013] EWCA Crim 1639.
[115] *Gore and Maher* [2009] EWCA Crim 1424.
[116] "Spent" convictions under the Rehabilitation of Offenders Act 1974 (para.7–22, above) are not excluded under the Act because there may be circumstances in which a spent conviction is relevant to a current charge, e.g. to show a pattern of offending or to correct a false impression given by the defendant.
[117] *Edwards* [2005] EWCA Crim 3244.
[118] In *Malone* [2006] EWCA Crim 1860 the Court of Appeal considered the difference between conduct that "has to do with the alleged facts of the offence" (CJA 2003 s.98(a)) and 'important explanatory evidence' (ss.100 and 101(1)(c)). In that case it was held that the evidence had been capable of being admitted under either section depending on how the Crown put its case, at [48].
[119] *Machado* (2007) 72 J.C.L. 105.
[120] *McNeill* 72 J.C.L. 105.

council housing officer two days later. In *Tirnaveanu*[121] where the defendant was convicted of facilitating illegal entry to the United Kingdom by issuing persons with forged entry documents and at trial evidence of possession by the defendant of other forged documents was admitted, the Court of Appeal said that there had to be a nexus in time between the offence and the earlier evidence. And in *Mullings*[122] the Court of Appeal said that a narrow interpretation of the section, requiring a close temporal connection with the event, was preferable. There the Court of Appeal doubted the view expressed in *Fox*[123] that taking indecent photographs of teenage girls and keeping a notebook with sexual fantasies about young girls was relevant to the defendant's mens rea whereas "the facts of the offence" referred to the actus reus of the offence which was taking sexual pictures of young girls. However, in *Sule*[124] the Court of Appeal said that earlier incidents comparatively distant in time were admissible as going to motive and so "part of the facts of the offence"; there was no express or implied temporal qualification in s.98 and where the evidence was relied on to establish motive it would be irrational to establish temporal requirements.

The question of lifestyle was considered in *Green*[125] where it was held that evidence of the defendant's lifestyle was admissible to support a charge of extensive drug dealing so long as the direction by the judge was clear and correct.

The investigation or prosecution of the offence In *Scott*[126] the Court of Appeal said that in a rape case a complainant's attempts to talk to a prosecution witness to "put her side of the case" did not have a sufficiently close link to the investigation and prosecution of the offence to come within the exception. In the fraud case of *Apabhai, Apabhai and Amani*[127] the Court of Appeal said that untrue allegations by one defendant (Amani) to another (Hashib) that an investigating Customs and Excise officer was attempting to blackmail him so as to put Hashib solely "in the frame" were sufficiently connected to the investigation etc of the fraud to bring the allegations within the exception: prior to the 2003 Act evidence of intimidation or blackmail by one co-accused against another had been admissible. In this case the allegation should be admitted, not because it went to general issues of credibility or propensity, but because it demonstrated a motive for Amani to implicate Hashib. 7–40

[121] *Tirnaveanu* [2007] 2 Cr.App.R. 397(3).
[122] *Mullings* [2011] 2 Cr.App.R. 21(2).
[123] *Fox* [2009] Crim.L.R. 881. See the criticism of this case in the commentary to the report. But see also *Vehicle and Operator Services Agency v Ace Crane and Transport Ltd* [2010] 2 All E.R. 791 and *DPP v Agyemang* (2009) 173 J.P. 487.
[124] *Sule* [2013] 1 Cr.App.R. 42(3).
[125] *Green* [2010] Crim.L.R. 306, following *Morris* [1995] 2 All E.R. 69 and *Graham* [2007] 7 *Archbold News* 2.
[126] *Scott* [2009] EWCA Crim 2457.
[127] *Apabhai, Apabhai and Amani* (2011) 175 J.P. 292.

The proper time for the defence to raise the issue under s.78(1) is before the evidence is given. The section provides that "the court may refuse to allow evidence on which the prosecution proposes to rely to be given". Accordingly, once the evidence has been given, it is too late: s.78(1) ceases to have effect.[155] However, no such limitation applies at common law. It would therefore appear that in an appropriate case the court may in its discretion, preserved by s.78(2) and s.82(3), rule that evidence already given should be disregarded and direct the jury accordingly; or discharge them if that is the only way to prevent injustice.[156]

10–32 Once the issue is raised in the Crown Court, the court must rule on it. It will usually be possible for the court to rule by referring to the witness statements and exhibits and considering the submissions of counsel. In some cases the court may wish to hear evidence on the *voir dire*, but it would appear that the defence cannot insist on it. In *Beveridge*[157] the Court of Appeal held that a judge in a trial on indictment is not obliged to hold a trial-within-a-trial where it was submitted that evidence of identification of a suspect in an identification parade should be excluded under the provisions of s.78. The Court said that there may be occasions when the judge thinks it desirable to hold a trial-within-a-trial when such a point is taken, but those occasions will be rare and the instant case was not one of them.

In the magistrates' court justices may deal with the issue either when it arises or may leave it until the end of the hearing: in either case the object must be to secure a trial which is fair and just to both sides.[158] The justices may hear the relevant evidence either in a trial-within-a-trial or as part of the prosecution case. If they decide to exclude the evidence, they must hear and determine the case without regard to the excluded evidence.[159] The defendant does not have the right to have the issue determined in a trial-within-a-trial.[160] It will only be in an exceptional case that the justices may wish to proceed by trial-within-a-trial; in such a case they are entitled to ask the defendant what issues are to be addressed in his evidence in order to assist them in deciding what course to take.[161]

In both the Crown Court and magistrates' courts, reasons must be given for exercising a discretion to either exclude or refuse to exclude evidence at trial. In *Denton*[162] it was held that this has been a rule of English law for many years and to which art.6 of the Convention gives added emphasis. Thus, it would appear that older authorities suggesting that the absence of a detailed ruling will not give rise to criticism no longer apply.[163]

[155] *Sat-Bhambra* (1989) 88 Cr.App.R. 55.

[156] *Docherty* [1999] 1 Cr.App.R. 274. Where a jury hears evidence which they should not have heard and the evidence was such that the jury may not be able to give an impartial verdict based on the admissible evidence in the case, the trial judge has a discretionary power to discharge the jury. In exercising that discretion the judge must decide whether there is a real danger of injustice occurring because the jury, having heard the prejudicial matter, might be biased. Furthermore, where there is more than one interpretation of the inadmissible evidence the judge, in exercising his discretion on whether to discharge the jury, should approach the issue on the basis of the more prejudicial meaning that could be placed on it rather than on some lesser prejudicial interpretation.

[157] *Beveridge* (1987) 85 Cr.App.R. 255.

[158] *Halawa v F.A.C.T.* [1995] 1 Cr.App.R. 21 at 32.

[159] *Halawa* [1995] 1 Cr.App.R. 21 at 32.

[160] *Vel v Owen* [1987] Crim.L.R. 479.

[161] *Halawa* [1995] 1 Cr.App.R. 21 at 32.

[162] *Denton* [2001] Crim.L.R. 225.

[163] *Moss* (1990) 91 Cr.App.R. 371 at 375.

CHAPTER 11

Privilege

Privilege in the law of evidence is the right of a witness to withhold from court information relevant to an issue in the proceedings before the court.[1] If such a privilege arises, a person may refuse to answer a question and cannot be obliged to do so. However, privilege can only be claimed by a witness once he has gone into the witness box. Thus, privilege may be distinguished from the law relating to the compellability of a witness (considered in Ch.17) which deals with the occasions when a person may be forced to go into the witness-box and give evidence. **11–01**

Privilege is a personal right.[2] Thus:

(a) it may be exercised only by the person entitled to claim it; and
(b) it may be waived only by that person.

Once, however, a witness has waived his right (whether by inadvertence or otherwise) the evidence given as a result is admissible.

The right arose because the law appreciated that as a matter of policy the public interest was better served by recognising certain privileges, despite the impediments to the ascertainment of the truth which may result.[3] However, these privileges are limited and only two of any significance[4] are recognised by law:

(i) the privilege against self-incrimination, and
(ii) legal professional privilege.

[1] This definition is based on that in para.1 of the Sixteenth Report of the Law Reform Committee, *Privilege in Civil Proceedings*, Cmnd. 3472 (1967).

[2] See Law Reform Committee, Sixteenth Report, above, at para.7. It should, however, be noted that a corporate defendant may also claim privilege: *Triplex Safety Glass Co. Ltd v Lancegaye Safety Glass (1934) Ltd*[1939] 2 K.B. 395.

[3] See *Attorney-General v Clough* [1963] 1 Q.B. 773 at 787, per Lord Parker CJ.

[4] One insignificant privilege remains in criminal proceedings, the privilege of declining to produce a document of title to land. The privileges relating to communications between spouses and evidence as to marital intercourse were abolished by the Police and Criminal Evidence Act 1984.

1. THE PRIVILEGE AGAINST SELF-INCRIMINATION

A. The general rule

11–02 A witness (other than the defendant) is not bound to answer a question if there is, in the opinion of the court, a risk that the answer will expose him to proceedings for a criminal offence, forfeiture or recovery of a penalty. The privilege is deeply rooted in the common law. In *Blunt v Park Lane Hotel*[5] Lord Goddard C.J. held:

> "The rule is that no one is bound to answer any question if the answer thereto would, in the opinion of the judge have a tendency to expose the deponent to any criminal charge, penalty, or forfeiture which the judge regards as being likely to be preferred or sued for."

The basis of the rule is to be found in the maxim *nemo tenebatur prodere seipsum*: a man should not be his own accuser.[6] The modern rationale has been said to be the belief that "the coercive power of the state should not be used to compel a person to disclose information which would render him liable to punishment."[7]

11–03 The privilege against self-incrimination (and the right to silence) have been described as "prophylactic rules designed to inhibit abusive power by investigatory authorities and prevent the eliciting of confessions which might have doubtful probative value".[8]

The rule is subject to these limitations:

(i) In criminal proceedings (in contrast to civil proceedings[9]) the privilege does not extend to the incrimination of a spouse or civil partner.[10]
(ii) The privilege does not apply to a defendant when he is asked questions in cross-examination about the offence charged: Criminal Justice Act 2003 s.98.
(iii) The privilege does not extend to protecting the witness from liability to civil proceedings.
(iv) The privilege does not apply to the incrimination of strangers.[11]

[5] *Blunt v Park Lane Hotel* [1942] 2 K.B. 253 at 257.
[6] See also *Entick v Carrington* (1795) 19 State Trials 1029, per Lord Camden C.J. (at 1073).
[7] Law Reform Committee, Sixteenth Report, above, at para.8. In *Rank Film Distributors v Video Information Centre*[1982] A.C. 380, Lord Wilberforce (at 442) said that the privilege was "long established in our law as a basic liberty of the subject".
[8] *Regina v Hertfordshire CC Ex p. Green Environmental Industries Ltd. The Times*, 22 February 2000, per Lord Hoffmann.
[9] Civil Evidence Act 1968 s.14(1).
[10] This would seem to be the law although there is some doubt. Stephen J. thought that the privilege did extend to protect a spouse (*Lamb v Munster* (1882) 10 Q.B.D. 110, 112, 113) and the Criminal Law Revision Committee considered that the law was doubtful on this point (Eleventh Report, para.169). There is much to be said for the recommendation of that Committee that the law in criminal proceedings should be brought into line with that in civil proceedings.
[11] *Minihane* (1922) 16 Cr.App.R. 38.

(v) The privilege does not protect the witness from answering questions or giving information in relation to others, including a company by whom the person is employed.[12]
(vi) The privilege does not apply if the criminal or penal sanction arises under foreign law.[13]
(vii) The rule is essentially the same whether it was invoked in criminal or civil proceedings.[14]

B. Taking the objection

11–04 In practice, questions of privilege against self-incrimination arise rarely during the course of criminal trial proceedings. This may be because the principle is so well known that advocates avoid questions which may expose a witness to the risk of incriminating himself. In most cases the dangers of self-incrimination are clear. It will be obvious that if the witness answers a question in a certain way he will admit a criminal offence. In such cases the judge will usually warn the witness that he is not obliged to answer the question. It is then a matter for the witness whether to answer or not.

The principles for taking the objection are as follows.

1. The witness must take the objection himself,[15] though it is customary for the judge to advise him of his right to do so. However, the judge is not obliged to take the objection for him. The witness is supposed to know the law sufficiently to be able to do so.[16]
2.
   (i) If the witness does not take the objection, his replies, once given, will be admissible in evidence in any proceedings against him.[17]
   (ii) If, on the other hand, the witness does take the objection, but is compelled wrongly to answer, his answers are not admissible in evidence in proceedings against him.[18]

[12] *Walkers Snack Foods Ltd v Coventry City Council* [1998] 3 All E.R. 163 at 173. The Divisional Court held that the privilege granted by s.14 of the Civil Evidence Act 1968 does not apply to protect an employee from answering questions of environmental health officers or giving access to a production line, as required by the Food Safety Act 1990, since it was the company and not the employee who was to be prosecuted. Accordingly, the employee could not rely on privilege as an excuse for not complying with the requirements of the 1990 Act.
[13] *Brannigan v Davison* [1996] 3 W.L.R. 859. In *Brannigan v Davison* the Privy Council said that its decision was based on principle but also on the practical consideration of the difficulty of finding out what the consequences of giving evidence would be: however, the Privy Council also said that the judge has discretion to excuse the witness from giving self-incriminating evidence in these circumstances. Note, however, that where the Secretary of State receives a request from the International Criminal Court ("ICC") for assistance in questioning a person being investigated or prosecuted by the ICC, in accordance with s.28 and Sch.3 to the ICC Act 2001, the person shall not be compelled to incriminate himself or confess guilt. The person being investigated or prosecuted should also be informed prior to being questioned of his right to remain silent, without such silence being a consideration in the determination of guilt or innocence.
[14] *C. plc v. P. (Attorney-General intervening)*[2008] Ch.1, CA.
[15] *Attorney-General v Radloff*(1854) 10 Ex. 84 at 107, per Parke B.
[16] *Coote* (1873) L.R. 4 P.C. 599.
[17] *Sloggett* (1856) Dears 656.
[18] *Garbett* (1847) 1 Den. 236.

3. The privilege is the witness's right. It belongs to no other party. Accordingly, the witness alone can take advantage of it. The defendant cannot claim the privilege on behalf of the witness, or benefit from his being wrongly denied the privilege. If a witness is wrongly compelled to answer and the defendant is convicted, the defendant cannot use this as a ground of appeal,[19] for no injustice has been done to him.[20]

11–05 4. A witness is not afforded protection unless he can satisfy the court that there is reasonable ground for the objection being made.[21] The burden of establishing the privilege would therefore appear to be on the witness claiming it. The witness does not have to describe precisely the peril which he faces (since to do so may expose him to the very peril against which the privilege is claimed). However, the claim must be made by the witness himself even if support and substantiation for it came from elsewhere.[22]

5. The witness should, however, be afforded the protection of the court if there appears reasonable ground to believe that an answer would tend to incriminate him.[23]

6. It is for the judge to rule whether there is reasonable ground or not.[24]

11–06 7. The court has a duty to ensure that the person is entitled to the protection of the privilege. Thus, if a claim is made in bad faith it will not be allowed,[25] for example if made to avoid answering the questions for reasons unconnected with self-incrimination. The mere fact that a witness swears that his answer would tend to incriminate him is not conclusive.[26]

8. A remote possibility of legal peril is not sufficient. The danger to be apprehended must be "real and appreciable, with reference to the ordinary operation of law and in the ordinary course of things."[27] Thus, if the possibility of prosecution has in fact been removed there is no privilege. In *Boyes*,[28] a witness in a bribery trial was called to prove that he had received a bribe. He refused to answer questions. The Solicitor-General was prosecuting. He handed the witness a pardon under the Great Seal. The witness still refused to answer. The judge directed him to do so. The Court of Queen's Bench upheld this ruling because the pardon had removed the risk of prosecution. It was argued that there was a risk of impeachment by the House of Commons. The court rejected this argument because the risk was not real.

[19] *Kinglake* (1870) 11 Cox CC 499.
[20] *Kinglake*, above.
[21] *Boyes* (1861) 1B. & S. 311; *National Association of Operative Plasterers v Smithies* [1906] A.C. 434, 438, per Lord James of Hereford; *Westinghouse*, below, at 728, per Shaw LJ.
[22] *Downie v Coe*, *The Times*, 28 November 1997.
[23] *Garbett* (1847) 1 Den. 236 (a court of nine judges).
[24] *Boyes*, above; *Re Westinghouse Electric Corp.* [1977] 3 All E.R. 703 at 717, 721, per Lord Denning M.R.
[25] *Adams v Lloyd* (1858) H.& N. 351 at 362, per Pollock C.B.; *Re Reynolds*(1882) 20 Ch.D. 294 at 300, per Jessell M.R.; *Re Westinghouse Electric Corp.* [1977] 3 All E.R. 717 at 725, per Roskill LJ.
[26] *Triplex Safety Glass Co. v Lancegaye Safety Glass Co. (1934) Ltd* [1939] 2 K.B. 395 at 403, per Du Parcq LJ.
[27] *Boyes* (1861) 1 B. & S. 311 at 330, per Cockburn CJ; approved in *Re Reynolds*(1882) 20 Ch.D. 294.
[28] Above.

9. On the other hand, provided that the risk of proceedings being taken against him is real and not remote or insubstantial, the witness does not have to show that proceedings are likely or could probably be taken against him.[29] **11–07**

10. "Reasonable ground may appear from the circumstances of the case or from matters put forward by the witness himself. He should not be compelled to go into detail because it may involve his disclosing the very matter to which he takes objection. But if it appears to the judge that, by being compelled to answer, a witness may be furnishing evidence against himself, which could be used against him in criminal proceedings or in proceedings for a penalty, then his objection should be upheld."[30]

11. Once it appears that there is a risk of danger for the witness, "great latitude" should be allowed to the witness in judging the effect of a particular question.[31] It may only be one link in a chain or only corroborative of existing material, but still he is not bound to answer if he believes on reasonable grounds that it could be used against him.[32]

12. Protection cannot be invoked where the compulsion to answer questions creates no material increase to an existing risk of incrimination.[33]

C. Statutory provisions abrogating the privilege

11–08 Where it applies, the common law privilege is absolute. It is for "the legislature, not the judiciary, to remove it, or to cut it down."[34] Fundamental rights cannot be overridden by general or ambiguous words.[35] Clear language is required to show that Parliament intended to abrogate such a fundamental principle of common law.[36] As held by Moore-Bick LJ in *R. v K*[37]:

> "where Parliament has not expressed itself in clear terms, the court should be cautious in reaching the conclusion that it intended to abrogate the privilege. Only in cases where the purpose of the statute would otherwise be frustrated is that conclusion likely to be justified".[38]

[29] *Re Westinghouse Electric Corp.*, above, at 722, per Lord Denning M.R.
[30] *Re Westinghouse Electric Corp.*, above, at 717, 721, per Lord Denning M.R. See also *JSC BTA Bank v Ablyazov* [2014] EWHC 2788 (Comm).
[31] *Boyes*, above, at 330.
[32] *Re Westinghouse Electric Corp.*, above, at 722, per Lord Denning M.R.
[33] See *Khan* [2008] Crim.L.R. 391 where the appellant's conviction for contempt was upheld by the Court of Appeal when he refused to answer questions as a witness for a co-accused having already incriminated himself by his guilty plea. He sought to rely on privilege on the grounds that answering such questions might make it more difficult in possible subsequent proceedings in the USA for him to deny his guilt.
[34] *Phillips v Mulcaire* [2012] 2 W.L.R. 848 per Lord Neuberger MR at [18]. See also *AT & T Istel Ltd v Tully* [1993] A.C. 45 in which it was said that the privilege against self-incrimination is "deeply embedded in English law and can only be removed or moderated by Parliament" (per Lord Griffiths at 57).
[35] *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 A.C. 115.
[36] *Malik v Manchester Crown Court* [2008] E.M.L.R. 19.
[37] *R. v K* [2010] Q.B. 343.
[38] Above at [19].

Various statutes remove the right to privilege. Some of the more significant in relation to criminal proceedings are considered here.[39]

1. The most significant is s.98 of the Criminal Justice Act 2003[40] which provides that the defendant may be asked any questions in cross-examination notwithstanding that it would tend to criminate him as to the offence charged. See paras 7–31 and 7–32, above.

The provision is clearly essential, for if the defendant could claim privilege in respect of questions in relation to the offence charged, there would be little point in his giving evidence as his evidence would remain untested by cross-examination.

2. Section 31 of the Theft Act 1968 removes the right in proceedings for the recovery or administration of any property, or for the execution of any trust or for an account of any property or dealings with property. However, the section provides that no statement or admission made by a person in answering a question put in such proceedings is admissible against the witness (or his spouse) in proceedings under the Act.[41]

3. Section 13 of the Fraud Act 2006 is almost identical to s.31 of the Theft Act 1968, save that the answers to the questions may not be used in evidence in proceedings for an offence under the 2006 or a "related offence", *viz.* conspiracy to defraud and any other offence involving any form of fraudulent conduct or purpose (s.13(4)). Such offences have been held to include bribery[42] and money laundering contrary to s.328 of the Proceeds of Crime Act 2002.[43]

4. Section 72 of the Senior Courts Act 1981 withdraws the privilege in civil proceedings in the High Court for infringement of rights pertaining to any intellectual property. It has been held that confidential information (whether commercial or not) can be deemed intellectual property for the purposes of s.72 and such an interpretation is not incompatible with art.6 of the ECHR.[44]

11–09 5. In proceedings under Pts IV and V of the Children Act 1989, *i.e.* in relation to orders for the care, supervision and protection of children, the privilege does not apply: s.98(1) of the Act. However, a statement or admission in such proceedings is not admissible in evidence against the maker or his spouse in proceedings for an offence other than perjury: s.98(2). The purpose of s.98 is to provide protection for a witness who is required to give evidence in relation to a child when such evidence could incriminate him or his spouse.[45] The true meaning of s.98(2) has still to be resolved. However, the Court of Appeal has held that the use of the words "proceedings" and "evidence" in the subsection indicates that it encompasses court proceedings (and evidence given in those

[39] See also J.D. Heydon, "Statutory Restrictions on the Privilege against Self Incrimination" (1971) 87 L.Q.R. 214.

[40] See also s.1(2) of the Criminal Evidence Act 1898.

[41] s.31 applies even if a person is liable to be prosecuted for forgery as well as theft: *Khan v Khan* [1982] 1 W.L.R. 513.

[42] *Kensington International Ltd v. Republic of Congo (formerly People's Republic of Congo)* [2008] 1 W.L.R. 1144.

[43] *JSC BTA Bank v Ablyazov* [2010] 1 Cr.App.R. 9.

[44] *Coogan v. News Group Newspapers Ltd*; *Phillips v. News Group Newspapers Ltd* [2012] 2 W.L.R. 848.

[45] *Kent C.C. v K* [1994] 1 W.L.R. 912, 916, per Booth J (Booth J held that putting inconsistent statements to a witness in order to challenge her evidence did not amount to using the statements against her within the meaning of s.98).

proceedings), and statements to expert witnesses[46], but not police inquiries.[47] In *Oxfordshire C.C. v P*[48] Ward J. held that s.98(2) was not limited to statements or admissions made in oral evidence and included a written statement and an oral admission made by a mother to a guardian *ad litem* (during the latter's investigation in care proceedings) that the mother had caused injuries to her baby. In *Re M. (Care Disclosure to Police)*[49] it was stated that it is important for all parties to take into account that the operation of the family courts is assisted if parties are prepared to be open and frank and that clearly they will only do so if they feel they have the protection of s.98(2), so that what is said does not directly incriminate them so far as criminal proceedings are concerned.[50]

6. If a person provides information under a statute removing the right to protection from self-incrimination and the statute does not restrict the use of that information, it may be used in evidence against him.[51] Thus, in *Scott*,[52] a bankrupt had been examined under an Act which provided that he was bound to answer questions put to him. Under threat of committal for contempt he answered the questions and provided certain information. His answers were used against him in criminal proceedings. The Court of Criminal Appeal held that the answers had been rightly admitted. Alderson B. said: "if you make a thing lawful to be done, it is lawful in all its consequences and one of its consequences is, that what may be stated by a person in a lawful examination, may be received in evidence against him."[53]

7. Pursuant to s.434 of the Companies Act 1985, a witness was obliged to answer questions put to him by Department of Trade and Industry inspectors. This was so even if the answer might tend to incriminate him. In *Saunders*[54] the Court of Appeal rejected a submission that the trial judge should have excluded (under the provisions of s.78 of the Police and Criminal Evidence Act 1984) transcripts of interviews with DTI Inspectors. Lord Taylor CJ said that Parliament had made its intentions clear in s.434(5) (that answers were prima facie admissible in criminal proceedings) and that it could not be right for a judge to exercise his discretion to exclude simply on the ground that Parliament ought not countenance the possibility of self-incrimination.[55]

11–10 However, the European Court of Human Rights subsequently ruled that *Saunders* had been deprived of a fair trial, in violation of art.6(1) of the Convention by reason of the use of statements obtained from him by the DTI Inspectors which amounted to an unjustifiable infringement of the right to silence and the right not to incriminate oneself: *Saunders v UK*.[56]

[46] *Re AB (A Child) (Care Proceedings: Disclosure of Medical Evidence to Police)* [2003] 1 F.L.R. 579.

[47] *Re C (A Minor) (Care proceedings: Disclosure)*, *The Times*, 22 October 1996.

[48] *Oxfordshire C.C. v P* [1995] 1 F.L.R. 552.

[49] *Re M. (Care Disclosure to Police)* [2008] F.L.R. 390.

[50] At [23].

[51] *Scott* (1856) Dears. & B. 47; *Customs & Excise Commissioners v Harz*[1967] 1 A.C. 760, 816, per Lord Reid.

[52] Above.

[53] *Scott* (1856) Dears. & B. 47 at 67.

[54] *Saunders* [1996] 1 Cr.App.R. 463.

[55] At 478.

[56] *Saunders v UK* [1997] 23 E.H.R.R. 313. See also *I.J.L. and A.K.P. v UK*, *The Times*, 13 October 2000 in which the European Court reached a similar conclusion to that of *Saunders*.

In response to the European Court's decision in *Saunders*—which had criticised UK legislation that permitted evidence against an accused obtained under compulsion being subsequently used against him at trial—Parliament enacted s.59 and Sch.3 to the Youth Justice and Criminal Evidence Act 1999.[57] This remedied the situation by restricting the use of answers in criminal proceedings obtained from an accused under compulsion under a whole range of legislative provisions.[58] Section 59 and Sch.3 stipulate that answers obtained under compulsion pursuant to the statutes set out cannot be adduced by the prosecution in a criminal trial, in chief or in cross-examination, except (a) where the defendant himself introduced them as evidence, or (b) the prosecution is for the failure to provide answers, refusal to do so or to disclose a material fact, or for having given an untruthful answer.

Despite the entry into force of s.59 and Sch.3 to the Youth Justice and Criminal Evidence Act 1999, there are still a number of statutory provisions that permit the use of answers obtained under compulsion in criminal proceedings that are not covered by the section.

Some of these provisions have been the subject of judicial scrutiny.

11–11 8. In *R v Hertfordshire County Council Ex p. Green Environmental Industries Ltd*,[59] the House of Lords considered whether a notice issued by a waste regulation authority pursuant to its powers under s.71(2) of the Environmental Protection Act 1990 offended the rule against self-incrimination. In deciding that it did not, Lord Hoffmann stated that the question whether a statute which conferred a power to ask questions or obtain documents or information excluded the privilege against self-incrimination was one of construction. Information obtained pursuant to s.71 is not obtained as a result of any oral interrogation and the information was needed not only for the purpose of investigation but also for the broad public purpose of protecting public health and the environment. Section 71 of the 1990 Act was not one of the statutes to which Parliament had made amendments following the decision of the European Court in *Saunders*. It was presumed that this was because it contained no express provision that answers were to be admissible in criminal trials and therefore left unimpaired the judge's discretion under s.78 of the Police and Criminal Evidence Act 1984.[60]

[57] Entered into force 14 April 2000. Prior to the entry into force of the 1999 Act, the European Court's decision in *Saunders*was given effect in the UK by guidelines issued by the Attorney-General that prosecutors ought not, except in specific circumstances, rely on evidence at trial that had been obtained under compulsion (see (1998) 148 N.L.J. 208). In *Faryab*[2000] Crim.L.R. 180, the Court of Appeal quashed a conviction where, in ignorance of the Attorney-General's guidelines, answers which should not have been relied upon were admitted at trial.

[58] Insurance Companies Act 1982 ss.43A, 44; Companies Act 1985 ss.434, 447; Insolvency Act 1986 s.433; Company Directors Disqualification Act 1986 s.20; Building Societies Act 1986 s.57; Financial Services Act 1986 ss.105, 177; Companies (Northern Ireland) Orders arts 427, 440; Banking Act 1987 ss.39, 41, 42; Criminal Justice Act 1987 s.2; Companies Act 1989 s.83; Companies (Northern Ireland) Order 1989 art.23; Insolvency (Northern Ireland) Order 1989 art.373; Friendly Societies Act 1992 s.67; Criminal Law (Consolidation) Act 1995 s.28; Proceeds of Crime (Northern Ireland)Order Sch.2, para.6.

[59] *The Times*, 22 February 2000.

[60] Lord Hoffmann also considered the European Court of Justice case of *Orkem v Commission of the European Communities (Case 374/87)* [1989] E.C.R. 3283, in which the European Court held that the Commission was entitled to ask for factual information, even if it might be incriminating, but that the Commission could not compel Orkem to provide it with answers which might involve an admission of an infringement which it was incumbent upon the Commission to prove. Accordingly, *Hertfordshire*

9. The Court of Appeal reached a similar conclusion in *Attorney-General's Reference No. 7 of 2000*[61] in holding that books and papers produced by the accused under compulsion under s.291(b) of the Insolvency Act 1986 were to be admissible. The court held that the documentation sought contained no compulsorily made statements and to admit it did not violate the accused's right to a fair trial, but stressed, that the admissibility of the documents was subject to the judge's discretion under s.78 of PACE.[62] In *C. plc v. P. (Attorney-General intervening)*[63] it was held by the Court of Appeal that where a search order was executed and items were seized which were independent of the order but disclosed the commission of a criminal offence (here indecent images of children were found on computers seized as part of the order), the person who was the subject of the search could not rely on the privilege against self-incrimination to prevent the material being transferred to the police. No privilege exists in the material itself as it is "real" and "independent" evidence and not itself "compelled testimony". In *R. (Malik) v. Manchester Crown Court*[64] the court considered whether the privilege against self-incrimination existed in relation to pre-existing documents. It concluded that the law was unclear and proposed that circuit judges should adopt the approach of the majority in *R. (Bright) v. Central Criminal Court*; *R. (Alton) v. Same*; *R. (Rusbridger) v. Same*[65] and treat the privilege against self-incrimination as an important relevant factor to be taken into account when exercising the discretion in respect of pre-existing documents.[66]

Where information is obtained under compulsory process, there is nothing to prevent it being passed from one prosecuting authority to another.[67] There is also no requirement to inform the owner of the information that this has been done where to do so might, for example, hamper any further investigation.[68]

fell on the right side of the line drawn by the European Court in *Orkem* as the request was for factual information and not an invitation to admit wrongdoing.

[61] *Attorney-General's Reference No. 7 of 2000* [2001] Crim.L.R. 736.

[62] Above.

[63] *C. plc v. P. (Attorney-General intervening)* [2008] Ch.1.

[64] *R. (Malik) v. Manchester Crown Court* [2008] 4 All E.R. 403.

[65] *R. (Bright) v. Central Criminal Court*; *R. (Alton) v. Same*; *R. (Rusbridger) v. Same* [2001] 1 W.L.R. 662.

[66] The court held that the following non-exhaustive factors should be taken into account when deciding whether a person should be required to disclose documents which risked infringing his privilege against self-incrimination: (a) The true benefit to the investigation of the material which is sought to be obtained in breach of the privilege. This includes consideration of the extent to which the material can be (i) obtained by other means; (ii) ordered to be disclosed in stages, (so that a part which does not involve the infringement of the privilege against self-incrimination is disclosed first, leaving the value of the rest to be weighed differently against the infringement); and (iii) redacted to exclude those parts which create the risk. (b) The importance of the privilege itself. (c) The gravity of the offence with which the person who is required to surrender the privilege might be charged. (d) The risk of prosecution. (e) If a person is prosecuted, the trial judge has the power to exclude the evidence under s.78 of PACE.

[67] *Brady* [2005] 1 Cr.App.R. 5.

[68] *R. (Kent Pharmaceuticals Ltd) v. Director of the Serious Fraud Office* [2005] 1 W.L.R. 1302.

D. The privilege against self-incrimination under article 6 of the Convention.

11–12 In some respects, the protection against self-incrimination contained within art.6 of the European Convention on Human Rights is more limited than the common law protection. The common law protection is available "well before as well as after criminal proceedings have been launched".[69] By contrast, the protection in art.6(1) is applicable only after charge. It has been said that this is considered to be the moment at which an "individual … has become a suspect".[70] Moreover, unlike the common law privilege, the protection against self-incrimination pursuant to art.6 of the Convention is not absolute, it can "be qualified or restricted if there is proper justification and the restriction is proportionate".[71]

The right not to incriminate oneself has been said by the European Court to "lie at the heart of the notion of a fair procedure under Article 6".[72] In *Saunders v UK*[73] the European Court held:

> "[T]he right not to incriminate oneself, in particular, presupposes that the prosecution in the criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in article 6(2) of the Convention."[74]

The privilege against self-incrimination under art.6 has been considered in a large number of cases, both domestically and in Strasbourg. It is an "area of law evidently replete with authority up to the highest level."[75]

In *R v Kearns*[76] Aikens J distilled the many earlier authorities into six core principles.[77]

Principle 1: Art.6 is concerned with the fairness of trial where there is an "adjudication". It is not concerned with extrajudicial inquiries as such.

The case law emphasises that inquiries that are merely "extrajudicial" or administrative do not, of themselves, engage the privilege against self-incrimination. So, for example, in the case of *R v Hertfordshire County Council ex parte Green Environmental Industries*,[78] Lord Hoffman observed that compelling a person to answer questions that had been posed for reasons of "public health" should be distinguished from circumstances where that material was then used in a criminal prosecution. In the former case there would be no breach of the privilege against self-incrimination; in the latter there may.

Principle 2: The right to silence and the right not to incriminate oneself are implicit in art.6.

[69] *O Ltd v Z* [2005] EWHC 238 (Ch) per Lindsay J at [44].
[70] *Ambrose v Harris* [2011] 1 W.L.R. 2435 per Lord Hope at [63].
[71] *R v Kearns* [2002] 1 W.L.R. 2815 at [54].
[72] *Saunders v UK* (1997) 23 E.H.R.R. 313.
[73] Above.
[74] Above at [68].
[75] *C plc v P* [2006] 3 W.L.R. 273 at [43], per Evans-Lombe J.
[76] *R v Kearns* [2002] 1 W.L.R. 2815.
[77] Above at [53].
[78] *R v Hertfordshire County Council ex parte Green Environmental Industries* [2000] 2 A.C. 412.

When the right is engaged, it is a fundamental one. Aikens J. drew this principle from the case of *Saunders v UK* where it said that the rationale for the protection lies, inter alia "in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfillment of the aims of Article 6".[79]

Principle 3: The right to silence and the right not to incriminate oneself are not absolute, but can be qualified and restricted.

This principle was taken largely from the judgment of Lord Bingham in the case of *Brown v Stott*,[80] which concerned the statutory requirement on a person to name the identity of a driver, in the specific context of the "regulatory regime" imposed on road users:

> "The jurisprudence of the European court very clearly establishes that while the overall fairness of a criminal trial cannot be compromised, the constituent rights comprised, whether expressly or implicitly, within Article 6 are not themselves absolute. Limited qualification of these rights is acceptable if reasonably directed by national authorities towards a clear and proper public objective and if representing no greater qualification than the situation calls for. The general language of the Convention could have led to the formulation of hard-edged and inflexible statements of principle from which no departure could be sanctioned whatever the background or the circumstances. But this approach has been consistently eschewed by the court throughout its history. The case law shows that the court has paid very close attention to the facts of particular cases before it, giving effect to factual differences and recognising differences of degree."[81]

Principle 4: There is a distinction between material which has an existence independent of the will of the suspect and statements made under compulsion. In the former there is no infringement of the right to silence; in the latter case there could be.

Some authorities have focused on the *type* of material that was being sought from the suspected person. This distinction between two categories of compelled information arises from a passage in the case of *Saunders v UK* :

> "The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the Contracting Parties to the Convention and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath and urine samples and bodily tissue for the purpose of DNA testing."[82]

[79] *Saunders v UK* at [68].
[80] *Brown v Stott* [2003] 1 A.C. 681.
[81] At 704 D-F.
[82] At [69].

However, the distinction is not as clear in practice. In some cases even the obligation to provide pre-existing documents, or the forced emission of material secreted within a suspect's body, have nevertheless constituted breaches of Article 6.[83] [See 11-11, above.]

Principle 5: A law will not be likely to infringe the right to silence or the right not to incriminate oneself if it demands the production of information for an administrative purpose or in the course of an extrajudicial inquiry. However if the information so produced is or could be used in subsequent judicial proceedings, whether criminal or civil, then the use of the information could breach those rights and so make the trial unfair

This principle flows directly from Principle 1: compelling information which will be used only in extra-judicial inquiries should be distinguished from information that is or could be used in criminal proceedings. The latter may be in breach art.6.

Principle 6: Whether Article 6 is breached will depend on all the circumstances of the case

Aikens J.'s sixth and final principle proposed a test consisting of two important considerations:

(i) Whether information demanded is factual or an admission of guilt.
(ii) Whether the demand for the information and its subsequent use in proceedings is proportionate to the particular social or economic problem that the relevant law is intended to address.

In *O'Halloran v UK*[84] the European Court set out three considerations to help assess whether the compulsion is proportionate for the purposes of art.6. These are:

(i) The nature and degree of compulsion used to obtain the evidence.
(ii) The existence of any relevant safeguards in the procedure.
(iii) The use to which the material was to be put.

(1) The nature and degree of the compulsion

11–13 A direct compulsion will usually be held to be in breach of art.6: *O'Halloran v UK.*[85] Thus in *Saunders v UK* the court did not accept the Government's argument that the complexity of corporate fraud and the vital public interest in the investigation of such fraud and the punishment of those responsible could justify such a marked departure as that which occurred in the present case from one of the basic principles of a fair procedure. The court held that "the general requirements of fairness contained in art.6, including the right not to incriminate

[83] Breaches of art.6 were found in the following three cases: (i) *Funke v France* (1993) 16 E.H.R.R. 297 where the obligation to provide documents to assist an investigation was punishable by a fine for failing to do so; (ii) *JB v Switzerland* (2001) where an obligation of a person being investigated for tax evasion to provide documents was punishable by a fine for failing to do so; and (iii) *Jalloh v Germany* (2007) 44 E.H.R.R. 32 where the forcible administration of emetics to the body of a suspect in order to obtain evidence of swallowed contraband.
[84] *O'Halloran v UK* (2008) 46 E.H.R.R. 21.
[85] At [53].

oneself, apply to criminal proceedings in respect of all types of criminal offences without distinction, from the most simple to the most complex. The public interest cannot be invoked to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during trial proceedings".[86]

In *Heaney v Ireland*,[87] several men suspected of being members of the IRA and being involved in a bombing were arrested and questioned. They exercised their right to silence. The authorities utilised s.52 of the Offences against the State Act 1939 to require them to answer questions accounting for their whereabouts at the time in question. They refused and were sentenced to six months imprisonment for failing to comply with the Order. As in *Saunders,* the European Court found that the compulsion to provide information, even in relation to the problems of terrorist activity, was in breach of art.6. The court held: "the security and public order concerns relied on by the Government cannot justify a provision which extinguishes the very essence of the applicants' right to silence and against self-incrimination guaranteed by art.6.1 of the Convention".[88]

By contrast, in *O'Halloran v UK* the court found that the nature and degree of compulsion arising from the requirement in s.172 of the Road Traffic Act 1972 (under which a keeper of a vehicle is required to name the driver at the time an offence was committed) did not breach art.6. This was because: (i) the sanction for non-compliance with the compelled request was very modest, no more than a fine; (ii) the compulsion was occurring within an established and very specific "regulatory regime" to which the person subject to the compulsion had, by implication, consented; and (iii) the question asked was limited to providing only "the identity of the driver".

The existence of a pre-existing "regulatory regime" also appears to have been a determinative factor in both *Brown v Stott*[89] in which the House of Lords considered the same provision.

All who own or drive motor cars know that by doing so they subject themselves to a regulatory regime which does not apply to members of the public who do neither. Section 172 [of the Road Traffic Act 1988] forms part of the regulatory regime. This regime is imposed not because owning or driving cars is a privilege or indulgence granted by the state but because the possession and use of cars (like, for example, shotguns, the possession of which is very closely regulated) are recognised to have the potential to cause grave injury.[90]

Similarly, in *O'Halloran v UK* the European Court held:

> "Those who choose to keep and drive motor cars can be taken to have accepted certain responsibilities and obligations as part of the regulatory regime relating to motor vehicles, and in the legal framework of the UK, these responsibilities include

[86] At [74].
[87] *Heaney v Ireland* (2001) 33 E.H.R.R. 12.
[88] Above at [61]. See also *Shannon v UK* (2005) in which the court held: "The security context—the special problems of investigating crime in Northern Ireland—cannot justify the application of the [compulsive measures] in the present case any more than could that in *Heaney and McGuinness*". At [38].
[89] *Brown v Stott* [2001] 2 W.L.R. 817. See also R. Pillay, "Self incrimination and Article 6" (2001) E.H.R.L.R. 78, arguing that *Brown* is limited to "regulatory" offences.
[90] Above at [705].

the obligation, in the event of suspected commission of road traffic offences, to inform the authorities of the identity of the driver on that occasion."[91]

(2) The existence of safeguards

11–14 In *O'Halloran v UK*, the court observed that some safeguard was provided by the fact that the burden remained on the Crown to prove any offence. Such minimal safeguard may be acceptable in a situation where the suspect is in no greater jeopardy than a modest financial penalty, in the context of a "regulatory regime". However, in other contexts far greater safeguards are usually provided. In *Saunders v UK* the European Court considered the presence of safeguards which struck a balance between the public interest in compelling information from a person, while simultaneously limiting the use for which compelled information could be deployed in a criminal prosecution against that person. The court said:

It is noteworthy in this respect that under the relevant legislation statements obtained under compulsory powers by the Serious Fraud Office cannot, as a general rule, be adduced in evidence at the subsequent trial of the person concerned.[92]

In *R v S*[93] it was held that the powers provided by s.78 of PACE can be used at subsequent proceedings to exclude evidence obtained by way of compulsion. Moreover, in *Cadder v Her Majesty's Advocate (Scotland)*,[94] Lord Rodger emphasised the importance of access to a lawyer as a key safeguard against violation of the privilege against self-incrimination. He stressed that "other protections" would not necessarily safeguard against a violation of art.6 of the Convention.

E. The right of silence

11–15 This topic is conveniently discussed here because the concept of a "right of silence" is based partly on the privilege against self-incrimination (and partly on the rules relating to the burden of proof).[95] This right has been restricted by the Criminal Justice and Public Order Act 1994, which is discussed at para.11–16 below.

(1) The common law rules

11–16 The right means that a suspect is not obliged to answer questions when interrogated by the police or others charged with investigating offences. The effect at common law is that a court or jury may not draw an adverse inference

[91] At [57].

[92] At [74]. In *R v Herts CC ex parte Green Industries Ltd,* HL [2000] A.C. 412, Lord Hoffman referred to the passage in *Saunders v UK*, observing: "As a result of this decision, Parliament in a Schedule to the Youth Justice and Criminal Evidence Act 1999 amended s.434(5) of the Act of 1985 by excluding evidence of the answers in prosecutions for certain offences."

[93] *R v S* [2008] EWCA Crim 2177 at [25].

[94] *Cadder v Her Majesty's Advocate (Scotland)* [2010] UKSC 43 at [93].

[95] "This expression [the right of silence] arouses strong, but unfocused feelings. In truth it does not denote any single right, but rather refers to a disparate group of immunities, which differ in nature, origin, incidence and importance, and as to the extent to which they have already been encroached upon by statute": *Director of S.F.O. Ex p. Smith* [1992] 3 W.L.R. 66, 74, per Lord Mustill.

from a defendant's failure to answer questions. As a further consequence at common law the defendant may (a) not generally be compelled to reveal his defence before a trial, and (b) in no circumstances be compelled to give evidence. (Various inroads were made into the right; for instance, a suspect in an investigation into serious fraud may be required to answer questions. Inroads have also been made by statutory provision relating to advance disclosure of the defence case (see para.18–14, below, on defence disclosure), for example the requirement that (a) notice be given of alibi evidence[96]; (b) experts' reports be disclosed[97]; and (c) in serious fraud cases the defence be disclosed.[98]

At common law the fact that a defendant exercises his right of silence and does not reply to questions when interviewed by the police is, as a general rule, not evidence against him. In these circumstances, the suspect's exercise of his right of silence could not normally be held against him. Thus, Lord Dilhorne said that to invite a jury to form an adverse opinion against an accused on account of his exercise of his right of silence is a misdirection.[99]

The common law right has been substantially affected by ss.34 to 38 of the Criminal Justice and Public Order Act 1994. However, the common law rule still applies where the statutory regime does not.

(2) Inferences from the defendant's silence: the 1994 Act

11–17 Section 34 of the Criminal Justice and Public Order Act 1994 provides as follows:[100]

> "(1) Where, in any proceedings against a person for an offence, evidence is given that the accused—
>
> (a) at any time before he was charged with the offence, on being questioned under caution by a constable trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings; or
>
> (b) on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention any such fact[; or
>
> (c) at any time after being charged with the offence, on being questioned under s.22 of the Counter-Terrorism Act 2008 (post-charge questioning), failed to mention any such fact],[101]
>
> being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, subsection (2) below applies.
>
> (2) Where this subsection applies—

[96] Criminal Justice Act 2003 s.6A(2) and (3)—see para.18–16.

[97] Police and Criminal Evidence Act 1984 s.81. See para.6–35, above.

[98] Criminal Justice Act 1987 s.2. See para.18–32.

[99] *Gilbert* (1978) 66 Cr.App.R. 237 at 244.

[100] As amended by the Criminal Procedure and Investigations Act 1996 s.44(3), (4); the YJCEA 1999 s.58(1), (2); the Counter-Terrorism Act 2008 s.22(9); the CJA 2003 ss.41 and 332; and Sch.3, paras 64(1), (2)(a) and (2)(b), and Sch.37, Pt 4. As to the variation in the text of s.34 depending on geographical location, see below.

[101] Sub-paragraph (1)(c) will be inserted into this section by the Counter-Terrorism Act 2008 s.22(9) as from a date to be appointed.

(a) a magistrates' court inquiring into the offence as examining justices;[102]
(b) a judge, in deciding whether to grant an application made by the accused under—
  (i) section 6 of the Criminal Justice Act 1987 (application for dismissal of charge of serious fraud in respect of which notice of transfer has been given under s.4 of that Act); or
  (ii) paragraph 5 of Sch.6 to the Criminal Justice Act 1991 (application for dismissal of charge of violent or sexual offence involving child in respect of which notice of transfer has been given under s.53 of that Act);
[paragraph 2 of Sch.3 to the Crime and Disorder Act 1998];[103]
(c) the court, in determining whether there is a case to answer; and
(d) the court or jury, in determining whether the accused is guilty of the offence charged,
may draw such inferences from the failure as appear proper.

(2A) Where the accused was at an authorised place of detention at the time of the failure, subsections.(1) and (2) above do not apply if he had not been allowed an opportunity to consult a solicitor prior to being questioned, charged or informed as mentioned in subs.(1) above.

(3) Subject to any directions by the court, evidence tending to establish the failure may be given before or after evidence tending to establish the fact which the accused is alleged to have failed to mention.

(4) This section applies in relation to questioning by persons (other than constables) charged with the duty of investigating offences or charging offenders as it applies in relation to questioning by constables; and in subs.(1) above 'officially informed' means informed by a constable or any such person.

(5) This section does not—
(a) prejudice the admissibility in evidence of the silence or other reaction of the accused in the face of anything said in his presence relating to the conduct in respect of which he is charged, in so far as evidence thereof would be admissible apart from this section; or
(b) preclude the drawing of any inference from any such silence or other reaction of the accused which could not properly be drawn apart from this section.

(6) This section does not apply in relation to a failure to mention a fact if the failure occurred before the commencement of this section.'

11–18 The effect of the section is that the court in determining whether the defendant is guilty of the offence charged (or a court in determining whether there is a case to answer), may draw such inferences as appear proper from evidence that on being questioned under caution by the police about the offence, before being charged (or on being charged), the defendant failed to mention any fact relied on in his defence, which, in the circumstances existing at the time, he could reasonably have been expected to mention.

[102] Subsection (2)(a) was repealed by the CJA 2003, ss.41 and 332, Sch.3, para.64(2)(a), and Sch.37, Pt 4 from 18th June 2012 (Criminal Justice Act 2003 (Commencement No.28 and Saving Provisions) Order 2012 (S.I. 2012 No.1320)), but only in certain areas (as to which, see the Order).
[103] Section 34(2)(b)(i) and (ii) are replaced by the words in square brackets that follow them (CJA 2003 s.41, and Sch.3, para.64(1) and (2)(b)). The amendment came into force in relation to cases sent for trial under s.51 or 51AD(3)(d) of the Crime and Disorder Act 1998 on 9 May 2005 (Criminal Justice Act 2003 (Commencement No.9) Order 2005 (S.I. 2005 No.1267). They were fully brought into force from 18 June 2012 (Criminal Justice Act 2003 (Commencement No.28 and Saving Provisions) Order 2012 (S.I. 2012 No.1320)), but only in certain areas (as to which, see the Order).

In determining whether to conduct an interview, police officers should have the opportunity to ask questions so that explanations may be put forward showing either that no offence has been committed by the suspect (enabling police, in appropriate cases, to pursue alternative lines of enquiry before evidence disappears) or to be sure that they are not accusing the wrong person. Where the officer is sure that there is sufficient evidence for a prosecution to succeed there should be no further questioning.[104]

In *Beckles and Montague*,[105] the Court of Appeal held that, as a matter of statutory construction, inferences under s.34 were not limited to an inference of recent fabrication, and that other inferences were open, for example that the accused was reluctant to be subject to questioning and further inquiry when in a compromising position. The court stated that a proper inference is one relevant to determining whether the accused is guilty, but may also be one which is simply adverse to the defence, and that ultimately the jury may draw such inferences as seem proper. For example in *Taylor*,[106] it had been proper to draw an adverse inference from the defendant's failure to mention a possible alibi defence when interviewed despite the fact that to have answered questions would have resulted in admissions to other criminal offences and the fact that the accused had told his solicitor of his alibi prior to interview. Thus, an accused cannot avoid an inference being drawn by informing his solicitor of his defence prior to interview with the intention thereafter to place reliance upon it. It is for the jury to consider why the salient fact was withheld, and to draw such inferences as appear proper.

11–19 The Royal Commission on Criminal Justice recommended against any interference with the right to silence on the ground that it would work adversely against the most vulnerable suspects.[107] However, it has been pointed out that there is now greater protection for suspects than formerly existed, *i.e.* greater access to legal advice and the introduction of tape recording of interviews.[108] In fact, s.34 is based on the recommendations of the Criminal Law Revision Committee's Eleventh Report of 1972 and the wording of the section is based on that in the draft Bill attached to the Report.[109] The Committee said that a suspect would not lose the right of silence in the sense that it is no offence to refuse to answer questions, but if he chooses to exercise the right he will risk having an adverse inference drawn against him at trial. The Committee thought that to forbid the jury or magistrates from drawing whatever inferences are reasonable from the failure of the accused, when interrogated, to mention a defence put forward at trial was contrary to common sense; and, without helping the innocent, gave an unnecessary advantage to the guilty.

[104] *Odeyemi* [1999] Crim.L.R. 828. See also *Pointer* [1997] Crim.L.R. 676; *Gayle* [1999] Crim.L.R. 502; *McGuinness* [1999] Crim.L.R. 318; and *Ioannou* [1999] Crim.L.R. 586. The Commentary to *Odeyemi* explains the view apparently emerging from the case law is that the interviewing officer may proceed with an interview provided he has not personally formed the opinion that there is sufficient evidence to charge. If his mind is not closed to the possibility of an innocent explanation from the suspect, there is no breach of Code C: 11.4 or 16.1.
[105] *Beckles and Montague* [1999] Crim.L.R. 148. See also *Daniel* [1998] Crim.L.R. 818 and *Randall* unreported 3 April 1998.
[106] *Taylor* [1999] Crim.L.R. 77.
[107] Cm. 2263 (1993), paras 4.20–4.24.
[108] Home Office, *Report of the Working Group on the Right of Silence (1989)*, para.39.
[109] Cmnd. 4991, para.28.

Section 34 of the Criminal Justice and Public Order Act 1994 was enacted in the face of considerable opposition.[110] It has remained an extremely controversial piece of legislation and been the subject of considerable academic criticism[111] and judicial scrutiny, both domestically and in Strasbourg. European jurisprudence and the effect of the Human Rights Act 1998 have considerably diminished the effect of s.34 leading some to recommend its complete repeal and a return to the common law position. [112]

11–20 To keep up with the rapid development of this area of criminal evidence the Judicial Studies Board issued a revised Specimen Direction in 2004. As explained in the Crown Court Bench Book, the "specimen direction has been consistently approved by the Court of Appeal, House of Lords and the ECHR".[113] The direction is as follows:

1. Before his interview(s) the defendant was cautioned. He was first told that he need not say anything. It was therefore his right to remain silent. However, he was also told that it might harm his defence if he did not mention when questioned something which he later relied on in court; and that anything he did say might be given in evidence.
2. As part of his defence, the defendant has relied upon (*here specify the facts to which this direction applies*). But [the prosecution say/he admits] that he failed to mention these facts when he was interviewed about the offence(s). [If you are sure that is so, this/This] failure may count against him. This is because you may draw the conclusion from his failure that he [had no answer then/had no answer that he then believed would stand up to scrutiny/has since invented his account/has since tailored his account to fit the prosecution's case/(*here refer to any other reasonable inferences contended for*)]. If you do draw that conclusion, you must not convict him wholly or mainly on the strength of it; but you may take it into account as some additional support for the prosecution's case and when deciding whether his [evidence/case] about these facts is true.
3. However, you may draw such a conclusion against him only if you think it is a fair and proper conclusion, and you are satisfied about three things: first, that when he was interviewed he could reasonably have been expected to mention the facts on which he now relies; secondly, that the only sensible explanation for his failure to do so is that he had no answer at the time or none that would stand up to scrutiny; thirdly, that apart from his failure to mention those facts, the prosecution's case against him is so strong that it clearly calls for an answer by him.

[110] For a detailed consideration of the background to the enactment of s.34 see Professor Birch's "Suffering in Silence: A Cost-Benefit Analysis of Section 34 of the Criminal Justice and Public Order Act 1994" [1999] Crim.L.R. 769.

[111] See R. Pattenden, "Silence: Lord Taylor's Legacy" (1998) 2 *International Journal of Evidence and Proof* 141; Professor Ashworth, "Article 6 and the Fairness of Trials" [1999] Crim.L.R. 261; Anthony Jennings *et al.* "Silence and Safety: The Impact of Human Rights Law" [2000] Crim.L.R. 879; Professor Ian Dennis, "Silence in the Police Station: the Marginalisation of Section 34" [2002] Crim.L.R. 25; and Anthony Jennings Q.C. and David Emanuel, "Adverse Inferences from Silence—an Update." [2001] 9 *Archbold News* 6.

[112] See *op.cit. Birch*, n.85.

[113] Crown Court Bench Book, *Directing the Jury*, (2010), p.265.

4. (*Add, if appropriate:*) The defence invite you not to draw any conclusion from the defendant's silence, on the basis of the following evidence (*here set out the evidence*). If you [accept this evidence and] think this amounts to a reason why you should not draw any conclusion from his silence, do not do so. Otherwise, subject to what I have said, you may do so.
5. (*Where legal advice to remain silent is relied upon, add the following to or instead of para.4 as appropriate:*) The defendant has given evidence that he did not answer questions on the advice of his solicitor/legal representative. If you accept the evidence that he was so advised, this is obviously an important consideration: but it does not automatically prevent you from drawing any conclusion from his silence. Bear in mind that a person given legal advice has the choice whether to accept or reject it; and that the defendant was warned that any failure to mention facts which he relied on at his trial might harm his defence. Take into account also (*here set out the circumstances relevant to the particular case, which may include the age of the defendant, the nature of and/or reasons for the advice given, and the complexity or otherwise of the facts on which the defendant has relied at the trial*). Having done so, decide whether the defendant could reasonably have been expected to mention the facts on which he now relies. If, for example, you considered that he had or may have had an answer to give, but genuinely and reasonably relied on the legal advice to remain silent, you should not draw any conclusion against him. But if, for example, you were sure that the defendant remained silent not because of the legal advice but because he had no answer or no satisfactory answer to give, and merely latched onto the legal advice as a convenient shield behind which to hide, you would be entitled to draw a conclusion against him, subject to the direction I have given you.

Accordingly, before an adverse inference can be drawn under the section the jury must be satisfied that: **11–21**

(a) on being questioned under caution the defendant failed to mention the fact;
(b) the fact is relied on in his defence;
(c) in the circumstances existing at the time, he could reasonably have been expected to mention the fact;
(d) that the only sensible explanation for his failure to mention the fact is that he had no answer at the time that would stand up to scrutiny; and
(e) that apart from the failure to mention the fact, the prosecution's case against him was so strong that it called for an answer.

"Any fact relied on in his defence" The Criminal Law Revision Committee said that the words "any fact relied on in his defence" are intended to apply to any definite statement made by a witness at the hearing and supporting the case for the defence, for example an alibi, consent in a case of rape, innocent association in an indecency case or, in a handling case, a belief that the goods were not stolen.[114] **11–22**

[114] *op.cit.*, para.33.

Lord Bingham considered the meaning of the words "any fact relied on in his defence" in *Webber*[115] and reviewed the previous authorities. The following conclusions were made:

(a) "Fact" should be given a broad and not a narrow or pedantic meaning. The word covers any alleged fact which is in issue and is put forward as part of the defence case: if the defendant advances at trial any pure fact or exculpatory explanation or account which, if it were true, he could reasonably have been expected to advance earlier, s.34 is potentially applicable.[116]

(b) A defendant relies on a fact or matter in his defence not only when he gives or adduces evidence of it but also when counsel, acting on his instructions, puts a specific and positive case to prosecution witnesses, as opposed to asking questions intended to probe or test the prosecution case. This is so whether or not the prosecution witness accepts the suggestion put.

(c) Where defending counsel adopts on behalf of his client in closing submissions evidence given by a co-defendant, the client is relying on that matter in his defence so as to render s.34 potentially applicable.

Such a fact may be established by the defendant himself in evidence, by a witness on his behalf or by a prosecution witness.[117] The "fact" must be one relied upon by the defendant. Failure to mention a fact is only relevant under s.34 if it is one relied on in the defence of the accused: s.34 must be confined to its express terms.[118] The precise facts that the defendant has failed to mention and from which the jury are permitted to draw an inference should be clearly identified.[119] Before any adverse inference can be drawn, the defendant must seek to rely on a fact, or facts, at trial: if he does not do so, for example if it is accepted that he did not, or if he gives or calls no evidence or otherwise raises no relevant facts in his defence and merely puts the prosecution to proof, no adverse inference can be drawn.[120] No direction under s.34 would be appropriate where the fact the defendant failed to mention was a true fact.[121]

11–23 **Prima Facie Case** Section 34 does not expressly require the prosecution to satisfy the jury of a prima facie case before an inference could be drawn from a defendant's silence. In *Doldur*[122] the Court of Appeal observed that a s.34 direction would usually require a consideration of both the prosecution and defence evidence, it was held that for s.34 it is not necessary for the prosecution to satisfy the jury of a prima facie case before an adverse inference could be drawn. However, in both *Gill*[123] and *Milford*[124] after considering *Doldur*, it was

[115] *Webber* [2004] 1 W.L.R. 404.
[116] In *Esimu*, 171 JP 452, it was held by the Court of Appeal (applying *Webber*) that the defendant's explanation as to why his fingerprints might have been found on a car was a "fact".
[117] *Bowers* [1998] Crim.L.R. 817.
[118] *Nickolson* [1999] Crim.L.R. 61.
[119] *Reader* unreported 7 April 1998, CA.
[120] *Moshaid* [1998] Crim.L.R. 420.
[121] *Wheeler* [2008] EWCA Crim. 688.
[122] *Doldur* [2000] Crim.L.R. 178.
[123] *Gill* [2001] 1 Cr.App.R. 160.
[124] *Milford* [2001] Crim.L.R. 330.

held that the respective juries should have been directed that any inference would not on its own prove guilt and that the jury had to be satisfied of a prima facie case against the accused before going on to consider whether to draw any inference from the accused's silence. The JSB Direction is such that an inference can only be drawn if the prosecution has satisfied the jury of a prima facie case strong enough to actually call for any response. This would appear to be in keeping with the requirements of art.6 of the European Convention on Human Rights. In *Telfner v Austria*[125] (see para.11–13 above) the European Court found a violation of art.6(2) as, by requiring the accused to provide an explanation, without first having established a prima facie case against him the burden of proof had been shifted from the prosecution to the defence.

Legal Advice The fact that a solicitor advises a client not to answer questions will not, of itself, prevent an adverse inference from being drawn. Thus, in *Condron and Condron*[126] the defendants were drug addicts and when they were at the police station their solicitor advised them not to answer questions because (contrary to the opinion of the Force Medical Examiner) the solicitor thought that they were unfit to be interviewed due to symptoms of drug withdrawal. The defendants made no comment in answer to the questions put to them in interview. At their trial the prosecution were permitted to adduce evidence of these interviews. The defendants gave evidence of matters which could have been given in answer to the questions asked by the police in interview and said that they had not answered questions in interview because of the advice of their solicitor. The judge directed the jury that it was for them to decide whether any adverse inference should be drawn from the defendants' failure to answer questions. The Court of Appeal upheld this direction. The court said that it was unlikely that the bare assertion that the defendant had not answered questions on the advice of his solicitor was by itself to be regarded as a sufficient reason for not mentioning relevant matters and it would be necessary to state the reasons for the advice if the defendant wished to avoid the court drawing an adverse inference (the court added that this would amount to a waiver of legal professional privilege and the accused or his solicitor—if called—could be asked questions to explore the nature of the advice given, the reasons for it, and whether it was given for purely tactical reasons, but that it would always be open to a defendant to attempt to rebut the inference by giving evidence that the relevant matters were revealed to a solicitor—or somebody else—at the time of the interview).[127] **11–24**

Similarly, the Court of Appeal in *Roble*[128] said that advice from a solicitor is not in itself likely to be regarded as a sufficient reason for not mentioning facts relevant to the defence and the evidence generally had to go further and indicate

[125] *Telfner v Austria* (2002) 34 E.H.R.R. 7.
[126] *Condron and Condron* [1997] 1 Cr.App.R. 185.
[127] At 197. For legal professional privilege, see paras 11–27 *et seq.*, below. In *Davis (Desmond)* [1998] Crim.L.R. 659 the Court of Appeal said that if a defendant wished to repeat in evidence a statement of fact made by a solicitor this might infringe the hearsay rule depending on the purpose for which it was to be adduced: a judge called on to rule on the admissibility of such evidence must be told in the absence of the jury what the evidence would be. Such evidence is admissible to rebut a suggestion of recent invention: Daniel [1998] Cr.App.R. 373.
[128] *Roble* [1997] Crim.L.R. 449.